



Original: **English**

No.: **ICC-RoR221-03/13**

Date: **2 December 2013**

THE PRESIDENCY

Before: Judge Sang-Hyun Song, President
Judge Sanji Mmasenono Monageng, First Vice-President
Judge Cuno Tarfusser, Second Vice-President

Public Redacted

Decision on the application for judicial review dated 18 October 2013

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

Applicant
[REDACTED]

Legal representative
Mr. Ghislain Mabanga

REGISTRY

Registrar
Mr. Herman von Hebel

Detention Section
Mr. Harry Tjonk

The Presidency of the International Criminal Court (“Court”) has before it the application of [REDACTED] (“applicant”) for judicial review of the decision of the Registrar concerning the applicant’s request for clarification as to whether he may transfer items provided to him by the Victims and Witnesses Unit (“VWU”) of the Court.

For the reasons set forth below, the Presidency grants the application and quashes the decision of the Registrar of 11 October 2013.

I. PROCEDURAL HISTORY

1. On 16 August 2013, the applicant addressed a letter to the Chief of the VWU requesting a clarification of the right of property that pertained to certain items that had been provided to him by the VWU.¹ The applicant noted that he had wished to use a bag to send or dispatch certain parcels to his family in the Democratic Republic of the Congo (“DRC”), and that the Acting Chief Custody Officer (“CCO”) had denied his request.² The applicant stated that the Acting CCO had informed him that the bag could only be used to pack his belongings upon his return to the DRC.³ He accordingly requested that the VWU provide “une explication claire et précise sur l’utilisation de tous ces effets” provided to him by the VWU.⁴
2. On 2 September 2013, the applicant wrote a letter to a staff member in the VWU, stating that he had received no response to his 16 August 2013 letter regarding the items provided to him by the VWU.⁵ The applicant indicated that he wished to use a jacket, a pair of shoes, a pair of slippers, and a bag (containing these items) but that the Deputy CCO opposed such action on the ground that the applicant had no right to

¹ ICC-RoR221-03/13-1-Conf-Exp-Anx1, pages 1-3. The applicant indicated that the VWU had provided him with a case, toiletries, and clothing prior to his arrival in The Hague. The applicant further indicated that the VWU had provided him with additional clothing, including a suit and a pair of shoes, upon his arrival in The Hague so that he could participate in hearings before the Court.

² The applicant did not clarify in the letter whether the items contained in the parcels were provided to him by the VWU, although he clearly implied that the bag itself was so provided. ICC-RoR221-03/13-1-Conf-Exp-Anx1, page 2. The decision of the Registrar (“Impugned Decision”), however, characterizes the applicant’s letter as stating that he wished to send a bag and clothing, all of which were provided by the VWU, to his family in the DRC. ICC-RoR221-03/13-1-Conf-Exp-Anx6, paragraph 1. However the Registrar later observed in his observations dated 22 October 2013 that the applicant intended to send “deux costumes qu’il avait lui-même achetés”, indicating an acceptance that these items were not provided to the applicant by the VWU. ICC-RoR221-03/13-1-Conf-Exp, paragraph 1.

³ ICC-RoR221-03/13-1-Conf-Exp-Anx1, page 2.

⁴ ICC-RoR221-03/13-1-Conf-Exp-Anx1, page 2.

⁵ ICC-RoR221-03/13-1-Conf-Exp-Anx1, pages 4-5.

use these items as he saw fit as they were the property of the VWU.⁶ The applicant reiterated his request that the VWU clarify his rights regarding the items provided to him.

3. On 5 September 2013, the Acting Chief of the VWU responded by letter to the applicant's 16 August 2013 letter.⁷ The Acting Chief explained to the applicant that the VWU had provided him with certain items, including the bag the applicant appeared to wish to send to the DRC, for the sole purpose of his appearance before the Court. The Acting Chief noted that the VWU did not require the applicant to return those items before leaving the Netherlands. However, he indicated that the applicant was to retain such items as long as they were useful to him because the VWU would not replace them. The Acting Chief added that the bag, in particular, had to be retained for the purpose of packing the applicant's belongings when he left the Detention Centre, which explained why the acting CCO would not permit him to dispose of it at this stage.
4. On 6 September 2013, the applicant addressed a letter to the Acting Chief of the VWU stating that he understood the VWU's 5 September 2013 response to his 16 August 2013 letter and indicating that he was returning the items in question.⁸
5. On 13 September 2013, the applicant wrote another letter to a staff member in the VWU claiming a violation of "*abusus*" with respect to the items provided to him for his appearance before the Court.⁹ The applicant declared that he had the right to dispose of that which he owned as he saw fit. He claimed that he did not receive an explanation when he received the items that his right to enjoy them was limited and circumscribed. He argued that the 5 September 2013 response from the Acting Chief of the VWU to his 16 August 2013 letter failed clearly to explain whether he could or could not dispose of these items. He further argued that no regulation governed the disposition of this question. The applicant stated that he had decided to return the items in question until his rights with respect to them were clearly and precisely defined.¹⁰

⁶ The applicant did not indicate in this letter that he wished to send these items to his family in the DRC, only that he wished to use them ("utiliser ces effets"). ICC-RoR221-03/13-1-Conf-Exp-Anx1, page 5.

⁷ ICC-RoR221-03/13-1-Conf-Exp-Anx2.

⁸ ICC-RoR221-03/13-1-Conf-Exp-Anx3. A "Proof of Shipment" form attached to this letter indicates that the applicant returned a jacket, a pair of shoes, two shirts, a belt, and a bag to the VWU.

⁹ ICC-RoR221-03/13-1-Conf-Exp-Anx4, pages 1-3.

¹⁰ The applicant indicated in this letter that the returned items consisted of a pair of shoes, a suit, a belt, three shirts, and a bag, which diverge from the items catalogued in the "Proof of Shipment" form attached to his 6 September 2013 letter to the Acting Chief of the VWU. ICC-RoR221-03/13-1-Conf-Exp-Anx4, pages 2-3.

6. On 13 September 2013, the applicant also filed a complaint with the CCO claiming a violation of “*abusus*” with respect to the items provided to him by the VWU for his appearance before the Court.¹¹ In his complaint, the applicant specifically alleged that the Deputy CCO had committed this violation.
7. On 26 September 2013, the CCO determined that the applicant’s complaint was unjustified on two grounds.¹² First, the CCO noted the applicant’s receipt of the 5 September 2013 letter from the Acting Chief of the VWU, which explained that the applicant had to retain the items provided to him to the extent that they would be useful, for they would not be replaced. The CCO held that this explanation was an ample response to the applicant’s concerns and rendered moot the complaint before him. Second, the CCO held that the applicant had failed to provide substantial information to support his allegation against the Deputy CCO.
8. On 27 September 2013, the applicant filed a complaint with the Registrar, contesting the decision of the CCO.¹³ The applicant stated that he had never requested that staff of the VWU or Detention Centre replace the items that were provided to him by the VWU in the event that he was required to appear in Court. The applicant claimed that these items belonged to him, noting the humanitarian and social context in which they were provided. The applicant further claimed that he was never informed that his right to enjoy these items was limited or subject to prior permission from the VWU. Accordingly, the applicant accused staff of the VWU and Detention Centre of collaborating to violate his “*abusus*.” The applicant requested that the Registrar clearly determine whether he possessed a right of property with respect to these items.
9. On 11 October 2013, the Registrar rejected the complaint of the applicant and upheld the decision of the CCO (“Impugned Decision”).¹⁴
10. On 18 October 2013, the applicant made the instant application for judicial review of the decision of the Registrar to the Presidency, pursuant to regulation 221 of the Regulations of the Registry, requesting the Presidency “définir sans ambiguïté [son] droit de propriété sur les effets [lui] fournis par l’UVT ainsi que le mode d’utilisation desdits effets.”¹⁵

¹¹ ICC-RoR221-03/13-1-Conf-Exp-Anx4, page 4.

¹² ICC-RoR221-03/13-1-Conf-Exp-Anx4.

¹³ ICC-RoR221-03/13-1-Conf-Exp-Anx5.

¹⁴ ICC-RoR221-03/13-1-Conf-Exp-Anx6.

¹⁵ ICC-RoR221-03/13-1-Conf-Exp-Anx7, paragraph 17.

11. On 22 October 2013, the Registrar made certain observations in response to the Application (“Observations”).¹⁶
12. On 7 November 2013, the Presidency ordered the Registrar to clarify the general regime with respect to the provision of clothing to witnesses for the purpose of their appearance before the Court, including any rules or policies with respect to what witnesses may do with such items.¹⁷
13. On 15 November 2013, the Registrar filed submissions in accordance with the Order of 7 November 2013.¹⁸

II. MERITS

A. Relevant parts of the Impugned Decision

14. The Registrar first noted that the 5 September 2013 letter from the Acting Chief of the VWU to the applicant had “largement fourni des éléments de réponse au requérant.”¹⁹ The Registrar reiterated the reasoning set forth in that letter, finding that the items provided to the applicant served a precise purpose: “permettre sa comparution devant la Cour pénale internationale.”
15. The Registrar elaborated on this purpose, explaining that the international character of the Court and the solemnity and decorum that attend its hearings call for detainees appearing before the Court (in their capacities as witnesses or otherwise) to dress appropriately.²⁰ As a result, detainees who lack the clothing or items necessary for a court appearance receive such effects from the Court.
16. The Registrar next drew on Article 1 of Protocol 1 of the European Convention on Human Rights, which guarantees the right to peaceful enjoyment of possessions, in rejecting the complaint of the applicant.²¹ The Registrar conceptualized this right as the “droit à la possession” separate from the “droit de propriété” proposed by the

¹⁶ ICC-RoR221-03/13-1-Conf-Exp, pages 4-6.

¹⁷ ICC-RoR221-03/13-2-Conf-Exp.

¹⁸ ICC-RoR221-03/13-3-Conf-Exp.

¹⁹ ICC-RoR221-03/13-1-Conf-Exp-Anx6, paragraph 8. The Registrar expressed astonishment at the applicant’s complaint in light of his 6 September 2013 letter to the Acting Chief of the VWU conveying his acceptance of the reasoning set forth in the Acting Chief’s 5 September 2013 letter and returning the items in question. The Registrar held this communication to render “*prima facie* sa requête sans objet.” Nevertheless, the Registrar proceeded to evaluate the applicant’s complaint on the merits.

²⁰ ICC-RoR221-03/13-1-Conf-Exp-Anx6, paragraph 9.

²¹ ICC-RoR221-03/13-1-Conf-Exp-Anx6, paragraph 10. The full text of Article 1 of Protocol 1 of the European Convention on Human Rights reads: “Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.”

applicant and defined it as the “possession physique” of something by someone with the right to possess (but not to own). The Registrar concluded, on the basis of this definition, that the applicant lacked the right to possess and to dispose of the items provided to him by the VWU as he wished (*e.g.*, by sending them to the DRC) so long as there were reasons to assume they could be reused. This limitation on the applicant’s enjoyment of the items, the Registrar explained, was linked to the purpose for providing them to him: “la comparution.”

17. The Registrar next held that when the Registrar determines that a detainee is indigent and that the costs of clothing shall be borne by the Court (pursuant to regulation 198(3) of the Regulations of the Registry), it is in the Registrar’s discretion to set limits on this allowance.²² The Registrar found that the items were the property of the VWU and were provided to the applicant for a specific purpose. The Registrar observed that the applicant would have need of the items provided to him either in the course of his asylum proceedings or in the event of a future appearance before the Court. Therefore, the Registrar found that the Chiefs of the Detention Centre and the VWU were justified in their response to the applicant and acted prudently to avoid future expenses for identical items.²³
18. The Registrar noted that he did not oppose the position expressed by the VWU that the applicant may take the items provided to him when he departs from the Detention Centre.²⁴ The Registrar further observed that this approach is more flexible than the policy of the Detention Centre concerning items provided to detainees.²⁵ Under that policy, each new detainee receives clothing upon his or her arrival at the Detention Centre. This clothing is “temporarily lent” to indigent detainees who are unable to purchase these effects. Indigent detainees must then return the clothing provided to them when they depart from the Detention Centre.²⁶

B. Arguments of the Applicant

19. In the application, the applicant stated that he had filled out “le formulaire destiné à l’exportation” and requested that the Detention Centre make available to him the bag

²² ICC-RoR221-03/13-1-Conf-Exp-Anx6, paragraph 11.

²³ ICC-RoR221-03/13-1-Conf-Exp-Anx6, paragraph 11. The Registrar also noted that, pursuant to regulations 166 and 192, the personal property of a detainee is that which he possessed at the time of his admission to the Detention Centre, in other words, those personal items that he brought with him to the Detention Centre. ICC-RoR221-03/13-1-Conf-Exp-Anx6, paragraph 13.

²⁴ ICC-RoR221-03/13-1-Conf-Exp-Anx6, paragraph 11.

²⁵ ICC-RoR221-03/13-1-Conf-Exp-Anx6, paragraph 12.

²⁶ ICC-RoR221-03/13-1-Conf-Exp-Anx6, paragraph 12.

containing clothing and two pairs of shoes, items which he had intended to send to his family in the DRC.²⁷ The applicant stated, that the CCO, upon seeing the request, had interrogated the applicant on the nature of the items he wished to send to the DRC. The applicant submitted that “[a]près lui avoir expliqué clairement [s]a préoccupation,” the CCO had refused his request, extrapolating that the clothing and other items were provided to the applicant for his appearance before the Court and should not be sent to the DRC.²⁸ The applicant accused the CCO of making “l’insinuation calomnieuse” that he had wished to export the items provided to him by the VWU.²⁹ The applicant concluded that the fact that he had requested the bag that the parcels that he wished to send should not be conflated with the fact of sending the items of the Court to the DRC.³⁰

20. The applicant also argued that regulation 198(3) of the Regulations of the Registry, which governs the issue of civilian clothing that the Court may purchase for an indigent detainee, does not mention a framework for permitting or refusing exportation of such clothing or the right of the VWU or the CCO to possess property. Nor, the applicant further argued, does regulation 198(3) determine the manner in which an indigent detainee should use such property.³¹
21. The applicant suggested that there exists a regulation that can define and explain that a witness does not possess any “droit de propriété” with respect to the clothing and other items provided by the Court. He submitted, however, that neither the Registrar nor the VWU have provided information regarding such a provision.³² Accordingly, the applicant requested that the Presidency “définir sans ambiguïté [son] droit de propriété sur les effets [lui] fournis par l’UVT ainsi que le mode d’utilisation desdits effets.”³³

C. Observations of the Registrar

22. In his Observations, the Registrar submitted that the applicant had adopted a different argument in his application to the Presidency.³⁴ Specifically, the Registrar submitted

²⁷ ICC-RoR221-03/13-1-Conf-Exp-Anx7, paragraph 1.

²⁸ ICC-RoR221-03/13-1-Conf-Exp-Anx7, paragraphs 2-3. The applicant did not provide any additional details regarding his conversation with the CCO, such as the specific nature of his “préoccupation” or what exactly he intended to send to his family in the DRC.

²⁹ ICC-RoR221-03/13-1-Conf-Exp-Anx7, paragraph 3.

³⁰ ICC-RoR221-03/13-1-Conf-Exp-Anx7, paragraph 11.

³¹ ICC-RoR221-03/13-1-Conf-Exp-Anx7, paragraph 12.

³² ICC-RoR221-03/13-1-Conf-Exp-Anx7, paragraph 15.

³³ ICC-RoR221-03/13-1-Conf-Exp-Anx7, paragraph 17.

³⁴ ICC-RoR221-03/13-1-Conf-Exp, paragraph 1.

that the language of the application addressed only the issue of the bag “pour contenir les colis à expédier”. In contrast, the applicant’s letters to the VWU and his complaints to the CCO and the Registrar were never limited to the bag, but also addressed items provided by the VWU generally.

23. The Registrar also noted an internal contradiction contained within the application itself. Whereas in paragraph 11 of the application, the applicant denied sending the items provided by the Court to the DRC, in paragraph 14, he suggested that he plans to ship these items once he has received clarification from the Presidency.³⁵
24. The Registrar emphasized that with regard to the items provided by the Court (whether they be from the Detention Centre or not), the question is whether the Registrar, and by delegation the CCO, authorized a detainee to retain these items. The Registrar stated that this decision rests solely within the discretion of the detaining authority.³⁶

D. Submissions of the Registrar

25. In response to the Presidency’s Order of 7 November 2013, the Registrar provided additional information regarding the VWU’s provision of clothing to witnesses for the purpose of their appearance before the Court.³⁷
26. The Registrar clarified that the VWU’s provision of clothing to witnesses who are appearing before the Court is “une pratique de l’UVT qui ne fait pas l’objet d’une procédure écrite.”³⁸ According to this practice, a VWU representative assesses (in conjunction with the witness) if the witness requires certain effects such as clothing, shoes and a suitcase so that he may travel to the Netherlands and appear before the Court.³⁹ The effects are provided to the witness either prior to his departure for The Hague or upon his arrival in The Hague. The VWU conducts the assessment of needs on a case-by-case basis according to the personal situation of each witness and

³⁵ The Registrar also observed that the applicant appears to embellish the facts with each submission, particularly with respect to his conversations with the Detention Centre administration. The Registrar cited, in particular, to language in paragraphs 2-5, 9, and 17 of the application as examples of such embellishment. ICC-RoR221-03/13-1-Conf-Exp, page 5.

³⁶ ICC-RoR221-03/13-1-Conf-Exp, paragraph 3.

³⁷ ICC-RoR221-03/13-3-Conf-Exp.

³⁸ ICC-RoR221-03/13-3-Conf-Exp, paragraph 2.

³⁹ The Registrar elaborated that the specific purpose of the clothing is to provide witnesses with attire appropriate for the solemnity of the hearings as well as to mitigate the climactic conditions of the Netherlands. ICC-RoR221-03/13-3-Conf-Exp, paragraph 4.

this assessment may be subject to re-evaluation depending on the circumstances and the length of the hearings.⁴⁰

27. The Registrar further clarified that VWU practice is that witnesses may keep the effects provided by the VWU for the purpose of their appearance before the Court “à la fin de leur témoignage.”⁴¹ As such, the VWU does not request the return of these items “à l’issue de la comparution des témoins.”⁴²
28. The Registrar submitted that in the present case, the applicant “a reçu comme tout autre témoin déposant devant le Cour [*sic*] et en nécessitant l’attribution, des effets personnels en vue de sa comparution.”⁴³ The Registrar further indicated that the VWU provided these effects to the applicant after his arrival in The Hague. The Registrar concluded that “[i]l appert de ce qui précède que le requérant pourra disposer pleinement des effets qui lui ont été remis par l’UVT lorsqu’il quittera le territoire néerlandais. A défaut, l’UVT ne fournira aucun autre effet au requérant s’il ne les a pas conservés.”⁴⁴

E. Determination of the Presidency

29. It is recalled 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 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.⁴⁵
30. The present request for judicial review concerns the issue of whether a detained witness may transfer items that he has received from the VWU. The Presidency notes, at the outset, that the applicant has fashioned his application more broadly as a

⁴⁰ ICC-RoR221-03/13-3-Conf-Exp, paragraph 3.

⁴¹ ICC-RoR221-03/13-3-Conf-Exp, paragraph 5.

⁴² ICC-RoR221-03/13-3-Conf-Exp, paragraph 5.

⁴³ ICC-RoR221-03/13-3-Conf-Exp, paragraph 6. The Registrar noted more generally that the applicant has been subjected to the same treatment by the VWU as that received by all witnesses appearing before the Court. Specifically, the Registrar stated that the VWU has made no distinction with respect to the applicant’s status as a detained witness transferred pursuant to article 93(7) of the Rome Statute of the International Criminal Court (“Statute”). ICC-RoR221-03/13-3-Conf-Exp, paragraph 10.

⁴⁴ ICC-RoR221-03/13-3-Conf-Exp, paragraph 8.

⁴⁵ The standard of judicial review was defined by the Presidency in its decision of 20 December 2005, ICC-Pres-RoC72-02-5, paragraph 16, and supplemented in its decision of 27 November 2006, ICC-01/04-01/06-731-Conf, paragraph 24. See also the decision of the Presidency of 10 July 2008, ICC-Pres-RoC72-01-8-10, paragraph 20.

request for the Presidency “définir sans ambiguïté [son] droit de propriété sur les effets [lui] fournis par l’UVT ainsi que le mode d’utilisation desdits effets.”⁴⁶ However, the Presidency finds the application to stem from an incident in which the applicant attempted to transfer items that he received from the VWU to his family in the DRC but was prohibited from doing so. The Presidency agrees with the Registrar that the applicant’s prior submissions consistently address the issue of whether he may transfer items provided to him by the VWU.⁴⁷ In his complaint to the CCO dated 13 September 2013, the applicant claimed a violation of his “*abusus*” in relation to the items that had been provided to him by the VWU for the purpose of his appearance before the Court.⁴⁸ Moreover, the applicant stated in his application that he had returned the items provided to him by the VWU “en attente de clarification et cela avant d’expédier les colis destinés à ma famille.”⁴⁹ Accordingly, the determination of the Presidency specifically clarifies whether the applicant may transfer items provided to him by the VWU in the present circumstances.

31. In addressing this question, the Presidency begins by considering the legal texts governing the VWU and its provision of items to witnesses. Article 43(6) of the Rome Statute of the International Criminal Court (“Statute”) mandates the establishment of the VWU within the Registry for the purpose of providing, *inter alia*, “appropriate assistance for witnesses”. Rule 17(2)(b)(ii) of the Rules of Procedure and Evidence (“Rules”) mandates, in similarly broad terms, that the VWU is to “[a]ssist[]” witnesses “when they are called to testify before the Court.”
32. Section 1 of Chapter 3 of the Regulations of the Registry enumerates the types of assistance the Registry (and by extension the VWU) is to render to witnesses and victims. This assistance ranges from arranging travel and accommodation to providing various allowances to protecting the safety of witnesses and victims. It also includes, pursuant to regulation 80(2), the provision of a clothing allowance, the particular type of assistance at issue in the present application.⁵⁰

⁴⁶ ICC-RoR221-03/13-1-Conf-Exp-Anx7, paragraph 17. Similarly, the applicant’s complaint to the Registrar requested that the Registrar clearly determine whether he possessed “un droit de propriété” with respect to these items. ICC-RoR221-03/13-1-Conf-Exp-Anx5, page 4.

⁴⁷ ICC-RoR221-03/13-1-Conf-Exp, paragraph 1.

⁴⁸ ICC-RoR221-03/13-1-Conf-Exp-Anx4.

⁴⁹ ICC-RoR221-03/13-1-Conf-Exp-Anx7, page 6. The Registrar refers to this point in his Observations of 22 October 2013. See ICC-RoR221-03/13-1-Conf-Exp, paragraph 2.

⁵⁰ The applicant’s 16 August 2013 letter to the Acting Chief of the VWU refers to regulation 80 in its subject heading. ICC-RoR221-03/13-1-Conf-Exp-Anx1, page 1. The applicant’s submissions, in describing the items provided to him by the VWU, refer both to clothing and accessories, such as a bag, a belt, and shoes. The Presidency uses the term “clothing” throughout the remainder of this decision to refer to both clothing and accessories provided to the applicant by the VWU.

33. The Presidency notes that regulation 79(1), which articulates general provisions governing the Registry's assistance to witnesses and victims, provides that "[p]ursuant to article 43, paragraph 6, and rules 16, 17 and 18, the Registrar shall develop and, to the extent possible, implement policies and procedures to enable witnesses to testify in safety".⁵¹
34. On 7 November 2013, the Presidency ordered the Registrar to clarify the general regime with respect to the provision of clothing to witnesses for the purpose of their appearance before the Court, including any rules or policies with respect to what witnesses may do with such items. On 15 November 2013, the Registrar filed submissions explaining VWU practice with respect to the provision of clothing to witnesses appearing before the Court pursuant to regulation 80. According to this practice, the VWU assesses whether a witness requires personal effects in order to travel to the Netherlands and to appear before the Court. In the case of clothing, the VWU provides such effects so that witnesses have attire appropriate for the solemnity of the hearings and can protect themselves against the climactic conditions of the Netherlands. The Registrar's submissions further explain that VWU practice is to permit a witness to keep such clothing "à la fin de [son] témoignage."⁵² In other words, the VWU "ne demande donc pas la restitution de ces effets à l'issue de la comparution des témoins."⁵³
35. The Presidency considers this practice to fall squarely within the rubric of the Registry's responsibilities as set forth in regulation 79(1). The regulation directs the Registry to "develop and, to the extent possible, implement policies and procedures to enable witnesses to testify in safety". The policy at issue here governs the provision of clothing to witnesses to facilitate their appearance before the Court. It directs that witnesses may keep these items upon the conclusion of their testimony, implying that witnesses must retain these items throughout the course of their

⁵¹ The phrase "testify in safety" suggests that the Registry is to develop and implement policies and procedures relating specifically to the protection of witnesses and victims. However, the Presidency interprets regulation 79(1) to direct the Registry to develop and implement policies and procedures relating to all aspects of its assistance to witnesses and victims. This interpretation is supported by both the structure and the language of regulation 79(1). First, regulation 79 is entitled "General provisions," indicating its applicability to the entirety of Section 1 of Chapter 3 of the Regulations of the Registry. That section in turn is entitled "Assistance to Victims and Witnesses" and enumerates a wide array of services that the Registry is to render to witnesses and victims, not limited to protective measures. Second, the language of regulation 79(1) reads "[p]ursuant to article 43, and rules 16, 17 and 18, the Registrar shall develop and . . . implement policies and procedures to enable witnesses to testify in safety". Article 43 and rules 16, 17, and 18, which respectively establish the Registry and articulate the responsibilities of the Registrar, describe the range of assistance the Registry is to provide to victims and witnesses, again not limited to protective measures. Accordingly, the Presidency finds regulation 79(1) to vest the Registry with authority to develop and implement policies and procedures relating to all aspects of its assistance to witnesses and victims.

⁵² ICC-RoR221-03/13-Conf-Exp, paragraph 5.

⁵³ ICC-RoR221-03/13-Conf-Exp, paragraph 5.

appearance before the Court. The Presidency finds this practice to be directly related to the Registry's responsibility to assist witnesses in appearing before the Court and, therefore, a legitimate exercise of the Registry's general powers and duties under regulation 79.

36. The Presidency further notes that Section 1 of Chapter 3 of the Regulations of the Registry recognizes a distinction between mandatory and discretionary assistance to witnesses and victims.⁵⁴ Regulation 80(2), which addresses services including "clothing allowances", specifies that such assistance "shall be provided on a case-by-case basis, in accordance with an assessment made by the Registry." The Presidency considers that the provision of clothing, which is the service at issue here, is accordingly provided to witnesses and victims at the discretion of the Registry. The Registry is not mandated to provide clothing to witnesses appearing before the Court; it may grant or deny this allowance "on a case-by-case basis." The Presidency observes that the range of discretion that the Registry wields over the provision of clothing to witnesses is particularly broad, including the determination of whether to even grant such an allowance. As a result, the Presidency finds a practice requiring witnesses to retain items provided by the VWU until the conclusion of their testimony to also be a legitimate exercise of the Registry's general powers and duties under regulation 80(2).
37. The Presidency notes that the Registrar relied on the reasoning set forth in the 5 September 2013 letter from the Acting Chief of the VWU to the applicant as the primary basis for denying the complaint in the Impugned Decision.⁵⁵ That letter informed the applicant that the VWU had provided him with certain items for the sole purpose of his appearance before the Court. While the letter noted that the VWU did not require the applicant to return such items before leaving the Netherlands, it also informed the applicant that he was to retain such items as long as they were useful to him because the VWU would not replace them.
38. The Presidency finds the Registrar's reliance on the 5 September 2013 letter to be an insufficient basis for denying the complaint in the Impugned Decision. That letter failed to provide an adequate description of VWU practice regarding the provision of

⁵⁴ Certain regulations in this section mandate the Registry to provide a particular type of assistance to witnesses and victims. For example, regulation 81(1) provides that "[t]he Registry shall arrange transportation for witnesses," and regulation 85(1) provides that "[w]itnesses shall be provided with an attendance allowance as compensation for wages, earnings and time lost as a result of testifying." See also regulations 82-83, 87-89, 92-93, 95-96. The unqualified use of the word "shall" in the aforementioned examples denotes the mandatory nature of such assistance. See Decision of 28 March 2012, ICC-RoR221-01/12-6/Red, paragraph 18 ("The Presidency notes that the regulation is mandatory, using the language of *shall* . . .").

⁵⁵ ICC-RoR221-03/13-1-Conf-Exp-Anx6, paragraph 8.

clothing to witnesses for the purpose of their appearance before the Court.⁵⁶ As the Registrar has since made clear in the 15 November 2013 submissions, VWU practice is to permit witnesses to keep, and therefore dispose of, such clothing upon the conclusion of their testimony before the Court.⁵⁷ The 5 September 2013 letter, on the other hand, while stating that the applicant does not have to return the clothing provided to him, leaves unclear the point at which he may dispose of such items.⁵⁸

39. Further, the Presidency considers that the Registrar's observation that the applicant may have need of the items provided to him by the VWU in the course of his asylum proceedings constitutes an irrelevant factor in assessing whether the applicant is entitled to dispose of the items in question.⁵⁹ It is recalled that in the submissions of 15 November 2013, the Registrar clarified that "[l]a pratique veut que les effets personnels soient mis à la disposition des témoins dans le but de leur comparution et qu'ils puissent les garder à la fin de leur témoignage" and that "[l]'UVT ne demande donc pas la restitution de ces effets à l'issue de la comparution des témoins".⁶⁰ This account clarifies that the practice of the VWU is directed towards proceedings before the Court and does not extend to encompass proceedings that may take place before national courts.
40. In light of the foregoing, the Presidency does not consider that the Registrar's arguments drawing on Article 1 of Protocol 1 of the European Convention on Human Rights, which guarantees the right to peaceful enjoyment of possessions, shed additional light on the present issue.⁶¹ The issue may be addressed in accordance with the legal texts of the Court and the practice of the VWU, as outlined in the Registrar's Submissions of 15 November 2013.
41. In applying VWU practice to the case of the applicant, the Presidency finds the fundamental question therefore to be whether the applicant has concluded his

⁵⁶ The letter also failed to provide the applicant with the legal basis for VWU practice regarding the provision of clothing to witnesses appearing before the Court. As discussed above, that legal basis can be found in regulations 79(1) and 80(2).

⁵⁷ ICC-RoR221-04/12-4-Red. The Presidency finds that VWU practice permitting a witness to keep ("garder") the clothing provided by the VWU logically includes the right to transfer or dispose of such effects.

⁵⁸ The letter did explain that the applicant was to keep the clothing provided to him as long as it was useful, but again failed to clarify exactly when the applicant was at liberty to dispose of these items.

⁵⁹ ICC-RoR221-03/13-1-Conf-Exp-Anx6, paragraph 11. The Presidency also does not agree with the Registrar's conclusion regarding the application of VWU practice in the case of the applicant, as presented in the submissions of 15 November 2013. The Registrar found that the applicant "pourra disposer pleinement des effets qui lui ont été remis par l'UVT lorsqu'il quitter le territoire néerlandais." ICC-RoR221-03/13-3-Conf-Exp, paragraph 8. The Presidency notes that this finding – that the applicant may dispose of the items provided by the VWU when he leaves the Netherlands – is not consonant with VWU practice as articulated by the Registrar – that the applicant may dispose of the items provided by the VWU when he completes his testimony before the Court.

⁶⁰ ICC-RoR221-03/13-3-Conf-Exp, paragraph 5.

⁶¹ ICC-RoR221-03/13-1-Conf-Exp-Anx6, paragraph 10.

testimony before the Court. The Registrar has clarified that witnesses may retain items provided to witnesses for the purpose of their appearance in Court “à la fin de [son] témoignage.”⁶² In the present case, the applicant has in fact concluded his testimony.⁶³ Accordingly, he may dispose of the relevant items provided to him by the VWU as he sees fit.

42. The Presidency notes that according to VWU practice, the VWU does not replace the items provided to a witness if he does not retain them. This policy is articulated in the Registrar’s 15 November 2013 submissions as well as in the 5 September 2013 letter from the Acting Chief of the VWU to the applicant. The Presidency therefore reminds the applicant that in the event that he chooses to transfer or to dispose of the items provided to him by the VWU he may not ask the VWU to replace such items.

III. CLASSIFICATION

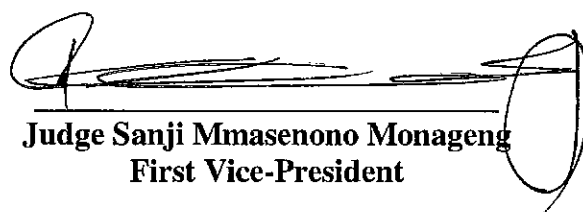
43. The Presidency notes that all documents in the instant Application have been filed confidentially and *ex parte*. The Presidency considers that, *prima facie*, there is no reason to retain the confidential *ex parte* classification of this decision and the related documents in the file, subject to ensuring the redaction of any information which may identify the applicant.
44. If there is any factual and/or legal basis for retaining the confidential *ex parte* classification of this decision or that of any of its related documents, or if there is any specific information requiring redaction before publication, the applicant and the Registrar are each ordered to inform the Presidency thereof by 5 pm on 16 December 2013. The Presidency will thereafter rule on whether the classification should be maintained and, if necessary, the need for any redactions.

For the above reasons, the Presidency grants the application and quashes the decision of the Registrar of 11 October 2013. The applicant may transfer the items that were provided by the VWU for the purpose of his appearance before the Court, as he has concluded his testimony before the Court.

⁶² ICC-RoR221-03/13-3-Conf-Exp, paragraph 5.

⁶³ See also ICC-RoR221-04/12-4-Red.

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



Judge Sanji Mmasenono Monageng
First Vice-President

Dated this Monday 2 December 2013

At The Hague, The Netherlands