

ANNEX I

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-RoR216-01/14
Date: 28 February 2014

THE PRESIDENCY

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

Public Redacted

Decision concerning the “Application to the Presidency pursuant to regulation 216 of the Regulations of the Registry for judicial review of the Registrar’s decision notified on 7 February 2014”

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

Applicant
[REDACTED]

Legal representative
[REDACTED]

REGISTRY

Registrar
Mr. Herman von Hebel

Detention Section
Mr. Harry Tjonk

The Presidency of the International Criminal Court (“Court”) has before it an application notified on 7 February 2014 (“Application”) of [REDACTED] (“Applicant”) for judicial review of the Registrar’s decision dated 28 January 2014 (“Impugned Decision”) pursuant to regulation 216 of the Regulations of the Registry (“RoR”). The Impugned Decision confirmed the decision of the Chief Custody Officer (“CCO”) dated 15 January 2014 (“CCO Decision”), which found that the Applicant had committed a disciplinary offence and imposed a disciplinary measure.

For the reasons set forth below, the Presidency upholds the Impugned Decision.

I. PROCEDURAL HISTORY

1. On 28 December 2013, the Applicant filed a complaint with the CCO alleging that a custody officer had refused to put a telephone call through for him “pour des raisons qui ne [lui] semblent pas évidentes.”¹ In the complaint, the Applicant included the following language regarding the custody officer who had refused to put the call through for him: “Je comprends aussi qu’étant un Noir Surinamien qu’il soit complexé et poussé à manifester une hostilité excessive envers les détenus Noirs pour prouver son degré de loyauté mais cela ne doit pas se faire en empiétant sur le droit des personnes détenues de communiquer avec les membres de famille et des amis.”²
2. On 31 December 2013, a custody officer read the Applicant’s complaint and alerted the CCO to its contents.³ The Applicant was subsequently charged with committing a disciplinary offence as set forth in RoR 207(d) and (f).⁴
3. On 7 January 2014, the Applicant received notification that a disciplinary hearing would take place on 9 January 2014.⁵ The notification informed the Applicant that his alleged offence was “le langage abusif qu’il a] utilisé” in his complaint dated 28 December 2013 and cited the following language from the complaint: “Je comprends

¹ ICC-RoR216-01-14-1-Conf-Exp-Anx2, page 5.

² ICC-RoR216-01-14-1-Conf-Exp-Anx2, page 5.

³ ICC-RoR216-01/14-1-Conf-Exp-Anx3, page 3; *see also* ICC-RoR216-01/14-1-Conf-Exp-Anx5, page 2.

⁴ ICC-RoR216-01/14-1-Conf-Exp-Anx3, pages 3-5; *see also* ICC-RoR216-01/14-1-Conf-Exp-Anx5, page 2. RoR 207(d) describes the following conduct as constituting a disciplinary offence: “Repeated misconduct after a warning has been given pursuant to regulation 211, sub-regulation (c).” RoR 211(c) states that the CCO may impose an “[o]ral or written warning” as a disciplinary measure. RoR 207(f) describes the following conduct as constituting a disciplinary offence: “Verbal abuse directed at a member of staff of the detention centre, another detained person or any visitor to the detention centre.”

⁵ ICC-RoR216-01/14-1-Conf-Exp-Anx4.

aussi qu'étant un Noir Surinamien qu'il soit complexé et poussé à manifester une hostilité excessive envers les détenus Noirs pour prouver son degré de loyauté"⁶

4. The disciplinary hearing took place on 9 January 2014.⁷ During the hearing, the CCO informed the Applicant that he was removing the charge pursuant to RoR 207(d).⁸ The CCO explained that he was dropping this charge because the warning that formed the basis of the charge did not constitute a warning pursuant to RoR 211(c) as required by RoR 207(d).⁹ With respect to the charge pursuant to RoR 207(f), the Applicant denied committing the disciplinary offence articulated in that provision.¹⁰ Specifically, the Applicant argued that his conduct did not fall within RoR 207(f) because "il n'y a pas eu une agresse [sic] verbale, c'était un écrit."¹¹
5. On 15 January 2014, the CCO confirmed the charge against the Applicant.¹² The CCO found that the Applicant had committed the disciplinary offence set forth in RoR 207(f) "dans l'usage de propos à consonance raciste et vexatoire à l'égard d'un fonctionnaire du quartier pénitentiaire."¹³ With respect to the Applicant's argument that the term "verbalement" in RoR 207(f) excludes writing,¹⁴ the CCO responded that "l'agression verbale", in the letter and spirit of RoR 207(f), "inclut des propos tant oraux qu'écrits."¹⁵ The CCO found that the term "verbalement" as used in RoR 207(f) "ne fait donc pas uniquement référence au caractère oral de propos pouvant être tenus par une personne détenue, mais couvre tout aussi bien des propos tenus sous forme écrite."¹⁶ The CCO explained that "[l]a portée sémantique" of the term "prend en compte l'expression de la pensée par un langage qui est soit oral ou écrit" and that "[l]e verbe constitue le langage, et l'oralité et l'écriture les formes que peut prendre ce verbe ou langage."¹⁷ The CCO ordered as a disciplinary measure that the

⁶ ICC-RoR216-01/14-1-Conf-Exp-Anx4, page 2.

⁷ ICC-RoR216-01/14-1-Conf-Exp-Anx5.

⁸ ICC-RoR216-01/14-1-Conf-Exp-Anx5, page 3.

⁹ ICC-RoR216-01/14-1-Conf-Exp-Anx5, page 3. The Applicant received this warning in the form of a letter dated 21 November 2013 from the Director of the Division of Court Services, who warned the Applicant to stop insulting members of the Court.

¹⁰ ICC-RoR216-01/14-1-Conf-Exp-Anx5, pages 5-7, 14-15.

¹¹ ICC-RoR216-01/14-1-Conf-Exp-Anx5, page 6.

¹² ICC-RoR216-01/14-1-Conf-Exp-Anx6; *see also* ICC-RoR216-01/14-1-Conf-Exp-Anx3, page 7.

¹³ ICC-RoR216-01/14-1-Conf-Exp-Anx6, page 2.

¹⁴ The French version of regulation 207(f) reads as follows: "agresse verbalement un employé du quartier pénitentiaire, une autre personne détenue ou tout visiteur du quartier pénitentiaire." The French version uses the adverb "verbalement" to modify the verb "agresse", whereas the English version of the provision uses the adjective "verbal" to modify the noun "abuse".

¹⁵ ICC-RoR216-01/14-1-Conf-Exp-Anx6, page 2.

¹⁶ ICC-RoR216-01/14-1-Conf-Exp-Anx6, page 2.

¹⁷ ICC-RoR216-01/14-1-Conf-Exp-Anx6, page 2.

- Applicant be confined to his cell for 14 days and that his activities be limited to a daily one-hour session of outdoor activity.¹⁸
6. On 15 January 2014, the Applicant addressed a letter to the CCO notifying him of his intention to appeal the CCO Decision to the Registrar in accordance with RoR 215.¹⁹
 7. On 16 January 2014, the Applicant addressed a letter to the Registrar, appealing the CCO Decision.²⁰ The Applicant submitted that there was no legal basis for the disciplinary proceeding or the disciplinary measure.²¹ The Applicant argued that the term “verbalement” means “vive voix ou oralement” while the term “verbal” means “qui est fait de vive voix, (par opposition à l’écrit), ou relatif à la parole ou aux mots.”²² The Applicant argued that “l’agression verbale”, therefore, would refer in the present case to “un échange ou une altercation entre . . . le gardien et la personne détenue au cours duquel des mots, des paroles ou des propos ont été tenus à l’égard d[u] gardien.”²³ He concluded that the CCO had failed to demonstrate the occurrence of “une agression verbale”.²⁴ The Applicant also argued that it was to avoid confusion over the definition and interpretation of the word “verbal” that RoR 211(c) was drafted so as to clearly differentiate “le terme verbal et écrit”.²⁵
 8. On 28 January 2014, the Registrar rejected the appeal of the Applicant and upheld the CCO Decision, confirming that “les propos injurieux et dégradants du requérant à l’encontre d’un garde constituent une agression verbale au sens de la norme 207 f)” and finding that the disciplinary measure imposed on the Applicant was justified.²⁶
 9. On 3 February 2014, the Applicant made the instant Application to the Presidency pursuant to RoR 216 for judicial review of the decision of the Registrar.²⁷

¹⁸ ICC-RoR216-01/14-1-Conf-Exp-Anx6, page 3.

¹⁹ ICC-RoR216-01/14-1-Conf-Exp-Anx7, page 2.

²⁰ ICC-RoR216-01/14-1-Conf-Exp-Anx7, pages 3-7.

²¹ ICC-RoR216-01/14-1-Conf-Exp-Anx7, page 3.

²² ICC-RoR216-01/14-1-Conf-Exp-Anx7, page 4. The term “verbal” is equivalent in both French and English, but is referred to in this paragraph in the French.

²³ ICC-RoR216-01/14-1-Conf-Exp-Anx7, page 4.

²⁴ ICC-RoR216-01/14-1-Conf-Exp-Anx7, page 4.

²⁵ ICC-RoR216-01/14-1-Conf-Exp-Anx7, page 5. The French version of RoR 211(c) states that the CCO may impose an “avertissement verbal ou écrit” as a disciplinary measure.

²⁶ ICC-RoR216-01/14-1-Conf-Exp-Anx8, page 5. Despite upholding the decision of the CCO, the Registrar terminated the imposition of the disciplinary measure because (1) the Applicant had appealed for clemency to the Director of the Division of Court Services and (2) the Applicant had received among the forms authorizing him to appeal the disciplinary measure a form that had not been amended in accordance with the current RoR, which entered into force on 5 December 2013. ICC-RoR216-01/14-1-Conf-Exp-Anx8, page 4; *see also* ICC-RoR216-01/14-1-Conf-Exp, pages 3-4, n.1.

²⁷ ICC-RoR216-01/14-1-Conf-Exp-Anx1.

II. MERITS

A. Relevant parts of the Impugned Decision

10. The Registrar began by recognizing that the fundamental dispute between the Applicant and the CCO lies in their respective understanding of “l’agression verbale”.²⁸
11. The Registrar considered the offences enumerated in RoR 207 and observed that none include the term “écrit”.²⁹ The Registrar submitted, however, that the absence of this term should not be taken to mean that RoR 207 “entend exclure la possibilité que des actes de nature disciplinaire restent sans faire l’objet de procédures disciplinaires”.³⁰ The Registrar illustrated his point by way of example, noting that RoR 207(i), which provides that “[i]nciting or attempting to incite another detained person to commit any of the foregoing offences” shall constitute an offence, “ne saurait être interprétée comme excluant une incitation par la parole ou par écrit.”³¹
12. The Registrar addressed the Applicant’s position that “seule la parole (formulée par le biais de la bouche) constitue une agression verbale” and “l’agression implique une altercation avec des échanges de mots.”³² The Registrar conceded that “l’agression verbale” refers in large part to orality and that “[l]a notion de verbe *prima facie* s’entend du mot prononcé par le biais de la bouche, donc la parole.”³³ Nevertheless, the Registrar continued that “le verbe” is not limited to an oral form, but “implique aussi l’écrit.”³⁴ In this sense, the Registrar concluded, “[l]e verbe est un langage . . . qui peut prendre deux formes, soit l’écrit ou l’oral.”³⁵
13. The Registrar drew a fundamental distinction between “l’agression verbale” and “l’agression physique”.³⁶ The Registrar defined “l’agression verbale” as “une atteinte à la personne”, which can be employed in any context, and is not necessarily the consequence or manifestation of an altercation between different people.³⁷ The Registrar later drew a comparison between RoR 207(f) and RoR 207(b), which provides that “[v]iolent behavior or aggression” towards, *inter alia*, detention centre

²⁸ ICC-RoR216-01/14-1-Conf-Exp-Anx8, page 3, paragraph 1.

²⁹ ICC-RoR216-01/14-1-Conf-Exp-Anx8, page 3, paragraph 2.

³⁰ ICC-RoR216-01/14-1-Conf-Exp-Anx8, page 3, paragraph 2.

³¹ ICC-RoR216-01/14-1-Conf-Exp-Anx8, page 3, paragraph 2.

³² ICC-RoR216-01/14-1-Conf-Exp-Anx8, pages 3-4, paragraph 3.

³³ ICC-RoR216-01/14-1-Conf-Exp-Anx8, page 4, paragraph 4.

³⁴ ICC-RoR216-01/14-1-Conf-Exp-Anx8, page 4, paragraph 4.

³⁵ ICC-RoR216-01/14-1-Conf-Exp-Anx8, page 4, paragraph 4.

³⁶ ICC-RoR216-01/14-1-Conf-Exp-Anx8, page 4, paragraph 4.

³⁷ ICC-RoR216-01/14-1-Conf-Exp-Anx8, page 4, paragraph 4.

staff shall constitute an offence, noting that the latter provision emphasizes “l’attitude physique de la personne”.³⁸

14. The Registrar next drew on the intention of the drafters of RoR 207(f).³⁹ In particular, the Registrar submitted that the drafters did not intend to limit “l’agression imputable à une personne détenue” to that which is oral, for such a limitation would open the door to offences of another form (*i.e.* written).⁴⁰ The Registrar further noted that similar provisions in the legal texts of the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) and Special Tribunal for Lebanon (“STL”) use the term “verbale” to cover the written as much as the oral.⁴¹
15. Finally, the Registrar relied on the definition of “abus verbal” as it appears in the online encyclopedia Wikipedia, which states, in relevant part: “Un abus verbal (agression verbale ou attaque verbale) est une forme de comportement abusif impliquant l’utilisation du langage. . . . Bien que la communication orale ne soit pas la seule forme commune, l’abus verbal peut aussi bien être fait par écrit.”⁴² The Registrar submitted that this definition is in accordance with the principle enunciated in RoR 207(f), which does not distinguish between “ce qui est écrit et oral mais les regroupe sous le terme verbal.”⁴³

B. Arguments of the Applicant

16. The Applicant began by noting the Registrar’s recognition in the Impugned Decision that “l’agression verbale renvoie à l’oralité.”⁴⁴ The Applicant then submitted that the Registrar was mistaken in subsequently extrapolating that “le verbe ne se résume pas seulement à l’oral mais à l’écrit aussi.”⁴⁵ The Applicant argued that it was to prevent confusion that RoR 211(c) was drafted so as to draw a clear distinction between “les mots verbal et écrit” by speaking of “un avertissement verbal ou écrit au lieu de

³⁸ ICC-RoR216-01/14-1-Conf-Exp-Anx8, page 4, paragraph 6.

³⁹ ICC-RoR216-01/14-1-Conf-Exp-Anx8, page 4, paragraph 5.

⁴⁰ ICC-RoR216-01/14-1-Conf-Exp-Anx8, page 4, paragraph 5.

⁴¹ ICC-RoR216-01/14-1-Conf-Exp-Anx8, page 4, paragraph 5 (citing Special Tribunal for Lebanon, Rules Governing the Detention of Persons Awaiting Trial or Appeal before the Special Tribunal for Lebanon or Otherwise Detained on the Authority of the Special Tribunal for Lebanon (“Rules of Detention”), rule 33(vi), STL/BD/2009/02, 20 March 2009; United Nations Detention Unit, Regulations for the Establishment of a Disciplinary Procedure for Detainees, paragraph 2, IT/97, April 1995). The Registrar refers to “verbal” in the feminine form in this part of the Impugned Decision.

⁴² ICC-RoR216-01/14-1-Conf-Exp-Anx8, page 4, paragraph 6. This definition of “abus verbal” appears in the French version of Wikipedia.

⁴³ ICC-RoR216-01/14-1-Conf-Exp-Anx8, page 4, paragraph 6.

⁴⁴ ICC-RoR216-01/14-1-Conf-Exp-Anx1, page 3, paragraph 1.

⁴⁵ ICC-RoR216-01/14-1-Conf-Exp-Anx1, page 3, paragraph 1.

l'avertissement verbal".⁴⁶ The Applicant also noted that according to the 2012 edition of Le Petit Larousse, "verbal signifie oral par opposition à l'écrit."⁴⁷

17. The Applicant next disputed the Registrar's distinction between "l'agression verbale et physique", on the grounds that the distinction implies that "la prétendue agression verbale incluant l'écrit s'étendait aussi à l'agression physique."⁴⁸ The Applicant submitted that he did not express any "parole agressive" to the custody officer in question.⁴⁹ Moreover, the Applicant argued that if he had, hypothetically speaking, physically assaulted the custody officer, that custody officer would have filed a complaint against the Applicant and presented eyewitnesses to the assault.⁵⁰ The Applicant observed that no such occurrence had come to pass.⁵¹
18. The Applicant also disputed the Registrar's reliance on the regulations of the ICTY and STL, arguing that the regulations of these two jurisdictions as to the management of detained persons do not apply to persons detained by the ICC.⁵² The Applicant submitted that the RoR are the sole text on the basis of which the Registrar must demonstrate the violation of a provision.⁵³ The Applicant reiterated, however, that RoR 207(f) nowhere mentions "une agression écrite" because "verbal signifie oral par opposition à l'écrit."⁵⁴
19. The Applicant concluded his Application by complaining of the process with respect to addressing the Registrar on the determination of a disciplinary offence and the imposition of a disciplinary measure pursuant to RoR 215.⁵⁵ Specifically, the Applicant raised issue with the fact that detained persons cannot benefit from an appeal "en temps réel".⁵⁶ The Applicant noted that the Registrar is to decide upon a detained person's request within 14 days of its receipt, but that the sanction remains in force during this period.⁵⁷ The Applicant further noted that if a detained person is subject to a sanction of 14 days, he will have fully served his punishment by the time

⁴⁶ ICC-RoR216-01/14-1-Conf-Exp-Anx1, page 3, paragraph 1.

⁴⁷ ICC-RoR216-01/14-1-Conf-Exp-Anx1, page 3, paragraph 1.

⁴⁸ ICC-RoR216-01/14-1-Conf-Exp-Anx1, page 4, paragraph 2.

⁴⁹ ICC-RoR216-01/14-1-Conf-Exp-Anx1, page 4, paragraph 2.

⁵⁰ ICC-RoR216-01/14-1-Conf-Exp-Anx1, page 4, paragraph 2.

⁵¹ ICC-RoR216-01/14-1-Conf-Exp-Anx1, page 4, paragraph 2.

⁵² ICC-RoR216-01/14-1-Conf-Exp-Anx1, page 5, paragraph 3.

⁵³ ICC-RoR216-01/14-1-Conf-Exp-Anx1, page 5, paragraph 3.

⁵⁴ ICC-RoR216-01/14-1-Conf-Exp-Anx1, page 5, paragraph 3.

⁵⁵ ICC-RoR216-01/14-1-Conf-Exp-Anx1, page 6-7, paragraph 5.

⁵⁶ ICC-RoR216-01/14-1-Conf-Exp-Anx1, page 6, paragraph 5.

⁵⁷ ICC-RoR216-01/14-1-Conf-Exp-Anx1, page 6, paragraph 5.

the Registrar makes his decision.⁵⁸ The Applicant asked what purpose the appeal serves in these circumstances.⁵⁹

C. Determination of the Presidency

20. 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.⁶⁰
21. The present request for judicial review challenges the decision of the Registrar confirming the CCO Decision finding that the Applicant had committed a disciplinary offence pursuant to RoR 207(f) and imposing a disciplinary measure. The Presidency notes, at the outset, that the Application is confined to a narrow interpretive question: whether the term “verbal” as used in RoR 207(f) refers only to that which is oral, as the Applicant submits, or refers to that which is both oral and written, as the Registrar submits.⁶¹ Accordingly, the determination of the Presidency specifically clarifies the interpretation of the term “verbal” as it appears in RoR 207(f).
22. The Presidency further notes, at the outset, that both the Applicant and the Registrar rely on the French version of the RoR. While the English and French versions of the RoR are equally authoritative, the Presidency notes that small interpretive differences

⁵⁸ ICC-RoR216-01/14-1-Conf-Exp-Anx1, page 6, paragraph 5.

⁵⁹ ICC-RoR216-01/14-1-Conf-Exp-Anx1, page 6, paragraph 5.

⁶⁰ 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* Reasons for the “Decision on the ‘Application for Review of Decision of the Registrar’s Division of Victims and Counsel dated 2 January 2008 not to Admit Prof. Dr. Sluiter to the List of Counsel’”, 10 July 2008, ICC-Pres-RoC72-01-8-10, paragraph 20.

⁶¹ At the end of his Application, the Applicant also complained of the process with respect to appealing the determination of a disciplinary offence and the imposition of a disciplinary measure to the Registrar pursuant to RoR 215. ICC-RoR216-01/14-1-Conf-Exp-Anx1, pages 6-7, paragraph 5. The Presidency notes that the Applicant submitted the present Application pursuant to RoR 216, which provides that a detained person may appeal a decision of the Registrar concerning the determination of a disciplinary offence and the imposition of a disciplinary measure. Accordingly, the Presidency addresses only the Applicant’s challenge to the Registrar’s decision and not the Applicant’s complaint regarding the RoR 215 process itself. The Presidency reminds the Applicant that other than challenges to the determination of a disciplinary offence and the imposition of a disciplinary measure, a detained person must make a complaint on any other matter concerning his or her detention pursuant to the procedure set forth in Section 5 of Chapter 5 of the RoR.

may arise when comparing the two texts.⁶² Accordingly, the Presidency shall address the terms “verbal” and “verbalement” as they respectively appear in the English and French versions of RoR 207(f).

1. Interpreting the Term “Verbal” in RoR 207(f) pursuant to Article 31(1) of the Vienna Convention on the Law of Treaties (“Vienna Convention”)

23. In addressing the interpretive question raised by RoR 207(f), the Presidency considers it appropriate to rely on the general principle of interpretation as set out in article 31(1) of the Vienna Convention.⁶³ Pursuant to this principle, the Presidency must interpret RoR 207(f) in accordance with the ordinary meaning of its terms in their context and in light of the instrument’s object and purpose.⁶⁴ The Appeals Chamber has further specified, with respect to the application of article 31(1), that:

The context of a given legislative provision is defined by the particular subsection of the law read as a whole in conjunction with the section of an enactment in its entirety. Its objects may be gathered from the chapter of the law in which the particular section is included and its purposes from the wider aims of the law as may be gathered from its preamble and general tenor⁶⁵

24. The text of RoR 207(f) provides as follows:

Regulation 207 (English)	Norme 207 (français)
The following conduct shall constitute a disciplinary offence: ...	Commet une infraction disciplinaire la personne détenue qui: ...
(f) Verbal abuse directed at a member of staff of the detention centre, another detained person or any visitor to the detention centre	f) agresse verbalement un employé du quartier pénitentiaire, une autre personne détenue ou tout visiteur du quartier pénitentiaire

⁶² RoR 1(2).

⁶³ Vienna Convention on the Law of Treaties, signed on 23 May 1969 and entered into force on 27 January 1980, 1155 United Nations Treaty Series 18232 (“Vienna Convention”). The RoR are not a “treaty” within the meaning of article 2(a) of the Vienna Convention. Nevertheless, the principles of interpretation set out in the Vienna Convention are applicable to the RoR pursuant to article 21 of the Rome Statute (“Statute”), which sets forth the applicable law of the Court. According to article 21, the Court shall apply “[i]n the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence” and “[i]n the second place, where appropriate, applicable treaties and the principles and rules of international law”. See, e.g., Pre-Trial Chamber I, Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence, 19 May 2006, ICC-01/04-01/06, paragraphs 1-7 (relying on the principle of interpretation set out in article 31(1) of the Vienna Convention in “interpreting the contours of . . . a statutory framework” encompassing provisions of the Statute, Rules, Regulations of the Court (“RoC”) and RoR).

⁶⁴ Vienna Convention art. 31(1).

⁶⁵ Appeals Chamber, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, paragraph 33 (citing Vienna Convention art. 31).

a. The Ordinary Meaning of “Verbal” in RoR 207(f)

25. The Presidency notes, at the outset, that the Registrar cited to the Wikipedia article on “Abus verbal” in support of his interpretation of the term “verbal” in the Impugned Decision.⁶⁶ Wikipedia “is an online open-content collaborative encyclopedia”.⁶⁷ Accordingly, Wikipedia itself advises that “nothing found [on the site] has necessarily been reviewed by people with the expertise required to provide . . . complete, accurate or reliable information.”⁶⁸ The Presidency does not consider a citation to Wikipedia as valid authority for any factual or legal proposition and therefore does not accept that portion of the Impugned Decision that relies on Wikipedia as a source of authority for the interpretation of the term “verbal”.
26. The Presidency has instead consulted language reference sources regularly cited by the Court in its past decisions. The term “verbal” in English can refer to that which is “[c]onsisting or composed of words” as well as to that which is “[e]xpressed or conveyed by speech instead of writing”.⁶⁹ Similarly, the term “verbalement” in French can refer to that which is expressed “[p]ar des mots” or “[d]e vive voix et non par écrit”.⁷⁰ The Presidency accordingly finds that a pure textual reading of RoR 207(f) renders the meaning of “verbal” ambiguous, as it could reasonably refer to any expression of words, be they oral or written, or only to words expressed orally.

⁶⁶ ICC-RoR216-01/14-1-Conf-Exp-Anx8, page 4, paragraph 6.

⁶⁷ Wikipedia: General disclaimer, Wikipedia, 24 January 2014, http://en.wikipedia.org/wiki/Wikipedia:General_disclaimer (accessed 17 February 2014).

⁶⁸ Wikipedia: General disclaimer, Wikipedia, 24 January 2014, http://en.wikipedia.org/wiki/Wikipedia:General_disclaimer (accessed 17 February 2014).

⁶⁹ “verbal, adj. and n.”, Oxford English Dictionary Online, December 2013, <http://www.oed.com/view/Entry/222360?rskey=eDmVSs&result=1> (accessed 17 February 2014); *see, e.g.*, Trial Chamber V, Decision on the content of the updated document containing the charges, 28 December 2013, ICC-01/09-01/11, paragraph 14, note 20 (defining “confirm” in article 61(1) of the Statute); Trial Chamber I, Decision establishing the principles and procedures to be applied to reparations, 7 August 2012, ICC-01/04-01/06, paragraph 270, note 444 (defining “through” in article 75(2) of the Statute); Presidency, Decision on the request for judicial review dated 8 February 2013, 28 March 2012, ICC-RoR221-01/12, paragraph 45, note 45 (defining “present” in RoC 103(4)); Appeals Chamber, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber II dated 20 July 2011 entitled “Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence”, 10 November 2011, ICC-01/09-02/11 OA 3, paragraph 53, note 115 (defining “privy to” in article 12(1)(b) of the Code of Professional Conduct for counsel).

⁷⁰ “verbalement, adv.”, Le Nouveau Petit Robert, Dictionnaire alphabétique et analogique de la langue française, Paris: Dictionnaires Le Robert, 2004; *see, e.g.*, Appeals Chamber, Judgment on the appeal of Mr. Germain Katanga against the decision of Pre-Trial Chamber I entitled “Decision on the Defence Request Concerning Languages”, paragraph 40, note 86 (defining “parfaitement” in article 67(1)(a) and (f) of the Statute); Appeals Chamber, Decision on the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the “Directions and Decision of the Appeals Chamber” of 2 February 2007, paragraph 15, note 39 (defining “préoccupation” in article 68(3) of the Statute); Pre-Trial Chamber I, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5, and VPRS 6, 17 January 2006, ICC-01/04, paragraph 80, note 69 (defining “personne morale” in the context of defining “natural person” in rule 85(a) of the Rules).

b. A Contextual Interpretation of “Verbal” in RoR 207(f)

(1) The Meaning of “Verbal” in RoR 207(f) within the Context of RoR 207

27. The Presidency proceeds to consider the term “verbal” within the context of the provision as a whole. The Presidency notes that RoR 207(f) is one of nine sub-provisions contained in RoR 207, which enumerates types of conduct deemed to constitute a disciplinary offence. The Presidency finds that none of the other sub-provisions contained in RoR 207 clarify the meaning of “verbal” in RoR 207(f). This conclusion applies with equal force to a reading of RoR 207 as a whole in either English or French.
28. The Presidency notes that the Registrar observed that while none of the disciplinary offences enumerated in RoR 207 include the term “écrit”, the absence of this term should not be taken to mean that RoR 207 “entend exclure la possibilité que des actes de nature disciplinaire restent sans faire l’objet de procédures disciplinaires”.⁷¹ As an example, the Registrar noted that RoR 207(i), which prohibits a detained person from inciting another detained person to commit a disciplinary offence, “ne saurait être interprétée comme excluant une incitation par la parole ou par écrit.”⁷² The fact that other sub-provisions, none of which contain the specific term “verbal” (or other terms such as “written” or “oral” that might elucidate its meaning), may encompass conduct in writing has no bearing on the specific interpretive question raised by the Applicant. Accordingly, the Presidency does not accept the Registrar’s interpretation of RoR 207(f) within the context of RoR 207 in the Impugned Decision.⁷³

(2) The Meaning of “Verbal” in RoR 207(f) within the Context of Section 4 of Chapter 5 of the RoR

29. The Presidency next notes that RoR 207 is situated within Section 4 of Chapter 5 of the RoR. Chapter 5 governs “Detention Matters” while Section 4 deals specifically with issues of “Discipline and Control”. The Presidency notes, and the Applicant

⁷¹ ICC-RoR216-01/14-1-Conf-Exp-Anx8, page 3, paragraph 2.

⁷² ICC-RoR216-01/14-1-Conf-Exp-Anx8, page 3, paragraph 2.

⁷³ The Registrar also drew a comparison between RoR 207(b) and RoR 207(f) in an attempt to demonstrate the distinction between “l’agression physique” and “l’agression verbale”. ICC-RoR216-01/14-1-Conf-Exp-Anx8, page 4, paragraphs 4, 6. The Presidency finds this analysis, which compares two different types of “agression”, to be irrelevant to the narrow interpretive question raised by the use of the term “verbal” in RoR 207(f).

also points out,⁷⁴ the wording of RoR 207(f) in comparison with the wording of RoR 211(c), which is also contained in Section 4. Specifically, the French version of RoR 211, which enumerates the disciplinary measures that the CCO may impose, provides in paragraph (c) that the CCO may impose an “avertissement verbal ou écrit”. The Applicant argues that this distinction “entre les mots verbal et écrit à la norme 211(c) quand il parle d’un avertissement verbal ou écrit au lieu de l’avertissement verbal” strongly suggests that the use of the term “verbalement” in RoR 207(f) refers to that which is oral and not written.⁷⁵ The Presidency would find this reading compelling were it not for its analysis of the same two provisions in the English version of the RoR. The English version of RoR 211(c) describes the warning that the CCO may impose as an “[o]ral or written warning”, not as a “verbal or written warning”. This formulation suggests that the use of the word “verbal” in RoR 207(f) is, by comparison, intended to encompass both oral and written statements. Thus, the Presidency concludes that a contextual reading of “verbal” in RoR 207(f) within Section 4 of Chapter 5 also fails to clarify its meaning.

(3) The Meaning of “Verbal” in RoR 207(f) within the Context of Chapter 5 of the RoR

30. Widening the contextual inquiry further, the Presidency considers the term “verbal” in RoR 207(f) in light of the other provisions contained in Chapter 5 (“Detention Matters”). The term “verbal” appears on one other occasion in Chapter 5, in RoR 194(7), which is contained in Section 3 governing “Management of the Detention Centre”.⁷⁶ RoR 194(7) provides, in relevant part, that “[w]here a detained person refuses to co-operate with a search, the Chief Custody Officer may authorise the use of the minimum force necessary to carry out the search as a last resort after verbal warnings have failed.”⁷⁷ The Presidency considers that the use of “verbal” in this provision suggests, to a greater degree than in RoR 207(f), words expressed in oral rather than written form. However, the Presidency also observes that the use of

⁷⁴ ICC-RoR216-01/14-1-Conf-Exp-Anx1, page 3, paragraph 1.

⁷⁵ ICC-RoR216-01/14-1-Conf-Exp-Anx1, page 3, paragraph 1.

⁷⁶ The Presidency notes that this is, in fact, the only other use of the term “verbal” in the entirety of the English version of the RoR. As already discussed, the French version of the RoR uses the term “verbal” in RoR 211(c).

⁷⁷ The French version of RoR 194(7) provides, in relevant part, that “[l]orsqu’une personne détenue refuse de coopérer lors d’une fouille, le chef du quartier pénitentiaire peut, en dernier ressort, après échec des mises en garde verbales, autoriser l’utilisation de la force minimum nécessaire pour procéder à la fouille.” The French version uses the adjective “verbales” to modify the noun “mises en garde”. The English version of the provision similarly uses the adjective “verbal” to modify the noun “warnings”.

“verbal” in RoR 194(7) – *i.e.* to describe a warning prior to forcibly carrying out a search – contemplates a particular circumstance where the most reasonable interpretation is a warning communicated in oral, rather than written, form. By contrast, the use of “verbal” in RoR 207(f) clearly encompasses a much broader range of circumstances – *i.e.* to describe abusive language – where a reasonable interpretation could refer to language conveyed through speech or writing or both. Accordingly, the Presidency concludes that the use of “verbal” in RoR 194(7) fails to clarify the use of “verbal” in RoR 207(f). This conclusion applies with equal force to a comparative reading of RoR 194(7) and RoR 207(f) in either English or French.

c. The Meaning of “Verbal” in RoR 207(f) in Light of the Object and Purpose of the RoR

31. The Presidency next considers the term “verbal” in RoR 207(f) in light of the object and purpose of the RoR. In addressing this question, the Presidency begins by considering the legal texts governing the management of the detention centre, particularly with respect to maintaining discipline and order. Section 1 of Chapter 6 of the Regulations of the Court (“RoC”) articulates general provisions governing persons detained by the Court. RoC 90(1) mandates that “the Registrar shall have overall responsibility for all aspects of management of the detention centre, including security and order, and shall make all decisions relating thereto” but provides that “[t]he day-to-day fulfillment of the[se] functions . . . shall be delegated to the Chief Custody Officer.” RoC 95 addresses the matter of “Discipline”, and provides, in paragraph 1, that “[d]iscipline and order shall be maintained by the Chief Custody Officer in the interests of safe custody and good administration of the detention centre.” RoC 95(2) then instructs that “[d]etails of the disciplinary procedure for detained persons shall be set out in the Regulations of the Registry.”
32. Section 4 of Chapter 5 of the RoR addresses in detail matters related to “Discipline and Control” of detained persons. As discussed above, RoR 207, which is situated within this Section, enumerates types of conduct that constitute a disciplinary offence. The remainder of Section 4 primarily addresses the disciplinary procedure for detained persons suspected of committing a disciplinary offence.
33. The Presidency determines that the clear object and purpose of RoR 207 is to identify types of conduct that could imperil “safe custody and good administration of the detention centre” with the view towards sanctioning such conduct as a means of

maintaining discipline and order. The Presidency finds that an interpretation of “verbal” in RoR 207(f) that encompasses both the oral and written is most consistent with this object and purpose.⁷⁸ The Presidency recognizes that an oral insult against a custody officer may, in certain circumstances, be more likely to immediately affect the security and order of the detention centre. However, a detained person’s use of abusive, degrading or offensive language regarding a custody officer in written terms may also reasonably affect the security and order of the detention centre and is thus subject to regulation as a disciplinary offence under RoR 207(f).⁷⁹

2. *Relevant Legal Texts of the ICTY and STL*

34. The Presidency notes that the Registrar relied in the Impugned Decision on provisions similar to RoR 207(f) in the legal texts of the ICTY and STL, observing that “l’expression ‘verbale’” in these provisions “recouvre tant l’écrit que l’oral.”⁸⁰ The texts of these provisions provide as follows:

⁷⁸ The Presidency notes that it has consulted the drafting history of the RoR as a supplementary means of interpretation in an attempt “to confirm the meaning resulting from the application of article 31” pursuant to article 32 of the Vienna Convention. The Presidency found, however, no discussion of the terms “verbal” or “verbalement” as they respectively appear in the English and French versions of RoR 207(f). Nor did the Presidency find any discussion of the distinction in the use of terms between RoR 207(f) and 211(c).

⁷⁹ The Presidency’s decision is narrowly confined to the interpretive question raised by the Application and therefore does not review whether the Applicant’s statements constituted a breach of discipline pursuant to RoR 207(f) or whether the imposed disciplinary measure was appropriate under the circumstances. However, the Presidency takes this opportunity to provide relevant legal guidance to the CCO and the Registrar should they face a similar situation in the future. The European Court of Human Rights (“European Court”) has had occasion to address the punishment of a detained person for allegedly writing defamatory statements regarding prison staff under the rubric of article 10 of the European Convention on Human Rights, which guarantees the right to freedom of expression. The European Court observed that “[p]ublic servants . . . may need protection from offensive, abusive and defamatory attacks which are calculated to affect them in the performance of their duties and to damage public confidence in them and the office they hold.” However, it cautioned that “[i]n the context of prison discipline . . . regard must be had to the particular vulnerability of persons in custody and therefore the authorities must provide particularly solid justification when punishing prisoners”. Accordingly, prison authorities must “base[] themselves on an acceptable assessment of the relevant facts”, including “the content of the remarks held against the Applicant and the context in which he made them”, and must consider whether the sanction is “proportionate to the legitimate aims pursued”. *Martin Kostov v. Bulgaria*, no. 13801/07, Judgment of 24 July 2012, paragraphs 42-48.

⁸⁰ ICC-RoR216-01/14-1-Conf-Exp-Anx8, page 4, paragraph 5.

United Nations Detention Unit Regulations for the Establishment of a Disciplinary Procedure for Detainees (ICTY)	
Regulation 2 (English)	Norme 2 (français)
The following conduct shall constitute a disciplinary offence: ... - verbal abuse directed against a member of the staff of the detention unit, another detainee or any lawful visitor to the detention unit	Les comportements suivants constitueront une infraction disciplinaire: ... - violence verbale à l'encontre d'un membre du personnel du quartier pénitentiaire, d'un autre détenu ou de tout visiteur autorisé du quartier pénitentiaire

Rules Governing the Detention of Persons Awaiting Trial or Appeal before the STL or Otherwise Detained on the Authority of the STL	
Rule 33 (English)	Article 33 (français)
The following shall constitute disciplinary offences: ... (vi) Verbal abuse directed at a member of staff of the Detention Facility, another Detainee or any visitor to the Detention Facility	Commets une infraction disciplinaire tout détenu qui : ... vi) agresse verbalement un membre du personnel du quartier pénitentiaire, un autre détenu ou tout visiteur du quartier pénitentiaire

35. The Presidency finds that the Registrar's position is not substantiated by a plain reading of these provisions in either English or French. The use of the term "verbal" in these provisions raises precisely the same interpretive question at issue here, *i.e.* whether "verbal" refers to any expression of words, be they oral or written, or only to oral communication. Moreover, the Registrar has not cited to any decisions by the respective tribunals, or any other relevant legal authority, to support its argument. Accordingly, the Presidency concludes that these provisions fail to further clarify the interpretation of the term "verbal".

3. Conclusion

36. In conclusion, the Presidency, applying the principle of interpretation set forth in article 31(1) of the Vienna Convention, finds that the term "verbal" in RoR 207(f) is ambiguous when read in accordance with its ordinary meaning and within the context of the provision, section, and chapter in which it appears. The Presidency finds,

however, that an interpretation of “verbal” that encompasses both oral and written conduct is most consistent with the object and purpose of the RoR, which includes maintaining discipline and order in the detention centre.

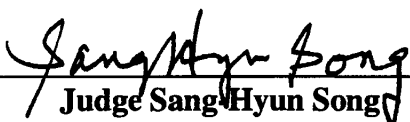
37. The Presidency recognizes that a plain reading of “verbal” in RoR 207(f) may continue to cause confusion, particularly for detained persons who may have difficulty accessing this decision. Accordingly, the Presidency invites the Registrar to revisit the precise language used in this provision to clarify the meaning of “verbal”.

III. CLASSIFICATION

38. 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, subject to ensuring the redaction of any information that may identify the Applicant.
39. If there is any factual and/or legal basis for retaining the confidential *ex parte* classification of this decision, 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 17 March 2014. 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 upholds the Impugned Decision but replaces the reasoning in the Impugned Decision with the reasoning contained herein.

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



Judge Sang Hyun Song
President

Dated this 28 February 2014

At The Hague, The Netherlands