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Report of the Bureau on family visits for detainees

Note by the Secretariat

Pursuant to paragraphs 17 and 18 of resolution ICC-ASP/7/Res.3, of 21 November 2008, the Bureau of the Assembly of States Parties hereby submits for consideration by the Assembly the report on family visits for detainees. The present report reflects the outcome of the informal consultations held by The Hague Working Group of the Bureau.

Report of the Bureau on family visits for detainees

A. Background

1. At its eleventh session the Committee on Budget and Finance (hereinafter "the Committee") restated a view it had expressed at its sixth session that the question of whether the Court should fund family visits for indigent detainees was a political one to be decided by the Assembly of States Parties. The Committee referred to the fact that the Assembly at its seventh session would consider the substantial and long-term financial implications of this question for the Court's budget and the precedent that would be set.[1]

2. In preparation for the seventh session of the Assembly, The Hague Working Group (HWG) under the facilitation of the ad hoc facilitator, Ms. Irina Nita (Romania), discussed, inter alia, the Court's draft report and revised draft report entitled "Family Visits to Detained Persons". However, unable to take the Committee's comments into account due to report's late presentation, a number of delegations considered that there was not sufficient time to properly discuss the issues thoroughly such as to allow a decision to be taken at the seventh session of the Assembly. Rather, the matter should be discussed further during 2009 in accordance with relevant procedures, for example regarding the involvement of the Committee, with a view to taking a decision at the eighth session of the Assembly.[2]

3. At its seventh session the Assembly noted with reference to the recommendations of the Committee on Budget and Finance that further discussions were necessary in order to facilitate a policy decision on the issue of financial assistance for family visits to persons detained on remand by the Court, as well as, in case of the adoption of such a policy, the specific conditions for its implementation. Therefore the Assembly invited the Court to engage in a constructive dialogue with States Parties on this issue in a timely manner, allowing for a proper review by the Committee at its twelfth and thirteenth sessions and for a decision to be taken at the eighth session of the Assembly, and requested the Bureau to remain seized of the matter.

4. In the resolution the Assembly referred to the report of the Bureau on family visits for detainees and the report of the Court entitled "Report of the Court on family visits to indigent detained persons," and recognized that detained persons were entitled to receive visits and that specific attention should be given to visits by family members, while also recalling that, according to existing law and standards, the right to family visits did not comprise a co-relative legal right to have such visits paid for by the detaining authority. [3]

5. Pending the policy decision, the Assembly discussed the issue of family visits in the context of facilitation for the Court's budget for 2009 and agreed, on an exceptional basis and limited to 2009 only, to allow the Court to fund family visits up to the amount of €40,500 in accordance with the 2009 programme budget, subject to caveats.[4]

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[1] ICC-ASP/7/15, para. 66-67.

[2] ICC-ASP/7/30, Report of the Bureau on family visits for detainees.

[3] *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Seventh session, The Hague, 14-22 November 2008* (International Criminal Court publication, ICC-ASP/7/20), vol. I., part III, resolution ICC-ASP/7/Res.3, paras. 17 and 18.

[4] a) The funding of family visits by the Court in 2009 should be implemented solely in accordance with the priority needs of the current indigent detainees; and

b) The decision to fund family visits in 2009 has been taken on an exceptional basis and does not in anyway create or maintain a status quo; nor establish any legal precedent in respect of those States that have already or will enter into sentence enforcement agreements with the Court; nor does it create any legal precedent in respect of current or future detainees at a national or international level; nor does the Assembly's decision prejudice or prejudge in any way the future outcome of discussions on the issue of funding family visits for indigent detainees. (*Official Records of the*

B. Decision of the Presidency of the Court dated 10 March 2009

6. While the Bureau assigned the issue to be considered in The Hague Working Group with a view to reaching a policy decision before the eighth session of the Assembly, the issue was simultaneously under consideration by the Presidency of the Court, based on a Confidential ex parte application dated 21 November 2008 by Mr. Ngudjolo Chui, who has been detained in the Detention Unit since 2008. Mr. Ngudjolo Chui challenged the Registrar's decision to fund three family visits of two persons or two family visits of three persons in 2009 and claims that this decision is tantamount to refusing his right to receive family visits, since he is indigent.

7. The Presidency in its decision of 10 March 2009[5] ("the Decision") granted this application and stated that "notwithstanding the lack of such recognition [of a general right to funded family visits in the texts of the Court or in international human rights instruments] in the instant case, a positive obligation to fund family visits must be implied in order to give effect to a right which would otherwise be ineffective in the particular circumstances of the detainee. As such, in determining that there is no positive obligation to fund family visits in the particular circumstances of the detainee, the Registrar erred in law."[6] The Decision is not subject to appeal by the Registrar since it is a decision to the appeal by Mr. Ngudjolo.

8. In the light of the above finding, the Presidency instructed the Registrar to ensure that provision was made for the funding of family visits to indigent detained persons in the budget of the Court and stated that although funding through the budget might be supplemented by funding from alternative sources if available, the primary responsibility for funding lay with the Court.[7] Notwithstanding this responsibility, the Presidency found also that the obligation could not create an entitlement to unlimited funded family visits, but that the obligation to fund could legitimately be restricted by the resource constraints faced by the Court, to the extent that the right to family visits was still rendered effective.[8] In this respect, the Registrar is expected to apply a balancing test in order to strike a fair balance between safeguarding resources and ensuring that family links are maintained.[9]

C. Discussion in The Hague Working Group

9. The issue of family visits was discussed in detail during The Hague Working Group's meetings of 6 April, 20 May and 27 May 2009. The current report is to be seen in the context of the more detailed minutes and decisions of those meetings.

10. At its fifth meeting on 6 April 2009, the Working Group focused on discussing the situation following the Presidency's decision and possible new circumstances created by it. In addition to the Decision, the Group had before it a discussion paper on funding family visits for indigent detainees, dated 30 March 2009, submitted by the facilitator, as well as an informal paper on financial aspects for consideration within the budget in respect of family visits to indigent detained persons submitted by the Registry on 6 April 2009.

Assembly of States Parties to the Rome Statute of the International Criminal Court, Seventh session, The Hague, 14-22 November 2008 (International Criminal Court publication, ICC-ASP/7/20), vol. I, part II.E.1, paras. 15 and 16.)

[5] ICC-RoR-217-02/08, reclassified as public on 24 March 2009.

[6] Ibid, para 37.

[7] Ibid, para 41.

[8] Ibid, para 42.

[9] Ibid, para 51

11. A number of delegations expressed strong reservations as regards the legal basis and the status of the Decision which they considered of an administrative nature, not a judicial one since the Presidency's Decision reviewed an administrative decision of the Registrar. Delegations recalled that in the 2008 discussions on this issue, the Working Group had already reached a consensus that there was no legal obligation to fund the family visits of indigent detainees. Other delegations wished to reserve their views on the legal basis and the budgetary implications subject to further clarification of the status of the Decision.

12. The Hague Working Group reiterated the importance of continuing the discussions on the issue of funding family visits. As a conclusion, a summary of the general views and concerns of the Working Group regarding the financial implications was submitted to the Committee on Budget and Finance at its April session by the facilitator, stressing that the discussions were at an early stage in light of the Presidency's recent Decision and that the legal aspects and other issues would be discussed at a later stage.

13. In order to obtain clarity from the Court's side on the legal status of the Decision and following a request by the facilitator on behalf of The Hague Working Group, a note from the Presidency was circulated on 23 April 2009 entitled "Overview of some of the judicial/legal functions of the Presidency of the Court". In the note the Presidency points out that the Presidency is an appellate court conducting judicial review of the Registrar's decisions on a range of issues, including the conditions of detention and the rights of detained persons. The judgments of the Presidency are final, non-appealable judgments rendered by three independent judges elected by their peers to serve in the Presidency.

14. At its seventh meeting on 20 May 2009 the Working Group considered the way forward for its future discussions. It had before it the report of the Committee on its twelfth session.[10] The Committee had requested the Registrar to inform The Hague Working Group if she encountered problems in meeting her obligations within the budget allocated by the Assembly for family visits. The Committee further recommended that the Assembly use its amending power to amend regulation 179 of the Regulations of the Registry[11]. The Hague Working Group questioned the feasibility of such amendments, since those powers were actually vested in the Registrar and the Presidency.

15. It was noted that, in addressing this issue, the Assembly was fulfilling its responsibility under article 112 of the Rome Statute to provide oversight over the management of the Court, including the heads of the organ. It also had responsibility for policymaking. The conclusion reached by the Assembly at its seventh session should be borne in mind by the organs of the Court as the context for their work. It was noted that the Decision which had far-reaching policy and budgetary implications, could not be legally challenged by the Registrar or the States Parties. However, it was also posited that a decision of an administrative nature addressed to the Registrar and not to States could not impose upon States a legal obligation that was not recognized in treaty.

16. On the other hand, the view was expressed that the Decision of the Presidency overtook the earlier discussions by the Assembly and, furthermore, provided sufficient scope for the Assembly's discussion of the policy on family visits and the funding thereof. It was recalled in this regard that one regional group had, as a whole, supported the funding of family visits during the seventh session. It was proposed that the Working Group should therefore focus on the limited policy and practical issues.

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[10] Report of the Committee on Budget and Finance on the work of its twelfth session (ICC-ASP/8/5), paras. 94 and 96.
[11] Ibid., para. 96.

17. Concern was expressed that the Decision could have implications for the conclusion of sentence enforcement agreements with the Court, and some doubt was cast on the Presidency's conclusion that all possible alternative means of communication were impractical. The point was made on the difference between an obligation to fund and a decision to subsidize the cost of family visits, the former being compulsory in nature and the latter voluntary and that with the exception of the Trust Fund for Victims, funding for humanitarian assistance was not within the mandate of the Court. Furthermore, in light of the decision of the Presidency and the need for the Assembly to address the practical realities now faced by the Court regarding family visits, it was proposed that consideration be given to the option of the establishment of a voluntary trust fund for the funding of family visits.

18. While not being in a position to agree on the legal status of the Decision and its effects or potential impact on the policy decision to be taken by the States, The Hague Working Group acknowledged that the Registrar faced conflicting legal obligations arising from the decisions of the Assembly and the Presidency. In a pragmatic approach, the Working Group decided to focus its future discussions on the practical issues arising from the decision of the Presidency, since this was the immediate challenge facing the Court. Such issues would include the formula for determining indigence, the number of family members who may visit, the frequency of the visits and the definition of family members.

19. Accordingly, the facilitator prepared a discussion paper, circulated on May 25 with a set of issues and specific questions that the Hague Working Group should address at its meeting of 27 May. The questions were subsumed under the following headings:

a) Precedent for national jurisdictions?

b) Formula for indigence, specific for family visits

c) Defining the (number of) family members whose visits are funded

d) Frequency of visits

e) Alternative means of communication, such as videoconferencing or internet video link

f) Modalities for funding

g) Format of policy decision

20. In order to benefit from an expert's view on the first issue, precedent for national jurisdictions, the facilitator had invited Professor Piet Hein van Kempen, Professor of Criminal Law and Criminal Procedure as well as Professor of Human Rights Law, Faculty of Law of the Radboud University Nijmegen, to address the Working Group at its eighth meeting on 27 May 2009 as an independent expert.[12]

21. In addition, the Registrar had been invited by the Working Group to give her views regarding her ability to implement the Decision within existing resources, in light of the recommendation of the Committee on Budget and Finance.[13]

[12] The points made by Professor van Kempen are attached in annex II to this report.

[13] Report of the Committee on Budget and Finance on the work of its twelfth session (ICC-ASP/8/5), para. 94.

22. In response to the request of 20 May 2009 by the Working Group the Registrar informed the States that in light of the Decision, she had been reconsidering the criteria to be applied when deciding whether to fund the detainee's family members' visits. That included:

a) Reconsideration of the criteria and conditions;

b) Consideration of possible budgetary implications for 2009; and

c) Current status of implementation of the allocated budget of €40.500 to fund family visits.

23. The Registrar explained that the criteria should be reviewed again in case the fund of €40,500 allocated for family visits was depleted as a result of a possible increase in demand for family visits as of September 2009, when the hearings were expected to start. The Registrar added that she could, theoretically, find herself in a conflicting situation when trying on the one hand to execute the Decision and, on the other, not to exceed the budget allocated to family visits, as proposed by the Committee. She mentioned, however, that the flexibility provided for by the Decision had so far allowed her to manage such potential conflicting situation.

24. The Registrar confirmed that her report on the financial aspects of family visits presented the maximum amounts and that she did not foresee the need for additional resources in 2009, unless circumstances changed in the coming months. She further explained that the situation in 2010 was expected to be different, so that the report might need to be reviewed.

25. A number of delegations expressed concern that what was viewed as a legally flawed decision without the possibility to appeal had the potential for such wide-ranging effect and, further, that an administrative decision had sought to create a positive obligation based on administrative regulations, i.e. the Regulations of the Registry. The Regulations, however, were not part of the normative hierarchy that was legally binding on States, nor were they to be considered as "applicable law" pursuant to article 21 of the Statute. It was suggested that States Parties had the duty to interpret the Decision and could decide to set limits to the effect thereof.

26. It was noted that if the Decision was applicable to a single case only, then the policy decision still remained to be taken by the Assembly. The view was expressed in this regard that since the decision was of an administrative nature limited to a particular case, the prerogative of the Assembly to set a policy was not restricted thereby. Furthermore, it was noted that the aspect of the Decision relating to funding was extrajudicial, since decisions on funding were not within the competence of the judges.

27. While delegations concurred that the Decision had deviated from human rights standards, it was noted that the issue of how the Decision might be managed had now arisen. A view was expressed to the effect that the Assembly ought to focus on managing the Decision and its effects and not necessarily continue to challenge the Court's competence or reasoning.

28. The point was made that the criteria for the funding of family visits were not as detailed as those concerning legal aid, i.e. the corresponding provisions of the Regulations of the Registry varied considerably in the degree of detail, with a potential impact on the quality of the administrative decisions of the Presidency. It was suggested that a more detailed set of regulations pertaining to family visits might assist in better addressing and managing the issue within the Court. The Registrar replied that further elaboration of the Regulations might be considered as an alternative by the Court.

29. Overall, during the detailed discussions in the Hague Working Group in the course of 2009, several delegations expressed the view that they were not under a positive legal obligation to fund family visits. While some delegations held different views, there was wide agreement that the debate should not focus on the legal aspect but on pragmatic financial considerations, criteria and modalities relating to the funding of family visits for indigent detainees. The need to find a balanced consensus at the forthcoming session of the Assembly was underlined. Moreover, there was broad understanding of the difficult position of the Registrar in the current situation following the decision of the Presidency dated 10 March 2009.

30. There was a wide consensus in the Hague Working Group to approve the facilitator's report and the following recommendations. However, some delegations, although to different extent, wished to formally maintain at this stage their reservations on the funding through the regular programme budget of the Court. These positions included a stricter perspective (Italy) which, in principle, would exclude any funding through assessed contributions, based on its precedential effect.

31. The Hague Working Group acknowledges that the strong concerns raised by some States Parties relating to broader issues, such as the respective roles of the Court and the Assembly of States Parties particularly in matters with significant financial implications, may benefit from further clarification in discussions separate from those on specific policy questions pertaining to the funding of family visits.

D. Recommendations

32. The Working Group agreed to present to the Bureau the following recommendations, in view of the policy decision to be taken at the eighth session of the Assembly of States Parties:

a) Take the appropriate measures to limit the impact of any decision to finance family visits as a precedent for national jurisdictions or for cases other than those of detainees in the Court's custody:

i) The role of the Assembly as the decision-making body on the budgetary and policy issues should be underlined;

ii) The language agreed by the Assembly at its seventh session of should serve as the basis for the Assembly's position on the issue, and thus it should be reaffirmed that no legal obligation to fund family visits exists. Consequently, neither the Court nor any other authority is under any obligation to absorb such costs, even in the case of an indigent detainee;

iii) Any financial assistance for family visits should be considered only on humanitarian grounds and should be defined from the perspective of the available resources as it is not a right of the detainee;

iv) The Court should define any criteria for such assistance within the administrative framework of the Court, such as the Regulations of the Registry;

v) The scope of the policy decision should be explicitly limited to detainees in the Court's custody in their pre-trial and trial phases only.

b) Require that strict criteria for indigence, specific to funding family visits be defined in the Regulations of the Registry:

Such criteria should be:

i) Transparent;

ii) Apply reference figures that are as individualized as possible;

iii) Take into account also the relevant income of the family members;

iv) Include an option to determine partial indigence for family visit purposes;

v) Address issues of hidden assets, financial investigation thereinto and recovery of assistance paid.

c) Define the criteria for eligibility of the family members for purposes of financial assistance:

i) The eligibility of a family member to receive financial assistance should be determined according to the existing human rights standards and case law of the established human rights bodies.

ii) Being eligible for financial assistance does not imply that such assistance is automatically granted.

d) No minimum frequency of visits should be pre-established:

i) There should be no pre-established minimum frequency of funded visits per year. Any request for financial assistance should be evaluated on a case-by-case basis, following the criteria set and within the margin of available resources. The Registrar is best positioned to apply this balancing test, also in light of the separation time from the family or particularly difficult periods of detention, while paying attention to the equal treatment of detainees.

ii) In general, if, following the due procedure, financial assistance is granted, within the scope of available resources the Registrar should seek to enable prolonged stays in order to maximize the ratio of travel costs to the time spent with the detainee. The Registrar should seek agreement with the host State in this regard.

e) Focus attention on the range of other communication means to maintain family contacts:

The Court should explore fully the range of other communication means available, such as telephone, videoconferencing or internet video link typically used in other international and national detention facilities or by humanitarian organizations such as the International Committee of the Red Cross, in order to ensure a more regular contact than can be provide by assisted family visits for the maintenance of family ties. The Court should report to the Assembly on the findings of such survey, with recommendations.

f) Provide a predictable financing model that shows implications for the Court's overall finances and explore all possible options for financing family visits through alternative mechanisms

i) In order to ensure predictable financial practices, the available resources together with the estimated need should guide any allocation of funds for this purpose. The allocated funds should be reasonable in proportion to the overall budget of the Court, other competing priorities and the benefits that such funds seek to create. This allocation is purely at the States Parties' discretion and is to be determined annually by the Assembly in the context of the approval of the programme budget. The Registrar should use her discretion so as to distribute the available funds as effectively as possible.

ii) Experience of the use of funds from previous years should give guidance for the allocation of funds for the future year. The Court should regularly report on the use of funds for family visits.

iii) Financial assistance to family visits, following the due procedure set according to the above recommendations, should be allocated in the general operating expenses budget line of the Detention Section of the Registry, where other items relating to the well-being of the detainees are addressed. This practice and report from the Court including the break-down of the measures taken within would ensure that the Assembly is in a position to evaluate all the administrative measures taken to ensure the well-being of the detainees in the Court's custody.

iv) The Court should explore, as a matter of priority, alternative funding options other than the programme budget, including but not limited to the feasibility of establishment of a voluntary trust fund.]

33. In conclusion, the Working Group suggests that on the issue of family visits to indigent detainees, for the sake of transparency and ease of reference a stand-alone resolution be adopted by the Assembly of States Parties at its eighth session. Although not all delegations could support at this stage the system of funding through the regular budget, The Hague Working Group recommended that the following draft resolution could serve as a useful basis for the Assembly's considerations. In addition, the Working Group proposes that the above recommendations form an integral part of the resolution and be annexed thereto, should the Assembly so agree.

Annex I

Draft resolution on Family visits for indigent detainees

The Assembly of States Parties,

Recalling that, at its seventh session, the Assembly had noted that further discussions were necessary in order to facilitate a policy decision on the issue of financial assistance for family visits to indigent detainees, including, but not limited to, consideration of the substantial and long-term financial implications of this question,[1]

Further recalling that the Assembly had also recognized that detained persons are entitled to receive visits and that specific attention should be given to visits by family members,[2] while, according to existing law and standards, the right to family visits does not comprise a co-relative legal right to have such visits paid for by the detaining authority, [3]

Welcoming the dialogue between the Court and States Parties on the issue of family visits,

Noting the views of the Committee on Budget and Finance on the issue,[4] and the report of the Court on family visits to indigent detainees,[5]

Noting the decision of the Presidency of 10 March 2009 on "Mr. Mathieu Ngudjolo's Complaint under Regulation 221(1) of the Regulations of the Registry against the Registrar's Decision of 18 November 2008" in relation to the funding of family visits to an indigent detainee,

Stressing the management oversight role of the Assembly as enshrined in article 112, paragraph (2)(b), of the Rome Statute, together with its decision-making role in respect of the Court's budget enshrined in article 112, paragraph (2)(d) of the Rome Statute,

Mindful of the overall responsibility of the Registrar to manage the detention center and to ensure that the detainees are treated with humanity[6] in the course of the detention in different phases of the trial arising from the *sui generis* nature of the Court;

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[1] *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Seventh session, The Hague, 14-22 November 2008* (International Criminal Court publication, ICC-ASP/7/20), vol. I. part III, resolution ICC-ASP/7/Res.3, para. 18, and part II, E, 1b), which set out the following caveats:

a) The funding of family visits by the Court in 2009 should be implemented solely in accordance with the priority needs of the current indigent detainees; and

b) The decision to fund family visits in 2009 has been taken on an exceptional basis and does not in anyway create or maintain a status quo; nor establish any legal precedent in respect of those States that have already or will enter into sentence enforcement agreements with the Court; nor does it create any legal precedent in respect of current or future detainees at a national or international level; nor does the Assembly's decision prejudice or prejudge in any way the future outcome of discussions on the issue of funding family visits for indigent detainees.

[2] Ibid., part III, resolution ICC-ASP/7/Res.3, para. 17.

[3] Ibid., paras. 17 and 18.

[4] Report of the Committee on Budget and Finance on the work of its twelfth session (ICC-ASP/8/5), para. 86 – 97, and thirteenth session (ICC-ASP/8/15), para. 127.

[5] ICC-ASP/7/24.

[6] Regulations 90 and 91 of the regulations of the Court.

1. *Takes note* of the report of the Bureau on family visits for indigent detainees and [*endorses*] the recommendations contained therein;[7]

2. *Reaffirms* that according to existing law and standards, the right to family visits does not comprise a co-relative legal right to have such visits paid for by the detaining authority or any other authority;

3. *Invites* the Court to continue to address the well-being of the detainees under its custody, paying particular attention to the maintenance of family contacts. In this light and in the particular circumstances of each detainee, alternative measures to family visits should be fully explored by the Court in order to ensure the maintenance of contacts;

4. *Decides* that in the case of an indigent detainee, while no legal obligation for the Court exists to fund family visits, for purely humanitarian grounds and following the application of clear criteria determining:

- full or partial indigence as determined by the procedure established by the Court to ascertain the status of indigence,
- family relation to the detainee,
- equal treatment of the detainees;

[the Court may partly or fully subsidize family visits for indigent detainees up to an amount to be determined annually by the Assembly in the context of the approval of the programme budget;]

5. *Underlines* that such assistance is applicable exclusively in the case of an indigent detainee in the Court's custody and is not applicable in any other circumstance, such as but not limited to the case of a detainee under temporary release in a third country, a convicted person serving sentence of imprisonment in the host State pending the designation of a State of enforcement by the Court and until its implementation, or a convicted person serving sentence in a third country;

6. *Requests* the Court to review the relevant parts of the Regulations of the Registry in light of this resolution and annexed recommendations and *invites* the Registrar to continue the dialogue with States Parties;

7. *Acknowledges* that various mechanisms could usefully be taken in order to fund family visits and, in that regard, as a matter of priority, *invites* the Court to explore, inter alia, the feasibility of establishing a voluntary trust fund;

8. *Requests* the Court to report to the Assembly on the measures undertaken pursuant to this resolution and their financial implications;

9. *Requests* the Bureau to remain seized of the matter.

Annex

[insert the recommendations]

[7] Annexed to this resolution (ICC-ASP/8/42).

Annex II

Summary of remarks by Professor Piet Hein van Kempen, Professor of Criminal Law and Criminal Procedure as well as Human Rights Law, Faculty of Law of the Radboud University Nijmegen, at The Hague Working Group's eighth meeting of 27 May 2009

1. The Decision of the Presidency of 10 March was based on regulation 179[1] of the Regulations of the Registry, which was similar to rule 79[2] of the Standard Minimum Rules for the Treatment of Prisoners. While the latter had never been interpreted as conferring an obligation on the detaining authority to fund family visits, the Court had interpreted regulation 179 in this vein.

2. While human rights bodies acknowledged that the distance between the detainee and his family was problematic to family life, they had addressed this situation differently from the Court by, for example, demanding measures that included providing for extended visits, ensuring imprisonment as close as possible to the family, remanding the prisoner to his home country to await trial in another State and permitting extra telephone calls and extra correspondence, both funded by the detaining State.

3. The Decision diverged from international human rights law also in that it granted a lesser degree of latitude to the Registrar to decide whether these visits should be funded than International Human Rights Law offers to States. The European Court of Human Rights applies a fair balance that has to be struck between the interest of the individual and the interests of the authorities and community, while, in its Decision based on human rights principles, the Court had applied a narrower test and had considered only the budget available to the Registrar. In addition to the fair balance test, the European Court of Human Rights (ECHR) also grants a wide margin of appreciation to States, an element that was also not recognized by the Decision.

4. The Court had held that the human right to family life entailed a positive obligation to fund family visits of an indigent pre-trial detainee. This right therefore could be described as a positive human rights obligation for the Court. As regards the precedent value of the Decision, it was binding in this particular case, and the precedent would limit itself to the Court in general, but had no binding effect *per se* beyond the Court.

5. It might be possible, however, that the Decision could eventually come to be viewed as a source of international human rights law and acquire precedent value, given the practice of international human rights bodies to refer in their jurisprudence to the human rights decisions of other such bodies. In such a case, the precedent thus created would apply to detainees in international as well as national jurisdictions. However, the human rights framework would then also apply, along with the requirements for a fair balance and a greater margin of appreciation for the Registrar.

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[1] Regulation 179 of the Regulations of the Registry provides in paragraph 1 as follows: "All visitors, other than counsel, diplomatic or consular representatives, representatives of the independent inspecting authority, or officers of the Court, shall first apply to the Registrar for permission to visit a detained person. The Registrar shall give specific attention to visits by family of the detained persons with a view to maintaining such links."

[2] Rule 79 provides as follows: "Special attention shall be paid to the maintenance and improvement of such relations between a prisoner and his family as are desirable in the best interests of both."

6. Going along this path, if a positive obligation were recognized, it could then be argued that the responsibility would not only be that of the Registrar but also that of the State of enforcement, or of the transferring State, especially if the latter was the State of nationality. Furthermore, the right would apply not only to the prisoner but also to each family member. In the case of a large family where each member could not visit, the rights of the family members who were unable to visit would be violated.

7. As regards whether, from the perspective of international human rights law, the funding of family visits from the Court's budget could be viewed as setting a precedent for a positive obligation for national jurisdictions, if one accepts that there is a positive obligation to fund, it could be possible to already regard the current funding as a precedent. It was a decision of the Assembly, it had been provided for in the budget and it might eventually be regarded as an important development in human rights law. Professor Van Kempen noted, further, that approving a budget for family visits at the eighth session of the Assembly could be interpreted as the Assembly's approval of the Decision and the positive obligation it established. Given the Court's authoritative stature, other courts might be similarly "inspired", regardless of the merits of the *obiter dicta* of the Decision itself.

8. On the question of the existence of an international standard which could assist in defining benchmarks for the concept of "nuclear family", the right to family life is broadly understood in the case law of the United Nations Human Rights Committee, the ECHR and the Inter-American Court of Human Rights. The central relationship was husband/wife, as well as parent/child, but could also include siblings and grandparents. Professor Van Kempen noted that a situation of multiple marriages would fall within the definition of "family life" but not necessarily within the term "nuclear family", and the definition would depend on the circumstances of each case.

9. As the possible way out of the seemingly difficult situation with a view to a potential precedent setting impact created by the Decision, the following scenarios could be considered by the Assembly:

a) Question the competence of the Court to take the Decision and therefore reject it;

b) Argue that the right to funded family visits is not a human rights standard, although it might be an ordinary regulation of the Court; or

c) Argue that, even if it were a human rights standard, then the human rights framework would apply, i.e. a fair balance test should be applied, and a greater margin of appreciation should be granted.

As regards scenario (b), it could be argued that since the Court had based its Decision strictly on regulation 179 of the Regulations of the Registry and not on an established human rights standard, the Decision had the status of being a practice for the Court, which would, in turn, make it less likely that human rights bodies would view it as a precedent.

With respect to scenario (c) it could be argued that, as the Court had not strictly adhered to international human rights law, States Parties could decide to proceed in this context and apply the fair balance test as well as ensure a wide margin of appreciation. This would allow the possibility of imposing some limits on the effect of the Decision.

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