

**Seventh session**

The Hague

14-22 November 2008

**Report of the Bureau on family visits for detainees**

**Note by the Secretariat**

Pursuant to paragraph 14 of resolution ICC-ASP/6/Res.2, of 14 December 2007, the Bureau hereby submits a report on the issue of family visits. The present report reflects the outcome of the informal consultations held by The Hague Working Group of the Bureau with the Court.

## Report of the Bureau on family visits for detainees

1. Following a recommendation of the Committee on Budget and Finance (“the Committee”) in its report on the work of the ninth session,<sup>1</sup> the Assembly of States Parties (“the Assembly”), at its sixth session, “invite[d] the Court, taking into account the comments of the Committee on Budget and Finance, to present to the Assembly at its next session an updated report on family visits, in consultation with relevant organizations, including the International Committee of the Red Cross and the Office of the United Nations High Commissioner for Human Rights, to assess, inter alia, the legal and policy aspects, as well as the human rights dimension and budgetary impact of family visits.”<sup>2</sup>

2. The Hague Working Group (“the Working Group”) agreed at its 6th meeting, held on 18 June 2008, on a non-exhaustive list of issues that should be considered when addressing the question of meeting the costs for family visits to detainees from the Court’s budget:

- a) Relevant applicable law and standards, as well as the existing practice at the international, regional and national levels, especially the practice of other international criminal tribunals;
- b) The scope of the right to family visits;
- c) Possible consequences for the execution of sentences;
- d) The relevance of the *sui generis* character of the International Criminal Court and the specificity of the circumstances of the detainees of the Court;
- e) The relevance and method of calculation of indigence;
- f) Possible concrete criteria for determination: definition of “family members,” frequency of visits, the margin of appreciation of the Court, etc.; and
- g) Short and long-term financial implications.

3. As part of the Court’s consultation process with a view to drafting its report on the issue of family visits, a seminar was organized by the Court on 8 and 9 July 2008, with the participation of some relevant organizations,<sup>3</sup> States Parties were represented by the Coordinator of The Hague Working Group, Ambassador Kirsten Biering (Denmark) and by the ad hoc facilitator for the issue of family visits. On 11 July 2008, the ad-hoc facilitator held an informal briefing, with the participation of a representative of the Court, to inform representatives of States Parties of the results of the Court’s seminar.

4. On 29 August 2008, an informal report by the ad-hoc facilitator was sent for information to the Committee to facilitate the preparation of the work of its eleventh session.

5. On 19 September 2008, a first draft of the Court’s report on the issue of family visits was circulated to the Working Group. Following consultations with the Working Group, the Court circulated an amended version of its report on 16 October 2008. The final version of the report, containing further amendments based on some States’ comments, was circulated on 31 October 2008.

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<sup>1</sup> *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Sixth session, New York, 30 November - 14 December 2007* (International Criminal Court publication, ICC-ASP/6/20), vol. II, part B.2.II.C.2 (j), paragraph 67.

<sup>2</sup> *Ibid.*, vol. II, part III, resolution ICC-ASP/6/Res.2, paragraph 14.

<sup>3</sup> International Committee of the Red Cross, Office of the United Nations High Commissioner for Human Rights, Office of the Commissioner for Human Rights of the Council of Europe, International Criminal Tribunal for Former Yugoslavia, International Criminal Tribunal for Rwanda, Special Court for Sierra Leone, United Nations Children’s Fund (UNICEF), Coalition for the International Criminal Court, International Bar Association, Prison Reform International, International Criminal Bar, Prison Watch, Dutch Red Cross, independent experts.

6. During its 11th and 17th meetings, on 24 September and 22 October 2008, the Working Group discussed, respectively, the Court's draft report and revised draft report entitled "Family Visits to Detained Persons" and took note of the comments and suggestions contained in the report of the Committee on the work of its eleventh session.<sup>4</sup>

7. The issue of family visits was also on the agenda of the 15th and 18th meetings of the Working Group, held, respectively, on 16 October and 3 November 2008.

8. The Working Group has constantly stressed the importance of receiving the Court's documents on time, as a vital element to enable States Parties to make informed decisions. In this regard, the Committee has repeatedly stressed the need for the Court to comply with its duty under the Financial Regulations and Rules<sup>5</sup> to present all documents having financial implications well in advance of the meeting of the Committee. Therefore, the Group expressed serious concerns with the fact that the report was not available before the meeting of the Committee in September.

9. Some delegations were of the view that the Court's original approach in preparing its report lacked sufficient objectivity. However, the Group welcomed the Court's subsequent readiness to accommodate some States' views following the circulation of the Court's first draft report, which was consequently amended.

10. On the substantive issue concerning the possible adoption of a policy by the Court to facilitate family visits to detainees financed from the regular budget, the following main views were expressed:

- a) The Court's current practice of financing family visits, without having undertaken prior consultation with States Parties, raised particular concerns;
- b) The scope of the right to family visits does not include, according to existing international and human rights law (be it conventional or customary international law or general principles of law), a positive obligation for the detaining authority to finance such visits;
- c) Current law and jurisprudence have never addressed the issue of a right to financial assistance for family visits. The European Court of Human Rights (ECHR), for example, has produced abundant jurisprudence on the scope of the right of detainees to receive visits, finding that it includes facilitation for the issuance of visas and detention close to the residence of the family members when allowed by a number of considerations (availability, security, distance, etc.), but has never referred to financial assistance for such visits;
- d) Relevant practice within other international criminal tribunals is very limited. The Working Group took note of the existing practice at the Special Court for Sierra Leone (SCSL), where a monthly allowance of US\$100 per family is paid for this purpose, but only for the in-country detainees. It was underlined that the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) do not have a similar practice. Although in 2006 the ICTY contemplated the issue, it concluded,

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<sup>4</sup> Report of the Committee on Budget and Finance on the work of its eleventh session, (ICC-ASP/7/15 and Add.1, paragraphs 66 - 69).

<sup>5</sup> The Committee is responsible for "the technical examination of any document submitted to the Assembly that contains financial or budgetary implications or any other matter of a financial, budgetary or administrative nature. In particular, it shall review the proposed programme budget of the Court...and shall make the relevant recommendations to the Assembly..." (See *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10 September 2002* (United Nations publication, Sales No. E.03.V.2 and corrigendum), part IV, resolution ICC-ASP/1/Res.4, paragraph 3).

however, that there was no firm legal requirement to provide financial assistance for family visits;

- e) At the national level, it has been noted that some States have in place assistance programmes to fund visits of family members to prison facilities within the same country of residence and that such programs are implemented by the Social Security system;<sup>6</sup>
- f) The current debate, which is anyway limited to the case of detainees during the pre-trial and trial phases in the limited context of the Court and the fact that the Court did finance several family visits, should not be seen as creating a new right or expanding existing rights. In particular, it cannot constitute a precedent at the domestic or international level and it cannot be taken to have any consequences either for Court-related issues such as:
  - i) the enforcement of sentences;
  - ii) the particular case of those convicted persons who serve their sentence of imprisonment in a prison facility in the host State pending the designation of a State of enforcement under article 103, paragraph 4, of the Rome Statute;<sup>7</sup>  
or
  - iii) the case of detainees on provisional release in a third country;
- g) Alternative mechanisms for covering expenses should be kept in mind for further consideration, for example, possible voluntary contributions of States Parties and other donors to facilitate family visits, via the establishment of a Trust Fund;
- h) A number of delegations were of the view that the possibility of a policy decision in favour of having family visits funded by the Court, founded on humanitarian and/or practical grounds, merits further consideration. Some delegations noted that humanitarian assistance does not fall as such within the mandate of the Court, but rather, of other international or non-governmental organizations;<sup>8</sup>
- i) Some delegations suggested further arguments in favour of funding family visits, including the stature of the Court, its *sui generis* character, its innovative practices and aspirations to establish best practices, as well as the current context of the Court and of its detainees. Other delegations noted that the question of the relevance of the *sui generis* character of the Court for the current debate would first require a detailed examination and were of the view that the *sui generis* character would have to pertain to those elements specifically relevant for the funding of family visits in order to be able to provide an argumentative basis on this issue;
- j) A number of delegations considered that there was not sufficient time to properly discuss the issues that would allow for a decision to be taken at the seventh

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<sup>6</sup> United Kingdom and Spain. In most of the United Kingdom, both remand and convicted prisoners are entitled to benefit from assisted family visits paid for by the Social Security system. Only families who qualify on low income grounds (i.e. are in receipt of benefits or had a Low Income Certificate) are entitled to apply for financial assistance. Detainees in immigration and detention centres are excluded from the scheme.

<sup>7</sup> According to article 103(4) of the Rome Statute, the costs arising out of the enforcement of the sentence in the host State shall be borne by the Court.

<sup>8</sup> For example, United Nations Human Rights Council (UNHRC), Office of the High Commissioner for Human Rights (OHCHR), United Nations Office for the Coordination of Humanitarian Affairs (UNOCHA), United Nations High Commissioner for Refugees (UNHCR), International Committee of the Red Cross (ICRC). Some delegations referred to the fact that the establishment of the Trust Fund for Victims could be seen as a strong precedent, as part of its activities do not directly concern the judicial mandate of the Court but have been considered on humanitarian grounds.

session of the Assembly. These delegations believed that the matter should be discussed further during 2009 and consistent with relevant procedures e.g. regarding the involvement of the Committee, with a view to taking a decision at the eighth session of the Assembly. Among the issues that would require further elaboration would be:

- i) The advisability of funding family visits from the regular budget and the examination of possible alternative arrangements (e.g. voluntary contributions);
- ii) The method for calculating the indigence of the detainee and of the family members;
- iii) The definition of those family members that could benefit from such assistance (close relatives);
- iv) Any mechanism guaranteeing low costs, including the consideration of alternatives to family visits that would ensure enhanced contacts between family members;
- v) Other specific criteria relevant for the implementation of a policy decision relevant to financing family visits.

11. As to the budgetary implications for 2009, some delegations were of the view that the sum of €40,500 proposed by the Court could be maintained provisionally in the 2009 budget pending the adoption of a policy decision, while others were of the view that, in the absence of such a decision, the recommendations of the Committee<sup>9</sup> should be adopted and read jointly, so that any costs would be excluded from the 2009 budget and, instead, the Court may seek alternative sources (voluntary contributions), to fund such visits within the limit of €40,500.

12. In this regard, some delegations noted the fact that continuing the decision of the sixth session of the Assembly to allow for exceptional funding from the budget for family visits also in 2009 would, whatever might be the wording, increase the expectations for a future positive decision of the Assembly, generate grounds for claiming the existence of a precedent and create possible discrimination among detainees. Other delegations, on the other hand, doubted the feasibility of creating a voluntary fund for this purpose.

13. The Working Group recommended that the discussions on the financial implications for 2009 continue within the budget debate.

14. As for the substantive issue concerning the adoption of a policy decision, the Working Group suggests that the language contained in the annex to this report be included in the omnibus resolution.

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<sup>9</sup> Report of the Committee on Budget and Finance on the work of its eleventh session (ICC-ASP/7/15 and Add.1, para. 68).

## Annex

### Suggested language to be included in the omnibus resolution

*“The Assembly of States Parties,*

*(...)*

*Recalling* the recommendations of the Committee on Budget and Finance,<sup>1</sup> *bearing in mind* the subsequent submission of the Report of the Court entitled “Report of the Court on family visits to indigent detained persons,”<sup>2</sup> *recognizing* that detained persons are 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,<sup>3</sup> the right to family visits does not comprise a co-relative legal right to have such visits paid for by the detaining authority;

*Notes* that further discussions are 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, *invites* 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 on Budget and Finance at its thirteenth session and for a decision to be taken at the eighth session of the Assembly, and *requests* the Bureau to remain seized of the matter.”

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<sup>1</sup> Report of the Committee on Budget and Finance on the work of its eleventh session (ICC-ASP/7/15 and Add.1, paras. 66-69).

<sup>2</sup> ICC-ASP/7/24.

<sup>3</sup> Such as the United Nations Standard Minimum Rules for the Treatment of Prisoners (approved by Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977); the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by General Assembly resolution 43/173 of 9 December 1988; and, at the regional level, Recommendation Rec(2006)2 of the Committee of Ministers on the European Prison Rules adopted by the Committee of Ministers of the Council of Europe on 11 January 2006; Committee for the Prevention of Torture Imprisonment Standards (CPT/Inf/E(2002)1-Rev.2006).