

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-RoR-217-02/08**

Date: **10 March 2009**

THE PRESIDENCY

Before: **Judge Philippe Kirsch, President**
 Judge Akua Kuenyehia, First Vice-President
 Judge René Blattmann, Second Vice-President

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
THE PROSECUTOR v. GERMAIN KATANGA AND MATHIEU NGUDJOLO CHUI

Confidential,
ex parte only available to the Defence of Mr Ngudjolo Chui and the Registrar

Decision 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”

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

Counsel for the Defence

Mr Jean-Pierre Kilenda Kakengi Basila

Mr Jean-Pierre Fofé Djofia Malewa

REGISTRY

Registrar

Ms Silvana Arbia

Detention Section

Mr Anders Backman, Chief Custody Officer

Deputy Registrar

Mr Didier Preira

The Presidency of the International Criminal Court (hereinafter “Court”) has before it the application of Mr Mathieu Ngudjolo Chui for judicial review of the decision of the Registrar confirming the decision of the Chief Custody Officer on the frequency of family visits funded by the Court and the number of visitors allowed per funded family visit.

The application is granted in so far as the detainee sought from the Presidency a finding as to a positive obligation upon the Court to fund family visits.

The Impugned Decision is quashed and the impugned visiting conditions are remitted to the Registrar for reconsideration.

I. PROCEDURAL HISTORY

1. On 21 April 2008, Mr Mathieu Ngudjolo Chui (hereinafter “detainee”) applied to the Registrar, in accordance with regulation 179(1) of the Regulations of the Registry for permission for his nuclear family (his wife and six children) to visit him in the detention centre of the Court (hereinafter all references to regulations are to those of the Regulations of the Registry unless otherwise provided).¹ That application was granted by the Registrar.²
2. On 22 October 2008, the Chief Custody Officer of the detention centre orally informed the detainee that during the course of one calendar year the Registrar would fund either two visits from three members of the detainee’s family or three visits from two members of the detainee’s family (hereinafter “Oral Decision”).³
3. On 31 October 2008, the detainee filed a complaint with the Chief Custody Officer against the Oral Decision, pursuant to regulation 217.⁴ The detainee argued that the Oral Decision did not allow him to maintain family ties in accordance with regulation 179(1), nor did it respect the entitlement of his children to visit their father several times a year. The detainee argued that his nuclear family ought to be able to visit him together at least three times per annum.⁵ He also argued that by authorising visits for all of his family members but only providing funding for two family members, his application for family visits had in effect been refused because some family members

¹ Page 2 of Annex I (ICC-RoR-217-02/08-6-Conf-Anx1) to the Transmission to the Presidency of the complaint of Mr. Mathieu Ngudjolo Chui to the Chief Custody Officer, ICC-RoR-217-02/08-6-Conf, 9 December 2008, (hereinafter “Complaint to Chief Custody Officer”).

² Page 3 of Annex I (ICC-RoR217-02/08-2-Conf-Exp-Anx1) to the *Décision du Greffier en application de la norme 220 suite au recours de Mathieu Ngudjolo contre la décision du Chef du quartier pénitentiaire en date du 7 novembre 2008*, ICC-RoR217-02/08-2-Conf-Exp, 18 November 2008.

³ See Complaint to Chief Custody Officer, page 2.

⁴ Complaint to Chief Custody Officer, pages 2-4.

⁵ Complaint to Chief Custody Officer, page 2.

would be unable to visit since he had no way of funding the costs of the visit and the accommodation of his family.⁶ The said complaint was rejected by the Chief Custody Officer on 7 November 2008, on the grounds that there had been no refusal of the request for a visit by the Registrar and there existed no positive obligation upon the Court to finance the family visits of detained persons (hereinafter “Decision of the Chief Custody Officer”).⁷

4. On 11 November 2008, the detainee sought review by the Registrar of the Decision of the Chief Custody Officer, pursuant to regulation 220.⁸ By decision of 18 November 2008, the Registrar upheld the Decision of the Chief Custody Officer (hereinafter “Impugned Decision”).⁹
5. On 21 November 2008, the detainee sought judicial review of the Impugned Decision before the Presidency pursuant to regulation 221(1) (hereinafter “Application”)¹⁰ on the grounds that regulation 179(1) had been breached by the Registrar. The Presidency is requested to find that the detainee may receive up to three visits from his nuclear family together per calendar year. In the alternative, the detainee requests that the Presidency instruct the Registrar to endeavour to ensure that the necessary funds are released by the Assembly of States Parties of the Court (hereinafter “ASP”) so as to allow the Registrar to fulfil her responsibilities in relation to family visits to detained persons.¹¹
6. On 5 December 2008, the Presidency ordered the Registrar to explain her decision on the frequency of family visits and the number of family members allowed per visit, as well as the financial constraints guiding the Impugned Decision.¹² In response to that order, the Registrar explained the reasoning behind the Impugned Decision on 12 December 2008 (hereinafter “Explanations”).¹³

⁶ Complaint to Chief Custody Officer, page 2.

⁷ Page 3 of Annex I (ICC-RoR217-02/08-2-Conf-Exp-Anx1) to the *Décision du Greffier en application de la norme 220 suite au recours de Mathieu Ngudjolo contre la décision du Chef du quartier pénitentiaire en date du 7 novembre 2008*, ICC-RoR217-02/08-2-Conf-Exp, 18 November 2008.

⁸ Annex (ICC-RoR217-02/08-1-Conf-Exp-Anx) to the *Adresse de Mathieu Ngudjolo au Greffier suite à la décision prise par le Chef du quartier pénitentiaire par rapport aux visites familiales*, ICC-RoR217-02/08-1-Conf-Exp, 11 November 2008.

⁹ Decision of the Registrar under Regulation 220 on Mathieu Ngudjolo’s Challenge of the 7 November 2008 Decision of the Chief Custody Officer, ICC-RoR217-02/08-2-Conf-Exp-tENG.

¹⁰ Mr Mathieu Ngudjolo’s Complaint Under Regulation 221(1) of the Regulations of the Registry Against the Registrar’s Decision of 18 November 2008, ICC-RoR-217-02/08-3-Conf-Exp-tENG.

¹¹ Application, page 11.

¹² Order concerning the Application for judicial review of Mr Mathieu Ngudjolo Chui of 21 November 2008, ICC-RoR-217-02/08-5-Conf, page 3.

¹³ Registrar’s Explanations in Response to the Presidency’s Order of 5 December 2008, ICC-RoR-217-02/08-7-Conf-tENG.

II. THE MERITS

A. Relevant part of the Impugned Decision

7. By the Impugned Decision, the Registrar recognised, by reference to the Universal Declaration of Human Rights, the United Nations Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment (hereinafter “Body of Principles”) and the United Nations Standard Minimum Rules for the Treatment of Prisoners (hereinafter “Standard Minimum Rules”), that detained persons have a right to receive family visits.¹⁴ Noting the terms of regulation 179(1), the Registrar found that family visits are particularly aimed at maintaining family links.¹⁵
8. The Registrar found regulation 179(1) to pertain primarily to the application for, and authorisation of, visits to the detention centre and that its language, which requires specific attention to be given to the maintenance of family links, cannot be construed as imposing a positive obligation upon her to fund family visits.¹⁶ The Registrar found it necessary to distinguish between authorising family visits and the financing thereof; holding that the authorisation of family visits does not create any positive obligation to fund them.¹⁷ In addition, the Registrar found no such positive obligation on a detaining authority to fund family visits in general principles of law, treaty law or case law of the European Court of Human Rights (hereinafter “European Court”) or similar courts.¹⁸ As such, the Registrar found that in so far as the detainee was alleging that his family visit had been refused pursuant to regulation 180, no such refusal had occurred in the instant case.¹⁹
9. By reference to the Standard Minimum Rules, which require detaining authorities to facilitate visits, the Registrar found that the forms of assistance which she is required to provide extend only so far as the provision of visiting space, the provision of information to help the family of the detained person travel to the detention centre and, as in the instant case, assistance in obtaining passports or visas.²⁰
10. The Registrar explained that although no positive obligation to fund family visits exists, favouring such funding, she decided to fund all or part of the costs of the family visits of the detained persons on a discretionary basis in consideration of their personal situation.²¹ In so doing, she took into account *inter alia*, the level of indigence of the detained persons, their family circumstances, the duration of

¹⁴ Impugned Decision, paragraph 8.

¹⁵ Impugned Decision, paragraph 8.

¹⁶ Impugned Decision, paragraphs 9-11.

¹⁷ Impugned Decision, paragraph 11.

¹⁸ Impugned Decision, paragraph 11.

¹⁹ Impugned Decision, paragraphs 12 and 13.

²⁰ Impugned Decision, paragraph 10.

²¹ Impugned Decision, paragraphs 20 and 22.

- separation between the detained person and his family prior to his transfer to the detention centre, in particular whether this duration exceeded eighteen months, as well as the availability of resources.²²
11. Recalling her decision to fund two visits from three family members or three visits from two family members of a detained person over a calendar year,²³ the Registrar found the frequency of family visits and the number of visitors to be reasonable, allowing for visits by the families of detained persons over the course of one or two calendar years.²⁴ The Registrar maintained that the authorisation of a visit does not *de facto* imply that all of the people for whom a visit has been so authorised may visit the detention centre at the same time, given its capacity to host and supervise visits.²⁵ The policy restricting the number of visitors per visit to three adults and three children may be relaxed depending on the personal circumstances of each detained person.²⁶
 12. The Registrar maintained that any failure on her behalf to soundly manage the funds allocated by the ASP for the administration of the Court, including the application of strict and objective criteria to the funding of family visits, might result in the ASP terminating the financing of such visits.²⁷ Such an outcome would affect not only the detainee but also other indigent detained persons in the custody of the Court.²⁸ The Registrar emphasised that the funding requested by the detainee exceeds the resources presently at her disposal.²⁹ The Registrar noted that if any ensuing decisions by the ASP allow for the financing of family visits in the manner proposed by the detainee, appropriate measures would be taken.³⁰

B. The arguments of the detainee

13. The detainee submits, by reference to international human rights instruments, that the existence of a right to family visits is undebatable.³¹ The detainee submits that the refusal of the Registrar to fund visits from all of his family members together is tantamount to refusing his request for family visits pursuant to regulation 180 given his lack of financial means,³² and further is a denial of his right to family visits.³³ The detainee argues that the Registrar is in breach of her obligations under regulation 179(1), which impose upon the Registrar the responsibility for maintaining the family

²² Impugned Decision, paragraph 20.

²³ Impugned Decision, page 4.

²⁴ Impugned Decision, paragraph 23.

²⁵ Impugned Decision, paragraph 17.

²⁶ Impugned Decision, paragraphs 17, 18 and 24.

²⁷ Impugned Decision, paragraphs 21 and 22.

²⁸ Impugned Decision, paragraph 22.

²⁹ Impugned Decision, paragraph 26.

³⁰ Impugned Decision, paragraph 26

³¹ Application, paragraph 5.

³² In this vein, the detainee indicates that he has no means of covering the cost of his family's travel and accommodation, Application, paragraph 7.

³³ Application, paragraph 8.

ties of the detainee.³⁴ Noting that authorisation was given for all members of his family to visit him, the detainee submits that it is meaningless to distinguish, as the Registrar has done, between authorising a family visit to an indigent detained person and funding such a visit. The detainee submits that in the case of indigent detained persons the issues of authorising and funding family visits must be addressed concurrently.³⁵

14. It is argued that in acknowledging the right of the detainee to family visits, the Registrar must guarantee the effectiveness of this right.³⁶ Whilst the detainee acknowledges that there is no explicit obligation in the texts of the Court requiring it to bear the costs of family visits to detained persons,³⁷ he submits that a practical and effective interpretation of the right to family visits requires a positive interpretation that the costs of such visits must be borne entirely by the Court.³⁸ In accordance with article 21 of the Rome Statute and by reference to principles of interpretation adopted by the European Court and the United Nations Human Rights Committee, the detainee argues that the right to family visits requires the funding of such visits by the Court or else the right is rendered theoretical or illusory.³⁹ As such, the detainee argues that the Registrar is subject to a positive obligation to fund visits from all members of his family.⁴⁰ In failing to respect such positive obligation, the Registrar is in breach of regulation 179(1).⁴¹
15. The detainee argues that the costs of family visits are a consequence of his transfer to The Hague and since he was not responsible for the said transfer, his right to family visits should not be adversely affected by the distance imposed between himself and his family.⁴² Making reference to the unique problems faced by prisoners detained in foreign countries, the detainee cites the recommendations of the Committee of Ministers of the Council of Europe that such prisoners “should be treated in such a manner as to counterbalance, as far as may be possible, these disadvantages”.⁴³ It is argued that the right to family visits cannot be sacrificed for budgetary savings.⁴⁴ The right to family visits is an imperative for which expenses must be allowed⁴⁵ and regulation 179(1) also imposes a positive obligation on the ASP.⁴⁶ The detainee argues that the Impugned Decision reveals an inconsistency, in that the Court funds the travel to The Hague of the family of witnesses appearing before it to provide

³⁴ Application, paragraphs 6 and 8.

³⁵ Application, paragraphs 6 and 15.

³⁶ Application, paragraph 8.

³⁷ Application, paragraph 9.

³⁸ Application, paragraph 10.

³⁹ Application, paragraph 9.

⁴⁰ Application, paragraphs 6, 10 and 15.

⁴¹ Application, paragraphs 6 and 8.

⁴² Application, paragraph 12.

⁴³ Application, paragraph 20.

⁴⁴ Application, paragraph 11.

⁴⁵ Application, paragraph 11.

⁴⁶ Application, paragraph 18.

psychological or emotional support to their relative; as such a paradoxical situation might arise in which a suspect appearing as a witness may be entitled to reimbursement for costs incurred for family visits whereas a suspect representing him or herself would not be so entitled.⁴⁷

16. The detainee contests the Impugned Decision which provides that he may only receive funding for family visits by two persons (one adult and one child) three times per year or three persons (one adult and two children) twice per year. The detainee argues that whereas regulation 179(1) imposes upon the Registrar the responsibility for maintaining the family ties of the detainee, the decision on family visits adopted by the Registrar contradicts her obligations in that it only allows for occasional family contact.⁴⁸ The detainee regards the Registrar's visiting plan as manifestly inadequate to enable him to maintain family ties as it only allows him to receive visits from his family, including six children, over approximately two years, which cannot be considered reasonable and regular frequency.⁴⁹ The detainee points to discriminatory aspects of the Registrar's decision, in that another detained person has received funded visits from at least six family members together.⁵⁰ The detainee further argues that the criteria which the Registrar took into account in reaching her decision do not go towards preserving family ties.⁵¹
17. In relief, the detainee seeks a minimum of three visits per annum from all members of his nuclear family. In the alternative, the detainee requests that the Registrar be instructed to endeavour to ensure the release of necessary funds from the ASP in order to fulfil her responsibilities with respect to family visits.⁵²

C. The explanations of the Registrar

18. By her Explanations, the Registrar provides information on the policy adopted in relation to the frequency and size of family visits and the financial constraints which informed the Impugned Decision.
19. The Registrar explains that all detained persons are entitled to receive as many visits from their family as desired, subject only to the detained person's ability to fund such visits and the administration of the detention centre.⁵³ The Registrar explains that the maximum size of any visit to the detention centre is six persons (three adults and three children); a limit dictated by the detention centre's reception facilities and the

⁴⁷ Application, paragraph 13.

⁴⁸ Application, paragraphs 16 and 19.

⁴⁹ Application, paragraphs 19 and 20.

⁵⁰ Application, paragraph 17.

⁵¹ Application, paragraph 18.

⁵² Application, page 11.

⁵³ Explanations, paragraph 1.

modalities of monitoring visits, bearing in mind the maintenance of order and security.⁵⁴ This limitation may be eased on a case-by-case basis.⁵⁵

20. Although the Registrar notes the absence of a positive obligation to fund family visits,⁵⁶ she emphasises that she has taken the initiative to fund family visits for detained persons whose indigence has been established.⁵⁷ The Registrar draws attention to section XII of the Policy on Family Visits which stipulates that the Court shall provide an indigent detained person with one funded family visit per year with a maximum of four nuclear family members.⁵⁸ In practice, however, alternative arrangements have been made. The first ever funded visit for the first detained person occurred in September 2006 and involved four visitors. That detained person then received two visits from his partner alone in 2007 and one in 2008. In addition, in 2007, he received a family visit involving five persons.⁵⁹
21. The Registrar explains that the current policy of allowing the detainee several visits per year from some family members originated from a 2007 study into the funding of family visits which the Court undertook at the request of the ASP.⁶⁰ Participants in the study expressed the view that rather than funding an annual family visit from the entire nuclear family of a detained person, it was more desirable to fund multiple visits by a more limited number of persons and allow for rotation.⁶¹ The Registrar points out that the proposal of three family visits by two persons for each indigent detained person played a part in the ASP's decision to approve the Court's 2009 budget for funding family visits.⁶²
22. The Registrar explains that the Host State grants a 45-day visa per person, per year, thus 15 days is considered to be the appropriate duration of a funded family visit.⁶³ Exceptions to typical duration might be made on a case-by-case basis, for example if the duration of separation of the detained person from his family exceeds 18 months or if the threefold rotation of two members of a large family does not allow a detained person to see his or her entire family within a reasonable time-frame.⁶⁴
23. The Registrar indicates that her desire to fund additional visits is impeded given budgetary considerations and the imperative of the careful management of funds.⁶⁵ The Registrar explains that in 2006 and 2007 she received no budget for family visits and the relevant amounts were drawn from various components of the budget of the

⁵⁴ Explanations, paragraph 3.

⁵⁵ Explanations, paragraph 4.

⁵⁶ Explanations, paragraph 13.

⁵⁷ Explanations, paragraph 2.

⁵⁸ Explanations, paragraph 5.

⁵⁹ Explanations, paragraph 5.

⁶⁰ Explanations, paragraphs 6 and 7.

⁶¹ Explanations, paragraph 7.

⁶² Explanations, paragraph 9.

⁶³ Explanations, paragraph 8.

⁶⁴ Explanations, paragraphs 8 and 14.

⁶⁵ Explanations, paragraphs 6 and 13.

Detention Section.⁶⁶ In 2008, the Registrar obtained funding for family visits by nine persons.⁶⁷ The Registrar explains that when two new potentially indigent detained persons entered the detention centre in 2008, she contemplated the use of the Contingency Fund to cover the cost of family visits for such persons, however, these funds were not allocated following consultation with the Committee on Budget and Finance.⁶⁸ It is also explained that in late 2009, as a result of consultations between the ASP and the Court, a final decision will be taken as to whether the Court intends to continue funding family visits and, if so, under what conditions.⁶⁹ Given these constraints, the Registrar is only able to guarantee that in 2009 each indigent detained person is entitled to two or three visits from a limited number of family members per visit.⁷⁰

D. Determination of the Presidency

24. 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.⁷¹
25. The instant Application pertains to the existence of a right of detained persons to receive family visits and the scope of any such right, in particular, whether such scope includes a legal obligation upon the Court to fund family visits to detained persons.

1. The existence of a right to receive visits

26. The right of detained persons to receive visits, guaranteed by regulation 100(1) of the Regulations of the Court in the section entitled “Rights of a detained person and conditions of detention” which provides that “[a] detained person shall be entitled to receive visits”, encompasses the right to receive family visits. Although regulation 100(1) enshrines the right to visits generally, the instant decision focuses on the right to family visits. The particular importance of the right to family visits is emphasised by regulation 179(1) of the Regulations of the Registry, in the section similarly

⁶⁶ Explanations, paragraph 11.

⁶⁷ Explanations, paragraph 11.

⁶⁸ Explanations, paragraph 12.

⁶⁹ Explanations, paragraph 16.

⁷⁰ Explanations, paragraph 15.

⁷¹ The standard of judicial review was defined by the Presidency in its decision of 20 December 2005, ICC-Pres-RoC72-02-5, paragraph 16, and supplemented in its decision of 27 November 2006, ICC-01/04-01/06-731-Conf, paragraph 24. See also the decision of the Presidency of 10 July 2008, ICC-Pres-RoC72-01-8-10, paragraph 20

entitled “Rights of detained persons and conditions of detention”, which provides in relevant part, that “[t]he Registrar shall give specific attention to visits by family of the detained persons with a view to maintaining such links”.

27. Noting the terms of article 21(3) of the Rome Statute, providing that the texts of the Court must be applied and interpreted consistently with internationally recognised human rights standards, the recognition of such a right is in accordance with international human rights law which clearly acknowledges that a detained person has the right to receive family visits. The Standard Minimum Rules provides that “[p]risoners shall be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals, both by correspondence and by receiving visits”,⁷² emphasising that “[s]pecial attention shall be paid to the maintenance and improvement of...relations between a prisoner and his family...”.⁷³ The Body of Principles provides that “[a] detained or imprisoned person shall have the right to be visited by and to correspond with, in particular, members of his family...”.⁷⁴ The European Prison Rules set out that “[p]risoners shall be allowed to communicate...with their families...and to receive visits from these persons”.⁷⁵ The concluding observations of the United Nations Committee Against Torture have highlighted that States Parties “should...[a]dopt measures to ensure detainees prompt access to...family members from the time they are taken into custody...”.⁷⁶ The Standards of the European Committee for the Prevention of Torture emphasise that “[a]bove all, a prisoner must be given the means of safeguarding his relationships with his family and close friends. The guiding principle should be the promotion of contact with the outside world...”.⁷⁷
28. The right of detained persons to family visits is also recognised by the jurisprudence of the European Court,⁷⁸ as well as the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (hereinafter “ICTY”) and the International

⁷² Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977, rule 37.

⁷³ Standard Minimum Rules, rule 79.

⁷⁴ Adopted by General Assembly resolution 43/173 of 9 December 1988, principle 19.

⁷⁵ Council of Europe Recommendation, Rec (2006)2, of the Committee of Ministers to member states on the European Prison Rules adopted by the Committee of Ministers of the Council of Europe on 11 January 2006, at the 952nd meeting of the Ministers’ Deputies, rule 24.1.

⁷⁶ Committee Against Torture, Consideration of Reports submitted by States Parties under Article 19 of the Convention: Conclusions and recommendations of the Committee against Torture to Tajikistan, 37th session, CAT/C/TJK/CO/1 (7 December 2006) paragraph 7; See also Committee Against Torture, Consideration of Reports submitted by States Parties under Article 19 of the Convention: Conclusions and recommendations of the Committee against Torture to Uzbekistan, 39th session, CAT/C/UZB/CO/3 (26 February 2008) paragraph 12.

⁷⁷ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, The CPT standards, CPT/Inf/E (2002) 1- Rev 2006, paragraph 51, page 18.

⁷⁸ For example *Messina v Italy (No 2)*, no. 25498/94, Judgment of 28 September 2000, paragraph 61; *Kulashmkov v Russia*, no. 47095/99, Decision of 18 September 2001, paragraph 7; *Lavents v Latvia*, no. 58442/00, Judgment of 28 November 2002, paragraph 141; *Estrikh v Latvia*, no. 73819/01, Judgment of 18 January 2007, paragraphs 166 and 169; *Vlasov v Russia*, no. 78146/01, Judgment of 12 June 2008, paragraph 123

Criminal Tribunal for Rwanda (hereinafter “ICTR”).⁷⁹ The rules governing detention at the ICTY, ICTR and Special Court for Sierra Leone (hereinafter “SCSL”) make express provision for the right of detained persons to family visits. In the section entitled “Rights of Detainees”, rule 61(A) of the ICTY Rules Governing the Detention of Persons Awaiting Trial or Appeal Before the Tribunal or Otherwise Detained on the Authority of the Tribunal provides “[d]etainees shall be entitled to receive visits from family, friends and others...”.⁸⁰ Similarly, in the section entitled “Rights of Detainees”, rule 61(i) of the ICTR Rules Covering the Detention of Persons Awaiting Trial or Appeal Before the Tribunal or Otherwise Detained on the Authority of the Tribunal provides that “[d]etainees shall be allowed...to receive visits from their family and friends at regular intervals...”. The SCSL Rules Governing the Detention of Persons Awaiting Trial or Appeal before the Special Court for Sierra Leone or Otherwise Detained on the Authority of the Special Court for Sierra Leone make equal provision for the rights of detained persons to family visits, rule 41(A) in the section entitled “Rights of Detainees”, providing “[d]etainees shall be allowed...to receive visits from their families and others at regular intervals...”.⁸¹

29. By reference to both the legal texts of the Court and international human rights jurisprudence and instruments, it is clear that the detainee has a right to receive family visits, as the Registrar correctly recognised.⁸²

2. *The scope of the right to receive family visits*

30. As his primary claim, the detainee requests that as a correlative to the right to receive family visits, the Presidency recognise the existence of an obligation on the part of the Court to fund periodic visits from all of his nuclear family members together.⁸³ The detainee also argues that no distinction should be made by the Registrar between authorising a family visit and funding such visit as, in the absence of funding, the mere authorisation of a visit fails to satisfy the right to receive family visits.⁸⁴ The issue is therefore not whether a visit may be authorised in the absence of funding, but whether any obligation to fund authorised visits exists in order to render the right to receive family visits effective in the case of the detainee.

31. The European Court has frequently emphasised that the nature of human rights is such that they must be interpreted in a practical and effective, rather than theoretical and

⁷⁹ *Prosecutor v Krajisnik*, Case No. IT-00-39-T, “Decision on the Defence’s Request for an Order Setting Aside, in Part, the Deputy Registrar’s Decision of 3 February 2004”, 14 May 2004, paragraph 9; *Prosecutor v Ndimityimana*, Case No. ICTR-2000-56-T, “The President’s Decision on a Defence Motion to Reverse the Prosecutor’s Request for Prohibition of Contact Pursuant to Rule 64”, 25 November 2002, paragraph 10.

⁸⁰ As adopted on 5 May 1994 and amended on 21 July 2005, IT/38/Rev.9.

⁸¹ As adopted on 7 March 2003 and amended on 14 May 2005.

⁸² Impugned Decision, paragraph 8.

⁸³ Application, paragraphs 9, 10 and 15.

⁸⁴ Application, paragraphs 6, 8 and 15.

illusory, manner.⁸⁵ It has held that in addition to negative undertakings, there may be positive obligations inherent in effective respect for the rights guaranteed by the European Convention on Human Rights. The Presidency accepts the merits of the detainee's argument that in his particular circumstances "his right to receive family visits can...only be effective and tangible" if the costs of these visits are borne by the Court.⁸⁶ The right to receive family visits necessitates the provision of funding for such visits since this is the only mechanism by which the right may be rendered effective in the circumstances of the detainee for the reasons set out below.

32. The detainee is incarcerated a considerable distance from his home in the Democratic Republic of the Congo (hereinafter "DRC") which imposes difficulties in relation to family visits which cannot be said to be negligible. Due to his indigence, the detainee argues that he cannot fund the passage and accommodation of his family members for a single visit from the DRC where they reside, to The Hague, nor can any of his family members afford to fund such a visit themselves. The Presidency sees no need to question the assertion of the detainee that he lacks the means to pay for the cost of a family visit to The Hague or to question the inference that his family similarly lack such means. Further, it would appear that alternative means of funding, for example from charitable or humanitarian sources, are not currently available to the detainee.
33. It is recalled that the Registrar decided, upon a preliminary examination of the financial information provided by the detainee as to his means, that the latter does not have the resources to bear all or part of the costs of his legal representation before the Court. As such, the Registrar provisionally decided, pursuant to regulation 85(1) of the Regulations of the Court, that the detainee is fully indigent for the purpose of legal assistance paid by the Court pending an investigation into his indigence.⁸⁷ The current indigent status of the detainee implies that at best his assets are only just sufficient to enable him to meet his obligations to his dependents.⁸⁸ The estimated cost of a ten day visit to The Hague for two persons from the DRC is €4,500, including transport, accommodation, dignity allowance, insurance, visa and other costs.⁸⁹ It is noted that the average annual gross domestic product per capita in the DRC was \$US151 in 2007.⁹⁰ Further, according to the United Nations Millennium Development Goals

⁸⁵ *Airey v Ireland*, no. 6289/73, Judgment of 9 October 1979, paragraph 24; *Artico v Italy*, no. 6694/74, Judgment of 13 May 1980, paragraph 33; *United Communist Party of Turkey v Turkey*, no. 133/1996/752/951, Judgment of 30 January 1998 [Grand Chamber], paragraph 33.

⁸⁶ Application, paragraph 10.

⁸⁷ Décision du Greffier sur la demande d'aide judiciaire aux frais de la Cour déposée par M. Mathieu Ngudjolo Chui, ICC-01/04-01/07-298, 22 February 2008.

⁸⁸ See general principles on the meaning of indigence in Report on the principles and criteria for the determination of indigence for the purposes of legal aid (pursuant to paragraph 116 of the Report of the Committee on Budget and Finance of 13 August 2004), 31 May 2007, ICC-ASP/6/INF.1, pages 4 and 5.

⁸⁹ Report of the Court on family visits to indigent detained persons, 5 November 2008, ICC-ASP/7/24, page 18.

⁹⁰ United Nations Statistics Division, Social indicators: <http://unstats.un.org/unsd/demographic/products/socind/inc-eco.htm>, last updated December 2008, accessed 4 March 2009.

Indicators, 59.2% of the population of the DRC live on less than \$US1 per day.⁹¹ As a result of these specific circumstances, the detainee's right to family visits is rendered ineffective in the absence of funding.

34. It must be noted that the detainee has not been convicted of any crime and is presumed innocent.⁹² The case against the detainee is now in the trial preparation phase and the duration of the detainee's detention prior to the issuance of a verdict as to his guilt or innocence is not likely to be insignificant due to the nascent stage of the Court and the complexity of its proceedings. In this vein it is noted that Mr Thomas Lubanga Dyilo, whose trial commenced at the end of January 2009, has been held at the detention centre of the Court since March 2006. By way of comparison, the average length of proceedings before the ICTY in 2000, prior to the implementation of the completion strategy, was ten months for pre-trial preparation and a little over twelve months for trial.⁹³
35. The right to receive family visits fundamentally affects the well-being of the detained person; his connection to his family being a central component of his identity. The Presidency has recognised, in a previous decision, the importance of maintaining family ties for the well-being of the detained person and that the lack of family visits may cause a degree of emotional hardship for the detained person and affect his morale.⁹⁴ The maintenance of family ties through family visits facilitates a detained person's re-integration into society in the event of an acquittal or his social rehabilitation upon release in the event of conviction. The maintenance of family contact also assumes particular importance in the context of detention, bearing in mind the cultural isolation which might be experienced by detained persons who are transferred long distances to a new environment entailing differences in cuisine, language, religion and custom. The detained person's right correlates with the interests of other affected individuals such as those of his children of minority age who wish to have contact with their detained parent.⁹⁵ It further coincides with the obligation upon the Registrar to fulfil her duty of care to maintain the physical and psychological well-being of detained persons.
36. The Presidency also observes that while the maintenance of family links is furthered by other methods of communication, such as telephone and mail, the availability of these alternative forms of communication are not a complete substitute for the right to receive face-to-face visits. Furthermore, following investigation, the Registrar has

⁹¹ See the official United Nations site for the MDG Indicators: <http://mdgs.un.org/unsd/mdg/SeriesDetail.aspx?srid=580&crd=180>, last updated 15 January 2009, accessed 20 February 2009.

⁹² Rome Statute, article 66(1).

⁹³ Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, United Nations General Assembly 51st session, Agenda item 52, UN Doc A/55/382-S/2000/865 (14 September 2000), page 9.

⁹⁴ See Decision of the Presidency of 4 November 2008, ICC-RoR217-01/08-10-Conf-Exp, paragraph 57.

⁹⁵ Convention on the Rights of the Child, 1577 UNTS 3, entered into force 2 September 1990, article 9(3).

indicated that alternative mechanisms to enable the maintenance of family links, such as video conferencing, relocation of the families of detained persons to The Hague or returning detained persons to the DRC for visits, are impracticable for cost and security reasons.⁹⁶

37. The Presidency recognises that regulation 179(1) does not explicitly provide for the costs of family visits to be borne by the Court in cases where a detained person and his family cannot afford to meet them, nor does any other provision specifically address the costs of family visits. This is in contrast to regulation 172(2) which provides that in the case of a detained person whose indigence has been determined by the Registrar, the cost for outgoing mail will be borne by the Court. Regulation 176(2) makes similar provision in relation to the cost of outgoing telephone calls of indigent detained persons. It is accepted that there is no express recognition of a general right to funded family visits in the texts of the Court or in international human rights instruments.⁹⁷ However, notwithstanding the lack of such recognition, the Presidency finds that, 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.
38. The jurisprudence of the European Court has determined that “it is an essential part of a detainee’s right to respect for family life that the authorities enable him or, if need be, assist him in maintaining contact with his close family members”.⁹⁸ The Registrar takes the view that assisting family visits requires only the provision of visiting space, information and assistance in applications for passports and visas.⁹⁹ Whilst the European Court has not yet interpreted the obligation upon detaining authorities to assist detained persons in maintaining contact with their family members as involving financial assistance in funding family visits,¹⁰⁰ it has noted the particular difficulties faced by those who are detained a distance from their families, holding that “the detention of a person in a prison at a distance from his family which renders any visit very difficult, if not impossible, may in exceptional circumstances constitute an interference with his family life, the possibility for members of the family to visit a prisoner being an essential factor for the maintenance of family life”.¹⁰¹ In contrast to

⁹⁶ Report of the Court on family visits to indigent detained persons, 5 November 2008, ICC-ASP/7/24, paragraphs 31-34.

⁹⁷ Impugned Decision, paragraph 11.

⁹⁸ *Messina v Italy (No 2)*, no. 25498/94, Judgment of 28 September 2000, paragraph 61; *Vlasov v Russia*, no. 78146/01, Judgment of 12 June 2008, paragraph 123.

⁹⁹ Impugned Decision, paragraph 10.

¹⁰⁰ See for example, *X v the United Kingdom*, no. 5712/72, Decision of 18 July 1974, *Ounas v France*, no. 13756/88, Decision of 12 March 1990; *Hacısuleymanoglu v Italy*, no. 23241/94, Decision of 20 October 1994, D.R. no. 79-B; *Selmani v Switzerland*, no. 70258/01, Decision of 28 June 2001

¹⁰¹ For example, *Hacısuleymanoglu v Italy*, no. 23241/94, Decision of 20 October 1994, D.R. no. 79-B, page 125; *Selmani v Switzerland*, no. 70258/01, Decision of 28 June 2001, page 5.

the instant case, the European Court has considered family visits in the context of convicted persons rather than persons who have yet to be tried and are presumed innocent, such as the detainee. This distinction is significant since international and national law grant unconvicted detained persons greater entitlement to family visits in comparison to convicted prisoners. For example, the European Prison Rules provide that “untried prisoners...may receive additional visits...”.¹⁰² In national practice, the relevant rules in the United Kingdom provide that a convicted prisoner is entitled to at least one visit every two weeks, whereas an unconvicted prisoner is entitled to visits at least three days a week.¹⁰³ In addition, the European Court has focused on whether a prisoner has any entitlement to choose their place of detention.¹⁰⁴ The jurisprudence involves requests by prisoners for transfer within their country of imprisonment to prisons closer to their family or to prisons in the country of residence of their family in order to facilitate visits or requests by the family members of prisoners to remain in the country in which their relative is imprisoned in order to facilitate visits; thereby raising, *inter alia*, complex deportation and immigration issues.

39. The Presidency observes that some detaining authorities have independently assumed responsibility for enabling detained persons to exercise their right to receive family visits. The SCSL funds family visits for its detained persons through the allocation of a special budget to its Defence Support Section which grants the sum of \$US100 per month to each detained person to be used for the purpose of family visits. In practice, some families of persons detained by the SCSL have used the funds allocated to move closer to their detained relative in Freetown, the seat of the court.¹⁰⁵ The Presidency has had regard to an example of a national system which funds family visits. The United Kingdom operates the ‘assisted prison visits scheme’, whereby financially eligible persons from Northern Ireland whose family members are held in prisons in England, and vice versa, receive financial assistance to enable family visits, consisting of travel, daily subsistence, accommodation and child care. The scheme also operates in relation to prisoners held in Scotland, Wales, Jersey and Guernsey.¹⁰⁶ In addition, states of nationality of persons detained by the ICTY, namely Serbia and Montenegro, Croatia, Bosnia and Herzegovina and the Republika Srpska, have provided funding for family visits.

¹⁰² European Prison Rules, rule 99(b).

¹⁰³ HM Prison Service, Prison Service Order Number 4410, Prisoner Communications – Visits, issue no. 279, issue date 5 September 2007, section 1.2.

¹⁰⁴ For example, *Hacisuleymanoglu v Italy*, no. 23241/94, Decision of 20 October 1994, D.R. no. 79-B, page 125; *Selmani v Switzerland*, no. 70258/01, Decision of 28 June 2001, page 5.

¹⁰⁵ Report of the Court on family visits to indigent detained persons, 5 November 2008, ICC-ASP/7/24, paragraph 24.

¹⁰⁶ Assisted Prison Visits Scheme: Customer Service Guide 2008-2009: available at <http://www.niprisonservice.gov.uk/uploads/docs/Assisted%20Visits%20pdf.pdf>, accessed 4 March 2009, HM Prison Service, Prison Service Order Number 4405, Assisted Prison Visits Scheme, issue/amendment date 11 March 1999.

40. The Presidency further observes growing international support for positive action on the part of detaining authorities in order to enable detained persons to exercise their rights. The European Commissioner for Human Rights has recommended in a report to Azerbaijan that the detaining authority provide transport assistance to enable family members to reach remote detention centres for the purpose of visits.¹⁰⁷ The United Nations Human Rights Committee has recommended in its concluding observations that prisons which are remotely located, and thereby prevent access for family visits, be closed down.¹⁰⁸
41. In light of the above, given that the decision of the Registrar to fund family visits is not properly regarded as discretionary, the latter should ensure that provision is made for the funding of family visits to indigent detained persons in the budget of the Court. Although funding through the budget may be supplemented by funding from alternative sources if available, the primary responsibility for funding lies with the Court.
42. Notwithstanding the above finding, the obligation cannot create an entitlement to unlimited funded family visits. The extent of the obligation to fund family visits will inevitably be restricted by the resource constraints faced by the Court as discussed below. This is consistent with the regulations regarding the costs of other types of communication, providing that the costs of telephone calls and outgoing mail of indigent detained persons will be borne by the Court *to the extent determined by the Registrar* (emphasis added).¹⁰⁹ Such restrictions are legitimate to the extent that the right to family visits is still rendered effective.

3. *The maintenance of family links: the frequency and duration of visits*

43. The Registrar decided to fund family visits on a discretionary basis, determining that the detainee may receive up to two visits by three family members per annum or three visits by two family members per annum.¹¹⁰ Each visit is to be of 15 days duration.¹¹¹ The Presidency turns now to consider the extent to which that decision satisfies the positive obligation upon the Court to provide for an effective right to family visits. In particular, it considers the extent to which the Registrar's policy renders the right to family visits effective by paying appropriate attention to the maintenance of family links as required by regulation 179(1).

¹⁰⁷ Report by the Commissioner for Human Rights Mr Thomas Hammarberg on his Visit to Azerbaijan, CommDH(2008)2 (20 February 2008), paragraph 50.

¹⁰⁸ Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Concluding Observations by the Human Rights Committee: Peru, 15 November 2000, UN Doc CCPR/CO/70/PER, paragraph 14.

¹⁰⁹ Regulations of the Registry, regulations 172(2) and 176(2).

¹¹⁰ Impugned Decision, page 4; Explanations, paragraphs 7 and 15.

¹¹¹ Explanations, paragraph 8.

44. As a preliminary issue, in considering whether the relationship between the detainee and the persons for whom a family visit had been requested falls within the ambit of regulation 179(1), the Presidency notes that the Registrar, in her decision to authorise family visits for the detainee, correctly makes no distinction between the detainee's natural and adopted children. The Presidency notes that although the family is universally recognised as the fundamental unit of society in international and regional human rights instruments,¹¹² it is rarely defined – reflecting the reality that families come in diverse compositions across and even within different cultural contexts. For present purposes, it is necessary only to note that the relationship between adopted children and their adoptive parents is to be treated the same as that between natural children and their biological parents.¹¹³

(a) The criteria adopted by the Registrar

45. The Registrar determined whether to fund family visits by reference to the following criteria: “the indigence of the detained persons, their family circumstances, the duration of the separation between the detained person and his family prior to his or her transfer to the [d]etention [c]entre and, in particular, whether this exceeded 18 months, as well as available resources”.¹¹⁴ Although the Registrar used these criteria to determine whether she should fund family visits,¹¹⁵ the Presidency notes that most are equally relevant to the number of visitors per funded visit and the frequency and duration of such visits (hereinafter “visiting conditions”) necessary to maintain family links and thereby render the right to family visits effective.
46. The Presidency will assess each criterion adopted by the Registrar in turn, beginning with the criterion of indigence. Since the positive obligation to fund is itself derived, in part, from the indigence of the detainee, the criterion is relevant to the existence of the obligation to fund itself and the extent of such funding, rather than to the visiting conditions necessary to maintain family links. The other criteria used by the Registrar, however, remain highly relevant to the determination of appropriate visiting conditions.
47. The criterion of family circumstances is a relevant consideration in determining the visiting conditions which satisfy the need to maintain family links; it is a flexible and

¹¹² Universal Declaration of Human Rights, GA Res 217A (III), UN Doc A/810 at 71 (1948), article 16(3); International Covenant on Civil and Political Rights, 999 UNTS 171, entered into force 23 March 1976, article 23; Inter-American Convention on Human Rights, 1144 UNTS 123, entered into force 18 July 1978, article 17(1); African Charter on Human and Peoples Rights, OAU Doc. CAB/LEG/67/3 rev. 5, entered into force 21 October 1986, article 18; African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49, entered into force 29 November 1999, article 18; Arab Charter on Human Rights, entered into force 15 March 2008, (2005) 12 International Human Rights Reports 893, article 33(1).

¹¹³ See for example, *Pini and others v Romania*, nos. 78028/01 and 78030/01, Judgment of 22 June 2004, paragraph 140

¹¹⁴ Impugned Decision, paragraph 20.

¹¹⁵ Impugned Decision, paragraph 20.

broad criterion, potentially encompassing a range of relevant factors, *inter alia* the ability of family members to travel, the size of the family, any special needs of the family, the existence of any key moments in the life of the family or the detainee and the status of family relationships.

48. The duration of family separation prior to transfer to The Hague may also be relevant, particularly in relation to a detainee's initial entitlement to visits and in determining frequency thereafter. A particularly protracted period of separation might provide a basis for increasing the size, frequency or duration of initial family visits.
49. The Presidency also finds that the availability of resources is a relevant consideration in determining visiting conditions. The European Court has generally recognised that the scope of a positive obligation may legitimately take resource constraints into account.¹¹⁶ The guiding standards espoused by the European Committee for the Prevention of Torture note, in relation to a detainee's contact with the outside world, that "any limitations upon such contact *should be based exclusively on security concerns of an appreciable nature or resource considerations*" (emphasis added).¹¹⁷ The Court of Appeal of England and Wales has held, in a case concerning the funding of medical treatment, that "[d]ifficult and agonising judgments have to be made as to how a limited budget is best allocated" and that a judicial decision which fails to acknowledge such reality would be "shutting one's eyes to the real world".¹¹⁸ Whilst the detainee is correct to assert that "the right to family visits cannot be sacrificed on the altar of savings in the budget",¹¹⁹ it is consistent with international standards for the Registrar to consider resource constraints when determining appropriate visiting conditions.
50. Other relevant constraints may be practical in nature such as the capacity of the detention centre to receive family visits (bearing in mind space and seating arrangements). In this vein, the Presidency confirms the flexible approach referenced by the Registrar in respect of easing the limitations on the number of family members allowed per visit where necessary.¹²⁰ Further considerations are the capacity of the Registrar to arrange such visits given the time-frames involved in securing appropriate travel documentation for family members and organising a visit, as well as any security considerations in existence.
51. Whilst the Registrar denied the existence of a positive obligation to fund family visits, she identified the criteria relevant to determine whether the detainee may effectively maintain family links. The above demonstrates that the Registrar must essentially

¹¹⁶ *Osman v the United Kingdom*, no. 87/1997/871/1083, Judgment of 28 October 1998 [Grand Chamber], paragraph 116; *Ozgur Gundem v Turkey*, no. 23144/93, Judgment of 16 March 2000, paragraph 43; *Pentiacova and others v Moldova*, no. 14462/03, Judgment of 4 January 2005, pages 12-14.

¹¹⁷ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, The CPT standards, CPT/Inf/E (2002) 1- Rev 2006, paragraph 51, page 18.

¹¹⁸ *R v Cambridge Health Authority, Ex parte B* [1995] 1 WLR 898 at 906D; cited in *R (on the application of Rogers) v Swindon NHS Primary Care Trust* [2006] EWCA Civ 392, paragraph 57.

¹¹⁹ Application, paragraph 11.

¹²⁰ Explanations, paragraph 4

apply a balancing test when determining the appropriate visiting conditions. The Presidency will go on to consider whether the Registrar struck a fair balance between safeguarding resources and ensuring that family links are maintained.

(b) The application of the criteria adopted by the Registrar

52. Although the Registrar identified relevant criteria, her decision to fund two visits by three family members or three visits by two family members failed to give sufficient weight to the circumstances of the family of the detainee, in particular the size of his nuclear family. Since there are seven members of the detainee's nuclear family and the detainee is only allowed six family visitors per year, the Impugned Decision would not even allow the detainee to see all of his family members in one year. Further, the decision of the Registrar provides less than the size and frequency of visits allowed under other funding schemes. The programme for ICTY detained persons funded by the government of Serbia and Montenegro allows for visits by all immediate family members once every two months. Whilst the Croatian programme allows for monthly visits by all immediate family members of detained persons once per month. The assisted prison visits scheme for persons detained in the United Kingdom enables most eligible close family members to receive funded visits once per fortnight.¹²¹ The Presidency takes the view that the Impugned Decision does not provide sufficient face-to-face family contact for the detainee. The Registrar failed to properly exercise her discretion in applying the criteria.
53. In light of the Presidency's finding that there exists a positive obligation to fund family visits to indigent detained persons and its finding that the visiting conditions do not allow the detainee to effectively maintain family links, the Presidency remits the impugned visiting conditions to the Registrar for reconsideration. The Registrar, bearing overall responsibility for the management of the detention centre, in accordance with regulation 90 of the Regulations of Court, is best positioned to determine the precise visiting conditions necessary to render the detainee's right to family visits effective, in particular his ability to maintain family links, in light of resource capacity. In reviewing the appropriate visiting conditions for the detainee, the Registrar should apply the criteria set out above, which informed her original decision, giving sufficient weight to the family circumstances of the detainee and giving appropriate consideration to his request to see all of his family members together.

¹²¹ Assisted Prison Visits Scheme, Customer Service Guide 2008-2009: available at <http://www.niprisonservice.gov.uk/uploads/docs/Assisted%20Visits%20pdf.pdf>, accessed 4 March 2009, section 5, HM Prison Service, Prison Service Order Number 4405, Assisted Prison Visits Scheme, issue/amendment date 11 March 1999.

54. By way of guidance, the Presidency confirms the Registrar's view that it is to the benefit of the detainee to receive several family visits in the course of a year.¹²² In relation to the duration of visits, both per length of stay in The Hague and per length of visit to the detention centre, the Registrar should continue to respect the basic principle that where detained persons are unable to receive frequent visits from their families, they should be able to accumulate visiting time.¹²³ The Presidency acknowledges that the Impugned Decision was informed by the Registrar's desire to carefully manage available resources¹²⁴ and emphasises that prudent management must continue even in light of the existence of a positive obligation upon the Court to provide funding for family visits.
55. The Registrar should engage in a continuous review of the visiting conditions adopted, considering any relevant changes in the circumstances of the detained person or his family and whether methods of making the right more effective are within her means; for example, if a family member is only visiting once in a calendar year, the Registrar might consider whether in such circumstances the right might be more effectively exercised if the 15 day duration of each visit were increased. As part of such continuous review process, the Registrar should also continue to pursue all options available to her to ensure that indigent detained persons may effectively exercise their right to family visits.

III. CLASSIFICATION

56. The Presidency notes that the originating document¹²⁵ and all subsequent documents in the instant Application have been filed confidentially and *ex parte*. No reasons were given in the originating document for its confidential *ex parte* classification. In the Presidency's view, nothing said in this decision *prima facie* qualifies it as confidential *ex parte*. If there is any factual and legal basis for retaining the confidential *ex parte* classification of the instant decision or if there is any information requiring redaction prior to publication, the detainee is ordered to inform the Presidency thereof by 4pm on 16 March 2009. The Registrar is ordered to file any response thereto or to provide additional reasons as to why the instant decision should retain its confidential *ex parte* classification or if there is any additional information

¹²² Explanations, paragraph 7.

¹²³ The European Committee for the Prevention of Torture has emphasised that prisoners whose family live far away "be able to accumulate visiting time"; European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, The CPT standards, CPT/Inf/E (2002) 1- Rev 2006, paragraph 51, page 18. The United Kingdom's Prison Service Order on prison visits specifies that prisoners, including those who are foreign nationals or those with close family abroad, are able to apply for accumulated visits; HM Prison Service. Prison Service Order Number 4410, Prisoner Communications – Visits, issue no. 279, issue date 5 September 2007, section 1.13

¹²⁴ Impugned Decision, paragraph 21; Explanations, paragraph 13.

¹²⁵ Adresse de Mathieu Ngudjolo au Greffier suite à la décision prise par le Chef du quartier pénitentiaire par rapport aux visites familiales, ICC-RoR217-02/08-1-Conf-Exp, 11 November 2008

requiring redaction prior to publication by 4pm on 20 March 2009. The Presidency will thereafter rule on whether the classification should be maintained and, if necessary, the need for any redactions.

In so far as the detainee sought from the Presidency a finding as to a positive obligation to fund family visits, the Application is granted.

The Impugned Decision is quashed and the impugned visiting conditions are remitted to the Registrar for reconsideration.

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

A handwritten signature in black ink, consisting of a large, stylized 'V' followed by a smaller 'K' and a long horizontal stroke extending to the right.

Judge Philippe Kirsch
President

Dated this 10 March 2009
At The Hague, The Netherlands