

Intermediaries and the International Criminal Court: A Role for the Assembly of States Parties

As a global court, the ICC is required to investigate around the world in countries with very different cultures, histories, languages and conflicts – and it must do so with limited resources. As a result, the court depends on partners to assist its work – with advice, convening power, and background information about the context in which it is operating. Sometimes the Court needs local partners to help conduct outreach in local languages in the field, liaise with victims and witnesses, or facilitate victims’ participation in legal proceedings. To undertake these tasks, the ICC relies heavily on a group of people commonly referred to as “intermediaries” – that is, people who work “between one person and another; who facilitate contact or provide a link between one of the organs or units of the Court or Counsel on the one hand, and victims, witnesses, beneficiaries of reparations or affected communities more broadly on the other.”¹ Without the work of intermediaries, the Court would simply be unable to function as well as it does now.

Yet some use of intermediaries by the ICC has been controversial. In the ICC’s first trial of Congolese businessman, Thomas Lubanga, questions over the role and proper use of intermediaries by the prosecutor’s office nearly derailed the trial twice. The trial’s judgment, expected at the start of 2012, will likely zero in on the role of intermediaries in investigations.

The increasing spotlight on the court’s deployment of intermediaries throughout the Lubanga trial highlighted the need for more formal regulation of the relationships between the ICC and intermediaries. To its credit, the ICC took a positive step to respond to this issue by developing the *Draft Guidelines Governing the Relationship between the Court and Intermediaries*. The *Draft Guidelines* address the existing legal and policy framework governing the use of intermediaries; the definition, functions and selection of intermediaries; and the relationship between the Court and intermediaries, including with respect to security and protection, as well as payment of expenses and provision of support to build capacity or address psycho-social care. The *Draft Guidelines* also anticipate a monitoring process which assesses the implementation of its provisions. The *Draft Guidelines* were finalized by the Court this year, but failed to be tabled at this ASP. They must be considered and formally adopted by the ASP as soon as possible.

The complex nature of the Court’s relationship with intermediaries requires that States remain engaged with this issue. The Assembly’s President should appoint a dedicated intermediaries facilitator through The Hague Working Group specifically to interact with the Court on intermediaries and to take forward review and discussion of the *Draft Guidelines* as they are implemented through the Court’s activities.

To this end, the Open Society Justice Initiative recommends:

- The ASP President should appoint an intermediaries facilitator;
- The ASP should urgently consider the ICC Draft Guidelines and adopt them at the earliest opportunity;

¹ See International Criminal Court, *Draft Guidelines Governing the relations Between the Court and Intermediaries*, August 2011, copy on file with the Open Society Justice Initiative, p 5.

- In the absence of formal adoption by the ASP at its 2011 session, the ICC should still i) utilize the Draft Guidelines to inform its interactions with intermediaries pending their adoption; and (ii) ensure the Draft Guidelines are subject to an on-going monitoring process, involving the Court, intermediaries and external experts to ensure the Guidelines achieve their aims in managing the partnership with intermediaries.

Who is an intermediary?

The term “intermediary” is absent from the Rome Statute. However, the Registry’s Regulation 97 refers to the obligation of confidentiality “between the Court and persons or organizations serving as intermediaries”. In addition, Regulations 67 and 71 of the Trust Fund for Victims provide that “intermediaries” may be of assistance regarding reparations. The term “intermediary” is frequently employed in proceedings before the Court, and particularly with respect to individuals who assist victims to complete applications to participate in proceedings. ICC Judges have lauded the contribution of intermediaries to the work of the Court. Judge Usacka, for example, has noted the financial savings which intermediaries provide with respect to the victim participation process² and declared that “intermediaries who assist applicants in accessing the Court are essential to the proper progress of the proceedings.”³

A broad range of actors assist the Court as intermediaries, including political figures, rebel force representatives, local community leaders and government officials acting in their private capacity. Creating relationships with some of these individuals, though often essential to Court functions, may raise complex issues, particularly with respect to “insiders” who may have been involved in criminal activities themselves and who facilitate locating and/or contacting other insider witnesses for the prosecution or defense. However, the majority of intermediaries with whom the Court works represent civil society organizations, for whom the pursuit of justice and the protection of human rights are core principles. These organizations and individuals provide the kind of specialist local knowledge and access to communities which are essential to ensuring effective Court engagement in a situation country.

The Court develops relationships with intermediaries in different ways. Some intermediaries come to the Court on their own election—they approach the Court to communicate on behalf of victim communities for example. Others are approached by the Court because they are known to have a specific expertise or connections that the Court needs. Intermediaries may provide their services voluntarily although, in certain circumstances, costs associated with the intermediary’s tasks may be reimbursed.⁴

What does an intermediary do?

Intermediaries perform a range of functions which are necessary for the ICC to do its work effectively. This may include, for example, assisting prosecution or defense investigators in identifying evidentiary leads and helping to contact potential witnesses. Intermediaries may help to raise awareness among affected communities about the rights of victims to participate in ICC proceedings, and assist victims in filling out official paperwork, or in securing psychosocial services, security, and legal services. More generally, intermediaries help the Court conduct outreach or provide public information in countries in which ICC investigations are taking place. Though not an exhaustive list, these activities demonstrate the breadth of support these individuals provide to the Court.

² See the International Criminal Court, Decision on the Applications for Participation Filed in Connection with the Investigation in the Democratic Republic of Congo by Applicants [ICC-01/04-545 04-11-2008] PTCl, at para. 8.

³ See the International Criminal Court, Decision on the Applications for Participation Filed in Connection with the Investigation in the Democratic Republic of Congo by Applicants [ICC-01/04-545 04-11-2008] PTCl, at para. 25.

⁴ ICC *Draft Guidelines*, above n. 1, p.11-15

Why is Regulation of the ICC's Relationships With Intermediaries So Important?

The ICC's first trial, of Congolese businessman Thomas Lubanga, pushed the role of intermediaries firmly into the public spotlight. In June 2008, ten days before the trial was set to start, judges threatened to release Lubanga after they became concerned that he could not get a fair trial because he was unable to access information collected by the Prosecutor that might help show his innocence. Some of this information was provided to the prosecution by intermediaries on a confidential basis. The judges, however, determined that this information should be disclosed to Lubanga to ensure his fair trial rights were respected. The Prosecutor was ordered to fix the problem, which he did, and the trial was able to go ahead.

Yet the spotlight remained on intermediaries when the Lubanga trial finally started in January 2009. The prosecution's first witness, an alleged former child soldier, abruptly changed his story during his testimony. The witness said that he had initially lied and had been coached on what to say in court by one of the prosecution's intermediaries. His testimony was the first in a series of revelations during the trial which raised concerns about alleged intermediary misconduct and interference with witness testimony. Lubanga's defense team argued that the prosecution should be dismissed on abuse of process grounds. In particular, Lubanga claimed that intermediaries were involved in making payments to witnesses to induce testimony and then issuing threats to cover up the fraud.⁵ Intermediaries were again called to the witness stand during the trial's defense phase to explore their alleged role in relation to witnesses.

Judge Adrian Fulford, on the trial's bench, noted in court on March 12, 2010, "[t]he integrity of the intermediaries and their role is now a critical ingredient of this trial."⁶ The use of intermediaries, as well as their relationship with the court and its witnesses, is expected to feature in the trial judgment, which the Court has suggested will issue at the "turn of the year."⁷

In the wake of this trial – and the media attention that the use of intermediaries is likely to garner when the trial judgment is handed down – the ICC must demonstrate that it has put structures in place to regulate the way in which it engages with intermediaries. On the one hand, the Court must ensure that any intermediaries-related problems which emerged in the course of the Lubanga trial do not recur. On the other, it must recognize the valuable role that intermediaries, when properly regulated, can play and capitalize on this potential. Similarly, States Parties must remain involved with this complex issue, particularly given the extent to which intermediaries may confront genuine danger and be reliant on States for help for security and protection. This is why urgent attention to the ICC's *Draft Guidelines Governing the Relations Between the Court and Intermediaries* is necessary.

ICC Draft Guidelines Governing the Relations Between the Court and Intermediaries

As the Lubanga trial was unfolding, the Court was working to develop *Draft Guidelines Governing the Relations Between the Court and Intermediaries*. After an extensive consultative process with all organs of the Court and civil society, the ICC finalized the draft in August 2011. On the whole, the *Draft Guidelines* addressed many concerns about the relationship between the Court and intermediaries. They will provide a solid base from which

⁵ See Wairagala Wakabi, *Lubanga witness says he was paid \$200 to tell lies*, February 8, 2010, Lubanga Trial Website at <http://www.lubangatrial.org/2010/02/08/lubanga-witness-says-he-was-paid-us200-to-tell-lies/>

⁶ Notes from an informal transcript, Lubanga Trial hearing, March 12, 2010, on file with International Refugee Rights Initiative.

⁷ International Criminal Court Trial Chamber I, Lubanga Status Conference, *The Prosecutor v. Thomas Lubanga Dyilo*, November 15, 2011, <http://www.icc-cpi.int/NR/exeres/1E6F7972-4A56-4855-90F2-10361E8B109E.htm>

to steer the ICC's work with intermediaries going forward. But they still need the ASP's blessing to be formally cemented into Court practice.

The *Draft Guidelines* address the existing legal and policy framework governing the use of intermediaries; the definition, functions and selection of intermediaries; and the relationship between the Court and intermediaries, including with respect to security and protection as well as payment of expenses and provision of support to build capacity or address psycho-social care. The *Draft Guidelines* also anticipate a monitoring process which assesses the implementation of its provisions.

Any short-term costs associated with intermediaries are anticipated to be minimal and absorbed within the current 2012 budget. But the Court's immediate use of the *Draft Guidelines* only heightens the urgency for the ASP to consider and adopt them soon so that the relationships between the court and intermediaries can be clear.

The Assembly's President should appoint a dedicated intermediaries facilitator through The Hague Working Group specifically to be available to interact with the Court on intermediaries and to take forward review of the *Draft Guidelines* as they are implemented through the Court's activities. No current facilitator is ideally placed to address this issue given their current mandates, which are already full and time-consuming. For the victims' facilitator, a conflict of interest may exist between the needs of victims and some intermediaries. The technical and substantive nature of the *Draft Guidelines* would fit poorly with the macro-level focus of the strategic planning mandate.

Security and Protection For Intermediaries

The Court has yet to clarify in detail the substance and parameters of its obligation to protect intermediaries. However, the ICC's *Draft Guidelines* do recognize that the Court "has a duty to prevent or manage security risks to intermediaries, resulting from the intermediaries' interaction with the Court" or the fulfillment of "functions on behalf of the Court." The ICC Appeals Chamber further recognized in the case of Germain Katanga, a Congolese rebel leader currently on trial on war crimes and crimes against humanity charges, that "the specific provisions of the Statute and the Rules [...] are indicative of an overarching concern to ensure that persons are not unjustifiably exposed to risk through the activities of the Court."⁸

Intermediaries themselves have at times expressed confusion about the extent of ICC protection they are due when their work for the Court endangers their security. Some intermediaries have not received Court assistance even after they had been harassed, detained, displaced, or otherwise injured in the course of their intermediary duties. Civil society groups have not infrequently stepped in to assist when intermediaries have found themselves in trouble. However, reliance on NGOs to assist intermediaries in crisis is risky because their ability to help is unpredictable. Civil society organizations themselves may be under threat; have little experience or capacity to take on a protective role; or may not have the funding to do so, even if they are otherwise equipped to provide the security and protection intermediaries need.

The *Draft Guidelines* authorize the provision of protective measures and security arrangements for those intermediaries who find themselves at risk on account of their Court-related duties. But the Court cannot manage these risks in isolation. States must step in when needed – including through negotiating and implementing relocation agreements with the Court for intermediaries who have been expelled or otherwise need to spend extended time out of their country of residence due to security risks. States must also provide short-term protection measures, like visas to intermediaries who need to flee their country quickly. An intermediaries facilitator could assist the Court in addressing these needs, including through identifying State Parties candidates willing and able to assist with these problems, both over the long-term and in crisis situations.

⁸ International Criminal Court, 'First Decision on the Prosecution Request for Authorisation to Redact Witness Statements', Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I *Prosecutor v. Germain Katanga*, ICC-01-04-01-07-475-ENG, 13 May 2008, para 54.

Conclusion

The search for justice in diverse circumstances of mass atrocity will regularly require more specialist local knowledge than the Court has at hand. The lack of established guidance regarding intermediaries has, to date, been a gaping deficiency. Implementing a Court-wide policy on intermediaries through the ICC *Draft Guidelines* will help address many of these issues. The ASP should consider and adopt the *Draft Guidelines* as soon as possible. The ASP President should appoint an intermediaries facilitator to facilitate mutual support and assistance between the Court and intermediaries in practice.