



COMMENTARY ON THE ICC DRAFT GUIDELINES ON INTERMEDIARIES

(1) Introduction

The International Refugee Rights Initiative (“IRRI”) works to enhance the protection of the rights of those who are forced to flee their homes worldwide. IRRI grounds its research and advocacy in the rights accorded to the displaced in international human rights instruments and strives to make these guarantee effective in the communities where the displaced and their hosts live. Based in New York and Kampala, IRRI acts as a bridge between local advocates and the international community, enabling local knowledge to infuse international developments and helping local advocates integrate the implications of global policy in their work at home. With a focus on Africa across all its programs, IRRI’s international justice work explores, inter alia, the impact of international and transitional justice efforts on conflict-affected communities.

The Open Society Justice Initiative (“OSJI”) uses law to protect and empower people around the world. Through litigation, advocacy, research, and technical assistance, OSJI promotes human rights and builds legal capacity for open societies. OSJI seeks to foster accountability for international crimes, combat racial discrimination and statelessness, support criminal justice reform, address abuses related to national security and counterterrorism, expand freedom of information and expression, and stem corruption linked to the exploitation of natural resources. OSJI staff are based in Abuja, Amsterdam, Bishkek, Brussels, Budapest, Freetown,

The Hague, London, Mexico City, New York, Paris, Phnom Penh, Santo Domingo and Washington, D.C.

This Commentary is jointly coordinated between IRRI and OSJI. The aim is to assist the International Criminal Court (the “ICC”) in the finalisation of the “Draft Guidelines Concerning the Relationship between Intermediaries and the International Criminal Court of October 2010” (the “Draft Guidelines”). To this extent, this Commentary follows the structure of the Draft Guidelines and makes proposals based on over two years of research and confidential consultations with persons who have worked with the ICC across each situation country. In particular, a meeting was recently held with over twenty participants who then worked closely with IRRI and OSJI in drafting and editing the present Commentary. La Fédération internationale des ligues des droits de l'Homme (FIDH) played a critical role in this process.

We acknowledge and appreciate the ICC’s efforts to establish a framework that will govern its relationship with intermediaries and clarify their status within the ICC institutional framework. Intermediaries play a critical role in the achievement of the ICC’s objectives by providing specialist information, services and expertise, and linking various organs of the ICC with key constituencies on the ground. In the light of the way in which the ICC is developing and expanding, it is likely that intermediaries will be increasingly called upon to assist across all stages of proceedings, from preliminary analysis to reparations. It is important that the ICC Draft Guidelines are cognizant of the range of potential intermediaries (individuals, local NGOs, international NGOs) and clearly articulate the applicable aims, principles, definition, selection criteria, contracts, support, protection and monitoring, subject of course to evolving jurisprudence.

The feedback we received from various stakeholders made frequent reference to the importance of recognizing the reciprocal nature of the relationship between the ICC and intermediaries. This Commentary to the Draft Guidelines seeks to address the full range of intermediaries potentially interacting with the ICC. Drafting of this Commentary was done with

reference to the commentary of the Victims' Rights Working Group, which focuses on the intermediary process pertaining to victims participating in ICC proceedings. The two commentaries demonstrate the growing awareness of the importance of addressing intermediaries and the critical role the Draft Guidelines will play in enhancing future interactions. To ensure the Draft Guidelines best incorporate past experiences and developed practices, the ICC is strongly encouraged to continue its consultations with interested parties, in particular, NGOs and persons experienced in working with, or as, intermediaries. The authors of this Commentary welcome the opportunity to enter a dialogue on any issues raised and look forward to facilitating the finalization of the ICC Guidelines on Intermediaries.

(2) ICC Draft Guidelines: Aims [p.3]

The aims are important as they establish the standards by which the usefulness of the Draft Guidelines can be assessed. The Draft Guidelines currently set out three aims, namely: to respect the judicial process; to provide guidance to Court staff; and to provide transparency and clarity for non-Court staff. The following draft text is suggested with proposed amendments in italics. Please note that we propose including an additional aim, which is listed first to indicate its overarching importance, and reflects the assertion made in the fifth paragraph on p.2 of the ICC Draft Guidelines:

- *First Aim: to provide guidance on the relationship between the Court and intermediaries, in particular the aspects that are operational on a Court-wide basis, recognizing that where appropriate, ICC organs or units shall make available their particular implementing guidelines on intermediaries which govern in more detail the rights and duties of both parties;*
- Second Aim: to provide transparency and clarity *for intermediaries and any third parties* who may interact with the organs or units of the Court or Counsel;

- Third Aim: to provide guidance to staff of the Court and improve efficiency of the Court's operations;
- Fourth Aim: to preserve the integrity of the judicial process to the maximum extent possible.

(3) ICC Draft Guidelines: Guiding Principles [p.3]

The principles are important as they represent the foundational standards that must be adhered to by the ICC Guidelines itself, and also must be adhered to by any separate guidelines which may be implemented as appropriate by different ICC organs or units. The Draft Guidelines set out four principles, namely: confidentiality and impartiality; non-substitution for Court staff; respect for the rights of the accused; and self-minimisation of risk. There has been extensive feedback from consultations conducted for this Commentary regarding the importance of articulating principles that balance the focus on the ICC's concerns on one hand, and intermediary concerns on the other hand, thus fully implementing the aims of the Draft Guidelines to provide transparency and clarity for both parties. The following draft text is therefore suggested in addition to the four principles set out in the Draft Guidelines, with proposed amendments in italics:

- *First Principle: The ICC's engagement with intermediaries (whether selected by the ICC, a third party, or "self-selected") incurs rights and duties for both parties;*
- *Second Principle: The relationship between ICC staff and intermediaries is based upon the principles of mutual respect and confidentiality. It is paramount that intermediaries uphold the highest standard of confidentiality, and respect the impartiality and independence of the Court. The obligation of confidentiality equally applies to staff of the ICC, as set out in the Rome Statute, the Rules of Procedure and Evidence, the Regulations of various organs and other implementing documents of the ICC. The ICC also recognizes the particular role*

and function that civil society and NGO intermediaries may play in victim communities, and their independent, although often complementary, mandate;

- *Third Principle: The relationship between ICC staff and intermediaries is to be characterized by full disclosure and sharing of information, depending on the exigencies of each situation and the requirements of the Rome Statute and related instruments;*
- *Fourth Principle: [Due to definitional issues, it is suggested that reference to “core functions” is deleted in this text.] Although intermediaries play a complementary role in the functioning of the Court, primary responsibility for implementing the duties of the Court rests with ICC staff;*
- *Fifth Principle: [It is suggested that the reference to the parties to the proceedings is broadened since intermediaries can interact with prosecution, defence and victims]. Cooperation between ICC staff and intermediaries must be done within a framework of respect for the interests and due process rights of all parties to the court proceedings, including the defence, prosecution and victims, and in the interests of a fair and impartial trial;*
- *Sixth Principle: Intermediaries and persons affiliated with intermediaries who are at risk on account of the activities of the Court have a right to protection, but also a duty to make every effort to perform their functions in a manner that prevents or minimizes any risk to themselves or other persons. The Court’s general system to assess risks and its general principles of risk management shall apply to intermediaries.*
- *Seventh Principle: [This proposed principle reflects statements detailed in subsequent sections of the Draft Guidelines which seek to provide support to intermediaries in implementing their relationship with the ICC. As for protection, it is important to include this as a principle with Court-wide application, particularly considering the potential for*

separate organs and units of the ICC to implement their own positions on intermediaries]. *Intermediaries will be supported by the Court in the safe and effective implementation of intermediary tasks, through provision of appropriate personal, financial, material and capacity building support.*

We welcome the inclusion of the Sixth Principle which categorically acknowledges the right of intermediaries to protection. This is a very important provision that removes any doubt as to whether a duty to protection is owed to intermediaries by the ICC. It is also important for intermediaries to understand they have a duty to conduct themselves in a manner that minimizes risk to themselves and others. However, protection should not be made subject to, or dependent on, performance of risk minimization by the intermediary. The scope and nature of ICC protective measures may, however, be dependent on the willingness of the intermediary to engage in, or refrain from certain actions.

(4) ICC Draft Guidelines Section 1: Definition of Intermediaries [pp.5-6]

The term “intermediary” is not in the Rome Statute or the Rules of Procedure and Evidence (RPE), with only a passing reference in Regulation 97 of the Regulations of the Registry and Regulations 67 and 71 the Trust Fund for Victims. However, the term “intermediary” is increasingly used by parties in submissions before Chambers, largely in referring to individuals who assist the victim application process. Judge Usacka in the *Lubanga* case has noted that such intermediaries “are essential to the proper progress of the proceedings”. She described in laudatory terms the work done by intermediaries in difficult circumstances which otherwise pose “a number of impractical hurdles prior to the applicants' access to the Court, [it] would also require resources unavailable to both the applicants and the non-governmental organizations which assist as intermediaries.” Furthermore, intermediaries have been recognized by Chambers as persons who could be considered “at risk on account of the activities of the Court” according to the protection regime under Rule 87 of the RPE.

It is noted that the Draft Guidelines do not explicitly define intermediaries, but instead sets out the “essence” of intermediaries by making reference to the potential activities or “main purposes” in which intermediaries may engage. The consultations conducted in preparation for this Commentary were overwhelmingly in favour of articulating a definition of an intermediary, as this was felt to be the best option for achieving the Draft Guidelines’ aim of transparency.

There was clear preference for a broad definition in order to be as inclusive as possible of the range of intermediary experiences across the situation countries and reflective of the evolving practice of the ICC. Additionally, it was felt that defining an intermediary with reference to a set list of functions or tasks could risk appearing to attempt an exhaustive list which would not be possible and could limit the need for ICC’s practice on intermediaries to reflect evolving circumstances.

It was universally agreed that, as stated in para.4 page 6, that the definition should not be dependent upon the existence of a contract between the ICC and the intermediary. We also appreciate the recognition in para.3 page 5 of the Draft Guidelines that an intermediary relationship can be created upon the initiation of the ICC, the intermediary, a third person already in contact with the ICC such as a victim or witness or a secondary intermediary, such as, for example, another NGO. The Draft Guidelines should also reflect that an intermediary may also be an individual or institution such as a local or international NGO.

We welcome the indication in para.4 page 5 and para.4 page 6 of the Draft Guidelines that the nature of the engagement with the ICC, rather than matters such as the frequency of contact, creates the intermediary relationship. Frequency of contact should not be relevant to defining an intermediary relationship, particularly as in practice there is scope for improving access between intermediaries and ICC staff, and also considering the risks that can arise in certain settings immediately upon initial contact.

Taking these concerns into consideration, the following definition of an intermediary is proposed:

- *An intermediary is an individual or an organization engaged in a mutually accepted relationship, that can be established with reference to the nature of the interaction with the ICC, providing assistance in furtherance of, or complementary to, the objectives of ICC, such as by providing an active link between the ICC and affected communities.*

There are some further matters under the definition section of the Draft Guidelines which raised concerns during consultations. Para.2 page 6 of the Draft Guidelines states that the legal regime guiding the relationship between the Trust Fund for Victims (TFV) and its partners limits the applicability of the Draft Guidelines. There are no details provided on the nature of this potential deviation. Although the creation of specific implementing guidelines for different ICC organs or units may be necessary, a basic framework (including matters relating to aims, principles and definitions) can and should be agreed upon on an ICC-wide basis. Thus the Draft Guidelines should be binding on all ICC organs and units. We note that in some respects the Draft Guidelines already adopt this approach e.g. section 5.4 of the Draft Guidelines relating to the potentially public character of TFV intermediaries.

Para. 3 page 6 of the Draft Guidelines states that not all persons cooperating with the ICC will be deemed to be an intermediary, with reference to two categories of persons/institutions who are intended to be excluded from the definition. First, contracts for “services in the field” are excluded. It is understood that the exclusion applies to contracts for the conduct of logistics or other matters not directed at the substance of ICC operations. There was general support for this position in the consultations conducted for this Commentary. Second, it is suggested in para.3 page 6 of the Draft Guidelines that “some entities” whose relationship is subject to special co-operation agreements are also excluded from consideration as an intermediary, such as intergovernmental organizations, international non-governmental organizations (INGOs) or national authorities. It was noted in consultations that in some cases, persons connected with

such entities can in fact be intermediaries according to the definition proposed above (and perhaps particularly when they perform such duties outside the scope of their official function), and as such, the exclusion in the Draft Guidelines should not be drafted so categorically which instead should be addressed on a case by case basis, particularly for INGOs, who frequently do carry out intermediary tasks.

Page 6 of the Draft Guidelines suggests two questions for discussion. The first is whether intermediaries have a duty to disclose their involvement with more than one ICC organ or unit and whether the ICC organs or units have a duty to share this information with other ICC organs or units. We note that the performance of multiple roles by an intermediary can raise not only confidentiality and security concerns, but also conflict of interest issues. The feedback from the consultations conducted for this Commentary demonstrate that a critical factor in making sound judgements about such issues is whether the intermediary properly understands the role of the relevant ICC staff member and how this role fits within the broader ICC framework. Thus the safe management of the question of disclosure to other ICC organs or units presupposes the implementation of the proposed Third Principle of the Draft Guidelines concerning information sharing, and the provision of an explanation on the role of the particular ICC staff in relation to other ICC organs or units. Intermediaries should be free to make their own decision as to whether or not to share the fact of cooperation with another ICC organs or units, particularly given the fact that persons with malicious intent have been known to pose as ICC staff in order to gain information from the intermediary. The ICC should therefore have standard and publicised practices on how they will identify themselves as ICC staff and should indicate to an intermediary if a prior relationship with different ICC organs or units is likely to impact security considerations or capacity to carry out the particular task.

The second question for discussion on page 6 of the Draft ICC Guidelines raises the issue of sharing of information within ICC organs and units. It is important for organs to know whether an intermediary is engaged in any form of activity with the ICC for at least two reasons: i) it enables organs to make decisions on conflict of interest and address issues associated with that

in advance; ii) there may be a need for inter-organ collaboration in relation to various aspects of intermediary work, in particular, protection and welfare support. Effective protection necessarily requires sharing of information about threats, etc. At the same time it is acknowledged that such sharing of information could have implications for implementing the mandate of certain ICC organs or units, such as maintaining the impartiality of prosecutorial strategy for the OTP. A compromise position could be an initial sharing of information of the names of individuals through a secure database of intermediaries managed within VWU. This could also facilitate any subsequent protection coordination and thus maximize use of ICC resources in this regard. It would be important at the same time that such a database was not considered as an exclusive list of intermediaries but as an indicative list only. Any further sharing of information such as the role and functions between the ICC staff and any particular individual could be taken up on a case by case basis. To facilitate this information sharing (and coordination of other activity as set out later in this Commentary), we propose the identification of intermediary focal points within each unit (VPRS, OPCV, OPCD, OTP etc).

(5) ICC Draft Guidelines Section 2: Identification and Selection of Intermediaries [pp.6-9]

The feedback from the consultations conducted for this Commentary was broadly supportive of standardizing criteria for assessing the suitability of potential intermediaries. It was suggested in the consultations that the first criteria would be for the ICC to assess internally whether in each setting, an intermediary was required.

It was also noted during consultations for this Commentary that the Draft Guidelines should recognize the specificities in mandate and function of different ICC units and the potential need for different ICC units to have additional criteria for selecting intermediaries beyond those set out in the Draft Guidelines. It is important that any additional criteria should be compliant with the aims, principles and definition set out in the Draft Guidelines. In particular, any additional criteria should not undercut rights of intermediaries; dilute obligations of that

organ/unit/counsel; or render more onerous the performance of tasks assigned to intermediaries.

The key issue that arises in the context of selection criteria is that it presupposes the question of sequencing of the contact between the ICC and the intermediary. In general, initial contact is made either on the initiative of ICC staff, or through the initiative of the potential intermediary or a secondary intermediary, or through a third person already associated with the Court such as a witness or a victim. From there, selection criteria can be applied to the potential intermediary by the ICC to decide how to proceed, including through formalising the relationship through a contract as set out in the following section of this Commentary.

However, there are two scenarios in which the matter may not proceed according to this sequencing. First, it should be acknowledged that in some cases, the initial contact initiated by the ICC will *ipso facto* categorize an individual as an intermediary, even prior to any application of selection criteria or formalization of the relationship through a contract (although continued or deepening engagement through the conduct of additional tasks should be subject to the application of the relevant criteria of assessment). Such individuals cannot be excluded from the definition of intermediaries and any future potential for protection or support as persons “at risk on account of activities of the Court”.

In the second scenario where it may not be possible to apply criteria before an intermediary relationship is established concerns “self-selection” as an intermediary. Inherent to the very existence of the ICC, is the acceptance that persons can unilaterally provide information to the ICC such as through the Article 15 communications procedure, or through a request of a victim or witness. In order for these aspects of the Rome Statute to be fully operationalized, such individuals cannot be excluded from the definition of intermediaries and any future potential for protection or support as persons “at risk on account of activities of the Court”.

The most likely settings in which selection criteria will be appropriate will therefore be when the ICC is initiating contact, or when there is sufficient time to apply criteria to persons who have come into contact with the ICC through their own initiative or through a third party such as a victim or a witness. However, it is important that there should be no discrimination or disparity in treatment regarding protection or other support depending on whether the criteria has been applied or the particular sequencing pertaining to the intermediary in question. With respect to the specific criteria set out in the Draft Guidelines, there was broad support during the consultations for the matters itemized below:

- For the matters raised in the introductory section on page 7 regarding to disclose certain information, it would be helpful for the ICC to provide a definitive check-list in the Draft Guidelines of the matters requested, although with an affirmation that such information is to be provided by the intermediary on a voluntary basis. Some matters touch upon privacy issues and therefore cannot be identified as an absolute obligation to be imposed upon a potential intermediary, for example, given that some jurisdictions do not permit prior convictions to be discussed in court, it would be difficult to insist that an intermediary provide such material, although it might be important for assessing whether proceeding with the relationship would be appropriate. It would also be particularly important to inform potential intermediaries that the information they provide will be recorded in the ICC documents management systems and may be required to be disclosed to the parties to the proceedings at a later date, including the Defence.
- For the criteria relating to sub-section (A) on page 7 regarding “adherence to confidentiality, respect and dignity”, it is recommended that confidentiality on the part of the ICC should not be invoked in a manner as to deny a potential intermediary access to all the information needed to facilitate their decision making, including whether they would like to act or continue acting as an intermediary. Disclosure requirements within the context of Article 54(3)(e) should be fully explained to intermediaries. In particular, potential intermediaries should be informed that their identity may be disclosed to the defence/made public and that they could be called to testify.

- For the criteria relating to sub-section (B) on page 7 regarding “credibility and reliability”, concerns were raised during the consultations for this Commentary on how the “reputation” of a potential intermediary would be established, particularly considering firstly, the sensitive security setting under which most intermediaries operate including, for example, where national authorities may have taken a hostile attitude to ICC investigations, and secondly, the need to maintain confidentiality.
- For the criteria relating to sub-sections (C) and (D) on page 8 regarding “risk assessment” and “policies and practices”, it important to reflect that these requirements presuppose all due information sharing on the part of the ICC.
- Finally, for criteria relating to sub-section (E) on page 8 regarding “capacity, knowledge and experience”, the feedback from those consulted for this Commentary indicate that it may be problematic to tie eligibility for selection as an intermediary to capacity in terms of resources, including the ability of the potential intermediary to deploy staff and maintain secure office space and equipment to protect information. Elsewhere in the Draft Guidelines it is recognised that the ICC may need to provide the necessary resources and equipment or to compensate for the use of the individual’s own infrastructure.

(6) ICC Draft Guidelines Section 3: Formalizing the Relationship [pp.9-12]

The feedback from the consultations conducted for this Commentary was broadly supportive of encouraging the initiation of written contracts between intermediaries and the ICC in furtherance of the aims and principles as set out in the Draft Guidelines, whilst recognizing that the definition of an intermediary is not dependent upon the existence of such a contract. Nor will the absence of a contract necessarily impact upon the assessment of “persons at risk on account of activities of the court” under Rule 87 of the Rules of Procedure and Evidence as interpreted by the ICC jurisprudence applying this provision to intermediaries.

It is important to recognize the settings where a contract in the form contemplated in the discussion below may not arise, namely, if an intermediary voluntarily contacts the ICC and

provides information that establishes an immediate link to affected communities, or when a third party such as a witness or a victim has indicated that an intermediary should be involved. It is also important to acknowledge that in some settings, security concerns may prohibit the transmission or signature of a written document, or even oral communication, discussion, and oral acceptance of contractual understandings. Persons consulted for this Commentary had creative suggestions for managing such security concerns, such as the transmission of documents to a legal representative to explain and hold the documentation on behalf of the intermediary. In some circumstances it is recognised that third parties (often themselves intermediaries) may be the only entities directly negotiating the intermediary relationship, in collaboration with the Court.

Some persons consulted in the preparation of this Commentary queried the use of the term “contract” given the connotations of employment, rights, obligations, and penalties for breach of terms. There were some suggestions that the document be referred to as a “memorandum of understanding”, “terms of reference”, “agreement” etc.

The issue of formalizing the relationship between the ICC and the intermediary is where questions surrounding the need for ICC-wide Guidelines and organ or unit specific guidelines become most apparent. Whilst it is clear that each particular intermediary will require a unique “contract” containing the specifics pertaining to each situation, the consultations conducted for this Commentary were in favour of the reference to a “standard template agreement” in relation to certain matters. It is recommended that any agreement should at a minimum perform a dual function of firstly, setting out the necessary information essential to both the ICC and the intermediary, and secondly, elaborating the specific terms for each individual relationship. For the former function, it would be crucial to have standardized explanations of the ICC and the functions of each organ or unit potentially contacting the intermediary, perhaps set out in an annex. For the latter function, although each organ or unit would most likely vary the terms according to the specifics of each individual situation, it would be possible that such

terms could be outlined in general so that matters are consistently addressed across the different ICC organs and units.

With respect to the information providing aspects of a “standard template” it is suggested that the following matters are covered:

- The general framework and the aims and principles that regulate the ICC's interaction with intermediaries as set out in the Draft Guidelines;
- Key aspects of the ICC legal process, bearing in mind the difference in legal cultures between common law and civil law setting, and particularly presenting the issue in lay persons' terms or even through illustrations in the case of non-lawyers, persons who are illiterate, or when there are language or dialect difficulties for translations;
- The different functions of the various organs and entities within the ICC, presented also in lay persons terms;
- The entity approaching the intermediary;
- The processes pertinent to the entity contacting the intermediary and sequencing following the initial contact (for example, with respect to victim related intermediaries, that first the Public Information and Documentation Service may be in contact regarding outreach, then the Victims Participation and Reparation Service is involved, followed by Office for Public Counsel for Victims or independent Counsel, then in some instances the Victim and Witnesses Unit is involved, with potential that Chambers may call the intermediary to testify);
- Obligations of confidentiality on the part of the intermediary;
- Obligations of confidentiality on the part of the Court, including full details of “worst case scenarios” with respect to information disclosure, in particular highlighting the potential of disclosure to the defence, even under the use of Article 54(3)(e);
- Legal and physical protection options and limitations, including information pertaining to “best practices” as referenced in the Draft Guidelines. Duration of potential protection

options should also be specified, where possible. Given that intermediaries may be accustomed to operating under high levels of risk, guidance may be needed perhaps through a questionnaire to identify risk indicators;

- Potential and limitations for provision of material and psycho-social support. Psycho-social support was a consistent point based on consultations for this Commentary given that many persons had suffered deep trauma as a result of activities conducted;
- Provision of contact details between the intermediary of the Court, including in emergency and non-emergency settings, and information pertaining to the relevant focal person within the relevant ICC organ or unit designated to the intermediary. Potential for a communication method that does not cost money should be addressed wherever possible;
- Sources of independent advice and support.

With respect to the specific aspects of an agreement which may differ per intermediary and per ICC organ or unit it is suggested that the standard template at a minimum cover aspects such as:

- Stipulation of the tasks to be performed;
- Start and end date of the activity (as opposed to the intermediary relationship, which can continue beyond the terms of engagement due chiefly to protection matters);
- Training on matters as set out in the Draft Guidelines, but also address concerns relating to vulnerable groups, children and gender issues. Training was consistently identified as essential before any concrete steps can be taken in implementing the intermediary relationship;
- Remuneration and reimbursement of costs, bearing in mind that any advance approval must address the issues of time pressures and the need to obtain the necessary approval in a format which is accessible to the intermediary. The “list of types of costs eligible for reimbursement” referred to on page 10 of the Draft Guidelines should be communicated in the contract. As much as possible, terms such as “may” or “might” should be eliminated in

this area such that intermediaries can have certainty on what aspects they can expect assistance. In terms of addressing any bias allegations which may arise as a result of remuneration or reimbursement, for victim-related intermediaries, reference could be made to the practicalities of implementing the Rome Statute requirement that victims shall not pay or be paid for their participation in proceedings;

- Security and protection duties, in particular the scope and duration of the ICC's protection mandate;
- Provisions for injury or loss in the course of the relationship;
- The manner and extent to which the intermediary can be expected to be informed about the impact of his/her contribution to the process and in turn advise persons with whom the intermediary has been interacting with on the ground. This typically arises where an intermediary has facilitated a victim or witness who then will approach the intermediary for feedback on the progress of the proceedings, which in turn depends on information being provided to the intermediary;
- The responsibilities which may arise in dealings with third parties, in particular victims and potential witnesses;
- Situations or activities which might create conflict of interest and/or impact future ICC proceedings;
- The right to be informed when they are implicated in disclosure or other proceedings at the Court, including communication of their intermediary number if assigned in proceedings.

Where the ICC is interacting with a secondary or mediating organization, such as an international NGO, in order to access a primary intermediary, the general feedback during consultations for this Commentary is that the "standard template agreement" should be issued separately with respect to each entity. Given the complexity of the issues raised, it may be necessary to creatively consider manners in which it can be verified that this information has been understood, whether by an ICC official or a third party (an expert NGO for example). Where the intermediary is an individual or a member of an organisation with no expertise in

human rights or related fields, the greatest of care must be taken to ensure that the intermediary is properly informed and appropriately understands the information provided.

(7) ICC Draft Guidelines Section 4: Support [pp.9-12]

We welcome the commitment that policies surrounding support will be “transparent” to the extent permitted by the particular legal exigencies of the ICC organ or unit. It is important for reasons of both transparency and effectiveness that the “level of support” which can be expected by the intermediary from the Court — personal, financial, material and training— is made clear, as the Draft Guidelines provide, “at the beginning of the contract”. However, it is important that the Draft Guidelines are amended to state: “at the beginning of the contract, *where a contract is applicable,*” since the definition of an intermediary is not dependent upon a contract. However, it was affirmed during the consultations for this Commentary that, as much as possible, these policies for support should be set out in writing and provided to an intermediary at the outset of the engagement.

We welcome the commitment in the Draft Guidelines to reimburse expenses incurred during the conduct of a particular task upon the request of the ICC. While acknowledging the need to include the clause that expenses are to be incurred only “in line with prior agreement”, flexibility is required, both in terms of how the budget for such tasks is set, and in how requests for additional expenses are handled. The Draft Guidelines should be amended to state “in line with prior agreement, *where applicable*”. The nature of the terrain within which intermediaries operate is generally such that it can be difficult to foresee precisely the costs entailed. In particular intermediaries should not suffer financially where they have had to take urgent steps to secure their safety or that of implicated third parties at costs exceeding the agreed budget. Finally the caveat “as far as the financial resources of the Court allow” should be a consideration during discussion and agreement on the nature and extent of the task to be conducted and not a criterion employed after the establishment of the intermediary relationship to limit reimbursement subsequent to the completion of the task.

(8) ICC Draft Guidelines Section 4.1: Compensation for Time / Lost Earnings [p.10]

It is recognized that each ICC organs or unit would need to assess their budgetary limitations to provide compensation for time or loss of earning, and in the context of the OTP, for example, may not be appropriate to make public since each calculation will depend on each individual, although it is recognized that this could be ultimately disclosable to the Defence. Within each ICC organ or unit, however, standard policies on compensation should be internally agreed, consistently applied, and regularly reviewed.

The decision by the ICC to offer compensation to an intermediary should be based on the following criteria: the specialist nature of the task, the intensity and duration of the task, and interference with the intermediary's livelihood, main business, or ability to conduct his or her family or community life. It should also be noted that the receipt by an intermediary of support from a third party for the conduct of an intermediary task, whether upon request from the Court to the third party or otherwise, should not impact the nature of the relationship with the Court, or the rights, responsibilities and duties of care set out in the Draft Guidelines.

(9) ICC Draft Guidelines Section 4.2: Reimbursement of Expenses [p.10]

We support the provision in the Guidelines that the schedule of eligible reimbursement of expenses should be applied consistently across the organs and units. We agree that in general reimbursement should be agreed with an intermediary "in advance and in writing". However, due to the context within which intermediaries work on the ground, and the short time-frame which may often be provided for the completion of some tasks, we suggest that agreements relating to expense reimbursement need not necessarily be in advance in writing on every occasion, as set out in the section above relating to contracts.

(10) ICC Draft Guidelines Section 4.3: Material Support [p.10]

The primary concern expressed during consultations for this Commentary concerned the use of terms such as “might” or “may” with reference to the provision of support to intermediaries. Although recognising budgetary or other constraints, materials essential for the effective and safe conduct of the requested task, in particular those required to ensure the security and safety of the intermediary, implicated third parties and the confidentiality of information, **must** be provided by the organ or unit requesting the service, whether directly or through a third party as confirmed by the ICC. An assessment of the need for material support must be part of the negotiation of the intermediary engagement by the ICC.

(11) ICC Draft Guidelines 4.4: Capacity Building [p.11]

We welcome the commitment in the Draft Guidelines to provide training and technical assistance as appropriate to ensure that intermediaries are equipped to effectively and safely carry out the requested task. The consistent feedback from the consultations conducted for this Commentary was that it is essential that this training is conducted in advance of the conduct of the intermediary task. Training should be sure to mainstream gender issues and address vulnerable groups such as children.

The ICC should ensure that intermediaries are trained such that they are aware of and able to conduct themselves in line with good practices, particularly relating to security and confidentiality.

It is recognized that in addition to standardised training packages, some intermediary engagements may require the development of specialized, situation-based protocols and documentation whether to effectively and lawfully carry out the task (e.g., receipt of instructions, management of chain of custody) but also to ensure security and confidentiality in

the particular circumstances. OTP intermediaries, for example, may require specific training, including in techniques relating to approaching and handling potential witnesses. Agreement on appropriate protocols for follow-up with, and response to questions from, interlocutors may also be required.

(12) ICC Draft Guidelines Section 4.5: Psycho-social Care and Support [p.11]

During the consultations in drafting this Commentary, the need for psycho-social care for intermediaries working with victims and witnesses was particularly emphasized as a matter that appears to be underappreciated to date. Due to the multiple threats to which intermediaries may be exposed, in addition to stresses and responsibilities created by interacting with victims and witnesses, intermediaries are often acutely in need of psychosocial care and support. While welcoming the ICC's recognition of the referral role of the ICC, we would suggest in appropriate cases, e.g. where such provision goes to the heart of the effective and safe completion of the requested intermediary task itself or where the intermediary has suffered or is likely to suffer significant psychological harm as a result of fulfilling the tasks assigned to him/her by the ICC, that such care be provided for directly by the ICC.

(13) ICC Draft Guidelines Section 5.1: ICC Duties of Security and Protection [p.12]

We welcome the inclusion of an express duty of protection on the organs and units of the ICC to "prevent or manage security risks to intermediaries, resulting from the intermediaries' interaction with the Court and the fulfilment of the intermediaries' functions on behalf of the Court." It is noted that this does not go so far as to provide protection to intermediaries per se, however, limits protection to situations where certain causal conditions are met. It is recommended firstly that the two causal conditions should be disjunctive, namely, the intermediaries interaction with the ICC *or* the fulfilment of the intermediaries functions. Secondly, the Draft Guidelines should state clearly that the jurisprudence of the ICC has

clarified that in certain circumstances intermediaries or third parties implicated by the work of intermediaries who are either potential witnesses or who are “persons at risk on account of the activities of the Court” can be considered eligible for measures of both legal and physical protection in appropriate cases, including through referral by the relevant ICC organ to VWU. Thus, persons associated with intermediaries (since the intermediaries are conducting activities of the ICC), could also be protected. Finally, it is important for the Draft Guidelines to require that ICC staff duly explain all options for protection and respond to questions or concerns of intermediaries, including on other avenues of recourse should a determination be made that protective measures (redactions, relocations or otherwise) are not required in particular circumstances.

(14) ICC Draft Guidelines Section 5.2 & 5.5: Risk Assessment & Protective Measures [p.12]

Risk assessments, the taking of preventive measures, and the putting in place of security and communication protocols, must be part of each intermediary engagement, to the extent required by the nature of the relationship. We welcome the provision in the Draft Guidelines that Individual Risk Assessments (IRA) will be carried out prior to engagement with an intermediary and that these will indicate “conditions which must be employed by an organ or unit of the Court or Counsel to assist in preventing or managing an identified risk”. It is highly recommended that each intermediary’s IRA is reviewed on a periodic basis and also when required due to changes in conditions.

We welcome the recognition in the Draft Guidelines that intermediaries should be informed about the risks and implications of their relationship with the ICC. In addition to the provision of information relating to disclosure and confidentiality set out above, it is suggested that this undertaking to provide information include the following:

- A commitment to share with the intermediary those aspects of the IRA which would assist the intermediary to take steps to more effectively enhance his or her security, where such sharing of information does not undermine the ICC's function or legal obligation;
- Inclusion of the "conditions which must be employed by an organ or unit of the Court or Counsel to assist in preventing or managing an identified risk" identified by the IRA in the contract or agreement negotiated with the intermediary, to the extent possible and appropriate;
- Provision of notice to an intermediary of any change in the IRA assessment, which would assist the intermediary to better take preventative security measures, where sharing of such information does not undermine the ICC's function or legal obligation;
- Provision of notice to an intermediary of situations in which he or she becomes the subject of proceedings which contains implications for his or her protection or security e.g., request for lifting of redactions/ disclosure with respect to the identity or function of the intermediary or a third party to which he or she can be assumed to have a duty of care;
- Provision of an emergency contact number which the intermediary can call in the event of threats or other apprehensions of harm being received or perceived;
- A laypersons description of the scope of legal and physical protection measures available should be provided to the intermediary at the outset of the engagement, clearly delineating the actors responsible for, and procedures for pursuing the implementation of, such measures, including the availability of independent advice and counsel.

It is recognized that protection matters are subject to the evolving jurisprudence of the ICC. However, it is proposed that the following undertakings could be addressed in the Guidelines:

- The ICC should endeavour to employ equivalent risk assessment standards across the organs;
- The fact that an intermediary has a high public profile on issues of international justice, or has spoken publicly about his or her support for the work of the ICC, should not be an

automatic basis for denying the existence of a link between the perceived risk and the implementation of the intermediary functions;

- Based on the definition of an intermediary, the fact that an intermediary has not been assigned an intermediary number for purposes of ICC proceedings, or has worked through a secondary intermediary, should not on its own constitute grounds for a finding of a lack of 'linkage' between the ICC and the work of the intermediary, or for a lack of linkage between the apprehended harm and the intermediary;
- The existence of legal protection measures should not be determinative with respect to the need not to provide physical protection: assessments of intermediary risks must be practical, contextually grounded and realistic. In situations where suspicion of ICC cooperation falls only on a small number of actors, for example, even redacted materials may bear the unmistakable hallmark of a particular intermediary's work;
- Measures taken by an intermediary to appropriately secure his or her own protection, such as, for example, the exercise of temporary relocation, including in cooperation with third parties, should not undermine ICC obligations with respect to providing relevant protective measures.

(15) ICC Draft Guidelines Section 5.3: Prevention and Limitation of Risk [p.13]

Where an intermediary task is particularly complex or requires the taking of unusual risks, risk management training should be provided to the intermediary. Protocols must be agreed setting out the appropriate emergency procedure responses of both the ICC and the intermediary in the event that the danger manifests. Consideration should be given to the sharing of elements of the ICC wide VWU guidelines which are being developed and involvement of the VWU in the delivery of this training.

(16) ICC Draft Guidelines Section 5.4: Confidentiality Measures [p.13]

As addressed above in this Commentary relating to Section 1 of the Draft Guidelines on the duty to disclose the dual status of an intermediary working with different organs, there will be a need for the ICC to institute procedures to ensure that there is coordination between ICC organs such that the appropriate protection measures are taken.

It is understandable that the ICC may wish to disengage from an active intermediary relationship if there has been a persistent and unjustified lack of compliance with good practices which duly communicated and able to be implemented. Disengagement by the ICC should not, however, negate an obligation to employ protective measures required by the circumstances created by the tasks conducted and any such disengagement process should be subject to a dialogue with the intermediary concerned.

(17) ICC Draft Guidelines Section 6: Monitoring [p.14]

Monitoring is necessary for effective application and development of the Guidelines. Monitoring should involve regular consultation with intermediaries, including with NGO structures created to reflect the views and experiences of NGO intermediaries. It is recommended, therefore, that the ICC maintain the Working Group that was established to draft these Guidelines. To that extent, the Working Group can monitor the implementation of the Guidelines on a continual basis. It could also be a forum for information sharing relating to the individual Guidelines to be issued by appropriate organs and units. It is also recommended that the subject of intermediaries be included in NGO briefings and diplomatic briefings organized by the ICC such that updates and experiences can be shared.
