
‘They told us we would be part of history’

Reflections on the civil society intermediary experience
in the Great Lakes region

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Introduction

The adoption of the Rome Statute marked the foundation of a new kind of international justice. With the elevation of victims as trial participants and the acknowledgement of the role of civil society, ‘victims of unimaginable atrocity’¹ were no longer to be mere beneficial objects, but also, at least in theory, active subjects of international criminal justice. In the early years of the Court, generally enthusiastic engagement by local non-governmental organisations (LNGOs) and networks of civil society organisations around victim participation processes and investigations in the first situation countries in the Great Lakes region, with the exception of Uganda, seemed to confirm this vision. Often heavily encouraged and supported by international NGOs (INGOs),² these local interlocutors took on more weight, importance and authority than they ever had in the context of the ad hoc tribunals for Rwanda and the former Yugoslavia.³ Against the background of the International Criminal Court’s (ICC) constantly expanding jurisdiction, they collaborated intensively across the organs as mediators for, and ‘interpreters’ of, the work of the Court with, and in relation to, communities in situation countries.

¹ Preamble, Rome Statute.

² INGOs such as Redress, Global Rights, Federation Internationale des Droits de l’homme, No Peace Without Justice, Human Rights Watch, the Women’s Initiative for Gender Justice and the Open Society Justice Initiative were at the forefront of this groundbreaking work.

³ For an account of this latter engagement by intermediaries in the prosecutorial context, see E. Baylis, ‘Outsourcing Investigations’, *UCLA Journal of International Law & Foreign Affairs* 14 (2009), 121, 126–130.

The involvement of these local organisations and individuals quickly became critical to the evolution of a new type of actor on the ICC stage: the ‘intermediary’. Despite their extensive engagement in operations, however, the role of intermediary was not explicitly envisaged in the Rome Statute. The word ‘intermediaries’ in fact appears only once in the core ICC framework documents.⁴ A comprehensive and precise definition of these ‘informal agents of the Court’⁵ remains elusive. The most recent official attempt describes an intermediary as,

[S]omeone who comes between one person and another; who facilitates contact or provides 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.⁶

It is clear, however, that not all who fulfil this definition are considered to be ‘intermediaries’ in different contexts and for different purposes. As the discussion below will illustrate, there are fundamental conceptual, legal and perhaps ideological tensions, which make agreement on the definition of an intermediary and the implications of such a designation contentious both inside and outside the Court. As has been recognised, ‘it is the complexity of the diversity of the situations with which the ICC is faced (rather than an ideological commitment to broader engagement as such) that has motivated the ICC’s turn to intermediaries’.⁷

The variety of roles played by intermediaries has particularly complicated efforts to encapsulate and manage their place in the process of investigation and trial. While the contours of individual participation as a victim or witness are ultimately controlled by the organs and judges of the Court,

⁴ Regulation 97 (1) of the Regulations of the Registry refers to the Registry’s obligation to take, ‘all necessary measures within its powers to ensure the confidentiality of communications’, including those ‘between the Court and persons or organisations serving as intermediaries between the Court and victims’. In addition to this reference, the Regulations of the Trust Fund for Victims (TFV) provide that intermediaries may be used in facilitating the disbursement of reparations awards and the implementation of collective awards. Regulations 67 and 71, Regulations of the Trust Fund for Victims, Resolution ICC-ASP/4/Res.3, adopted 3 December 2005.

⁵ C. De Vos, ‘Case Note: “Someone who comes between one person and another”: *Lubanga*, Local Cooperation and the Right to a Fair Trial’, *Melbourne Journal of International Law*, 12 (2011), 1, 2.

⁶ See ‘Guidelines governing the Relations between the Court and Intermediaries: for the Organs and Units of the Court and Counsel working with intermediaries’, ICC (March 2014), 5 (‘Guidelines 2014’).

⁷ E. Haslam and R. Edmonds, ‘Managing a New “partnership”: “Professionalization”, Intermediaries and the ICC’, *Criminal Law Forum*, 24 (2013), 49.

engagement as an intermediary, as a critical valve between the ICC and the community, presents an opportunity to engage strategically *before* a case goes to trial. This potentially impacts both the course of investigations and the nature of victim participation, from the inside and from the outset.⁸ Through tasks such as sharing information on international crimes, identifying witnesses and facilitating victim participation, many intermediaries go beyond providing a mere 'link' to the ground, actively shaping the narratives emerging about the situation itself.⁹ Enjoying this locus of apparent agency vis-à-vis the Court in the early years, many local civil society intermediaries grew to see themselves as critical partners – and perhaps even as equal partners – in the international justice project.

Towards the end of 2007, however, as the ICC began to face increasing challenges both inside and outside the courtroom, intermediaries came under attack. As the most visible and accessible faces of the Court on the ground, these assaults on intermediaries came from all sides: not just from those hostile to the effort to hold perpetrators accountable, but also from victim communities frustrated and disappointed with the lack of change in their daily circumstances. When the conduct of intermediaries was placed under judicial scrutiny in the ICC's first trial of Thomas Lubanga, intermediaries also found themselves portrayed as betrayers of trust, both of local communities and of the cause of international justice itself. At the same time, in different situation countries on the ground, intermediaries and their families were facing assault, imprisonment, torture and exile. As intermediaries fled for their lives, the responsibility and capacity of the Court to protect those who had taken serious risks on behalf of its operations were called into question.

Civil society intermediaries in many situation countries felt abandoned and disappointed. Not only were they under attack, but also they were grappling with an inconsistent – and unwritten – Court policy and practice, and an institution that seemed reluctant to acknowledge the full extent of their suffering. Even in its public pronouncements, the Court strived to minimise the reality, with Prosecutor Luis Moreno-Ocampo

⁸ Participating as a witness or victim can certainly shape the narrative at the Court in the early ICC cases; for example, a significant number of those who came to the court as participating victims were subsequently invited to become witnesses.

⁹ NGO intermediaries, for example, sometimes deliberately sourced certain categories of witnesses and victims. The work of the Women's Initiative for Gender Justice and the Sudan International Defence Group illustrate two modes of engagement in this regard.

adamant in his assertion (as late as 2009) that ‘no one ha[d] been harmed as a result of their work with the Court’.¹⁰

Eventually, the Court did begin an internal process to redress the gaps in the regulatory framework. In April 2012, the text of ‘Draft Guidelines Governing the Relationship between the Court and Intermediaries for the Organs and Units of the Court and Counsel Working with Intermediaries’ was agreed. It was only two years later, however, in April 2014 that a slightly amended version of this document (the ‘Guidelines’) was finally published on the Court’s website. Although publication of the Guidelines is welcome, the circumstances and form in which they have been issued are unlikely to fully address the confusion that has plagued intermediary engagement to date. With new situations under examination and investigation, the circle of intermediary engagement is only going to expand. Deliberate and thorough ‘road-testing’ of the Guidelines, anchored to a transparent review procedure, is urgently needed.

This chapter overviews the evolution of the role of local intermediaries in ICC operations and their gradual emergence as players before chambers, eventually becoming the fulcrum upon which the very existence of the ICC’s first trial turned. Drawing on aspects of the experience of intermediaries in the first five situation countries, it offers some reflections on the impact of this engagement upon intermediaries themselves, on their relationship with the Court and with their communities, and with the idea and reality of ‘international criminal justice’ more broadly.¹¹ The chapter has three parts: it first sets out some of the key elements of the nature of ICC and intermediary engagement to date; it then traces a genealogy of this relationship with reference to key jurisprudence, policy and practice; and finally, it examines the framework that has been developed in response to this experience, namely the Guidelines. The chapter ends with some reflections on how the evolution of the intermediary role is challenging some of the assumptions underpinning international criminal justice itself.

This account of intermediary experiences does not purport to be comprehensive; it is grounded in observations gleaned during personal

¹⁰ Notes of meeting attended by author in The Hague in October 2009. This was even after the prosecutor had made public reference in a speech to the UN Security Council to individuals who had been detained and tortured in Sudan ‘on account of their work with my office’.

¹¹ The reflections in this chapter were developed by the author while working at the International Refugee Rights Initiative (IRRI), in partnership with the Open Society Justice Initiative (OSJI).

interaction with intermediaries in the Court's first five situation investigations between 2007 and 2013.

New subjects of the international criminal justice process?

The work of civil society across the globe was critical to the creation of the ICC and the first decade of its operation. Through coordinated advocacy and action, NGOs – almost wholly INGOs – were major players in the drafting of the Rome Statute and influenced the final version to a degree then unique in treaty negotiations.¹² Since the Statute entered into force, NGOs, again particularly INGOs, have led and participated in intensive ratification and domestication campaigns and promoted the principle of complementarity. Groups of INGOs and local NGOs working together were at the origin of the first referrals and the evolution of the Court's caseload through vigorous human rights-monitoring initiatives and through sharing information with the Court and the international community.

Once proceedings began in The Hague, NGOs were successful in influencing the direction of investigations and trials through the submission of *amicus curiae* briefs and the identification of, and support to, victims as part of building the Court's arguably ground-breaking victim participation process. NGOs continue to work with victim groups and submit information on international criminal law violations as they are alleged, allowing the Court to respond quickly through preliminary analysis and examinations where appropriate, in theory, helping to prevent the escalation of situations where atrocities are occurring. As was made clear by the Office of the Prosecutor (OTP) in 2009,

None of the Office of the Prosecutor's objectives could be met without this permanent interaction with NGOs at all stages of its activities: development of policies and practices, crime prevention, promotion of national proceedings, monitoring, preliminary examinations, investigations, prosecutions, cooperation, and efforts to maximize the impact of its work and promote its understanding by victims and affected communities.¹³

The text of the Rome Statute itself recognises civil society as part of the community of actors charged with achieving its objectives. In the context

¹² See M. Glasius, *The International Criminal Court, A Global Civil Society Achievement* (Abingdon: Routledge, 2005).

¹³ 'OTP Prosecutorial Strategy 2009–2012' (Draft), 18 August 2009, para. 53. The final version of the strategy, published in 2010, contains a slight change in language at the equivalent para. 66: 'The Office's interaction with local and international NGOs is relevant at all stages of its activities.'

of initiating *proprio motu* investigations, Article 15 (2) of the Statute, for example, permits the prosecutor to 'seek additional information from . . . intergovernmental or non-governmental organisations, or other reliable sources'. Article 44 (4) notes that the Court may 'employ the expertise of gratis personnel offered by States Parties, intergovernmental organizations or non-governmental organizations to assist with the work of any of the organs of the Court'. The Court is also free to accept funds and voluntary contributions from 'international organisations, individuals, corporations and other entities' (Article 116). Where they have a representative function, civil society and NGOs can also be viewed as included within the references in the Statute to 'victims' and 'victim communities', in some circumstances. The requirement to take into account 'the interests of victims' pursuant to Article 53 (1)(c), for example, can be envisaged as involving consultations with local civil society.¹⁴

The role that NGOs and civil society play in terms of the daily operation of the Court – including taking on tasks that are conducted (or could be conducted) by Court staff – is little reflected, however, in the few references to NGOs or 'other entities' in the Statute. The reality is that civil society – most particularly local civil society organisations, often through the facilitation of an INGO partner – has been an essential partner for all organs of the Court, involved in outreach, investigations, victims' participation and even, in some cases, assisting with the protection of witnesses, victims and others at risk. NGOs and individual members of civil society have engaged with the organs of the Court across a broad spectrum of tasks: disseminating information on the Court's operations, collecting information on the commission of international crimes, advising on outreach strategy, helping defence counsel to locate experts, negotiating access to high-level insider witnesses, acting as 'first responders' for victims and witnesses under threat and participating in radio panels with Court staff.

This extensive engagement and its implications for the ICC's operations were little contemplated at the outset of the Court's work: as noted

¹⁴ The OTP acknowledged, for example, that in the context of Article 53, 'Understanding the interests of victims may require other forms of dialogue besides direct discussions with victims themselves. It may be important to seek the views of respected intermediaries and representatives, or those who may be able to provide a comprehensive overview of a complex situation. This may include local leaders (religious, political, tribal), other states, local and international intergovernmental and nongovernmental organizations.' See Section 5 (5), 'Policy Paper on the Interests of Justice', Office of the Prosecutor, ICC (September 2007).

above, the word ‘intermediaries’ only appears once in its formal framework. Initially, when intermediaries were referred to in proceedings it was in discussions around the proper completion of victim participation applications or the context of applications for redactions of witness statements. It was the Lubanga trial, however, which brought to light the extensive the role that intermediaries have been playing on the ground in the conduct of essential tasks for the Court.

The realities of intermediary engagement

There are a number of key aspects of the intermediary role which are important for understanding how the relationship of intermediaries with the ICC unfolded and, indeed, subsequently, at least partially, unravelled.

Unlike the ad hoc tribunals, which were set up for particular situations and thus able to deepen their contextual knowledge and internal expertise over time, the ICC is constantly engaging in new places. The OTP preliminary analysis can one day be working on the situation in the two Koreas, and the next day in Mali. As it embarks on a new investigation with generally little background and few contacts on the ground, local interlocutors become essential to the Court’s operations.¹⁵ At one point the prosecutor even called the use of intermediaries ‘best practice’, explaining that intermediaries could ‘undertake tasks in the field that staff members cannot fulfil without creating suspicion; they know members of the community, and they have access to information and places that are otherwise unavailable’.¹⁶ De Vos has argued that the OTP in fact deliberately designed its evidence-gathering practices, ‘to minimize the time investigators spend in affected communities, and their degree of engagement with local actors’.¹⁷ It is likely, therefore, that the ICC will increasingly rely on intermediaries as it increases its reach and its budget decreases in real terms in relation to the number of cases and situations before it.

As noted above, the current Guidelines definition of ‘intermediary’ pivots on the notion of a ‘link’ between the Court and others it must engage with on the ground. Although in many respects this conception is apt, the passivity of the notion fails to capture the variety of intermediary

¹⁵ There have nevertheless been suggestions that those who assist the OTP during the preliminary analysis stage cannot be considered intermediaries.

¹⁶ Redacted Decision on intermediaries, *The Prosecutor v. Thomas Lubanga Dyilo* (‘Lubanga’) ICC-01/04-01/06, Trial Chamber I, ICC, 31 May 2010.

¹⁷ See C. De Vos, ‘Investigating from Afar: The ICC’s Evidence Problem’, *Leiden Journal of International Law*, 26 (2013), 1009.

profiles and the breadth of tasks that they conduct.¹⁸ Intermediaries may come from all sides and strands of the community in a situation country. They can be political figures, rebel army representatives, local tribal leaders, teachers and professors, deserters from government forces or government officials acting in their private capacity.¹⁹ They will have a range of motivations from the politically partisan, to the ideological, financial and even, in some instances, revenge. Some intermediaries come to the ICC spontaneously (they may approach the Court to communicate on behalf of victim communities), while others are contacted by the Court because of their specific expertise. The majority of intermediaries, however, are staff of LNGOs or members of civil society networks working in the human rights or social justice field. These groups of intermediaries tend to identify most deeply with the ostensible objectives of the ICC and have also generally seen themselves as allied with the prosecution. It is local civil society and LNGO intermediaries who have also shouldered the greatest burdens as intermediaries, whether in terms of the multiplicity of tasks they have conducted, or through their position on the front lines of the broader national and regional battles around the legitimacy and impact of the Court.

The country and NGO contexts within which civil society intermediaries operate have been quite different: in Kenya, for example, the civil society movement has a very different history and set of capacities than its analogue in the Central African Republic. At the same time, where the pool of individuals with the necessary skills, interests and political courage to assist the Court is small, a few intermediaries often find themselves playing different roles for different sections and organs of the Court. This can complicate both the framework of the intermediary relationship with the ICC as well as relationships between the organs of the Court itself. It can also raise questions surrounding confidentiality and security.²⁰ Multiple roles may also be played by intermediaries in the proceedings

¹⁸ This chapter does not address the critical ethical and accountability questions that arise for NGOs, both LNGOs and INGOs, in relation to their own communities and constituencies – and to each other – while performing the intermediary role. This issue requires urgent attention by civil society.

¹⁹ Creating intermediary relationships with such individuals can raise complex conflict-of-interest issues and can have political implications for the Court.

²⁰ In *Lubanga*, for example, the defence argued that the fact that one intermediary had worked for both the Victims Participation and Reparations Section (VPRS) and the OTP undermined his impartiality and independence. See Redacted Decision on the 'Defence Application seeking a permanent stay of proceedings', *Lubanga*, ICC-01/04-01/06, Trial Chamber I, ICC, 7 March 2011.

themselves. In the *Lubanga* case, for example, a number of intermediaries eventually became key witnesses in the trial. Some were also victim participants, illustrating the close relationship between conflict-affected individuals and communities, and those who were carrying out work as 'intermediaries'.

Related to these realities, there is often a tension in the intermediary relationship between the Court's desire to benefit from local perspectives, access and expertise and its concern that local interests, whether political, financial, security-related or opportunistic, will tarnish the products of that relationship. The idea that local interlocutors should function as mere volunteers of the Court divested of their own politics or interests is prevalent.²¹ It would be natural that those working on behalf of the Court on the ground see financial or political opportunities in ICC interventions: the ICC generally arrives into situations of severe economic and conflict deprivation and Court staff and others in the international justice community enjoy relatively large salaries. These latter conditions of privilege are directly linked to the suffering of those whose cooperation they now seek. In this light, the extent to which local civil society intermediaries have been willing to engage without question of reward is remarkable. Indeed, intermediaries usually provide their services voluntarily to the Court. In certain circumstances, the basic costs associated with the intermediary task may be reimbursed, whether by the Court or one of its partners, such as, for example, an INGO through the operation of a special project. The Court directly remunerates intermediaries in extremely few circumstances. In the whole of 2012, for example, the total remuneration payments made to intermediaries by the OTP was €5,490.²² ICC judges have particularly lauded the cost-saving elements of the intermediary function, with Judge Ušacka declaring that 'intermediaries who assist [victim] applicants in accessing the Court are essential to the proper progress of the proceedings'.²³

The role of local civil society in the work of the Court has sometimes been obscured by the need to maintain confidentiality in difficult security

²¹ It is interesting that the political, ego or careerist ambitions of others in the international justice constituency do not appear to attract the same degree of suspicion and scrutiny.

²² See Second Report of the Court on the financial implications of the draft Guidelines governing the relations between the Court and Intermediaries, ICC-ASP/12/54, 30 October 2013, para. 9.

²³ Decision on the Applications for Participation Filed in Connection with the Investigation in the Democratic Republic of Congo by Applicants, *Situation in the Democratic Republic of the Congo*, ICC-01/04, Pre-Trial Chamber I, ICC, 11 April 2011, para. 25.

contexts, but also as a result of the more vocal public positioning of INGOs. INGOs have played very active intermediary roles themselves, in many cases initiating, bridging and directing the relationship between local NGOs and civil society and the Court. In these cases the INGO tends to take the role of principal interlocutor with the Court, reducing the risks that might be assumed by the local NGO but also helping to ‘manage’ what emerges from the ground. In this regard, INGOs are often viewed as the senior or lead intermediary, assumed to have the greater knowledge about the needs of the particular Court organ or process.²⁴ This dislocation of the local from The Hague – however well intentioned – has sometimes created complications. Although NGOs may be united around the same general principles and objectives, how these are interpreted in the situation country may vary. Local civil society and INGOs will usually have very different interests in the dynamics of power, access and resources that attend the Court. These diverse dynamics have affected how elements of ‘global civil society’ have understood, and acted in relation to, the Court’s activities and pronouncements, often with negative consequences for intermediaries on the ground.

Tracing the relationship: from enthusiasm to stasis

There are three main phases that can be discerned in the evolution of the relationship between local intermediaries and the Court in the first five situation countries.²⁵ The first phase was generally characterised by enthusiasm and energy, the second by disappointment and retreat, and the third by mutual wariness and efforts to corral intermediaries through regulation.

During the first phase, with the OTP and other organs of the Court actively entreating partnerships, NGOs responded generously, little questioning the wisdom of participating in investigations or the possible consequences.²⁶ In

²⁴ As Kendall and Nouwen have noted, ‘Those who work in and around the Court are presented by the field of international criminal law as the field’s actual agents. They consider themselves part of another abstraction: the “international community.”’ See S. Kendall and S. Nouwen, ‘Representational Practices at the International Criminal Court: The Gap between Juridified and Abstract Victimhood’, *Law and Contemporary Problems*, 76 (2014), 235.

²⁵ This is despite the fact that in each specific country context, the political tone of investigations and the nature of the NGO community differed greatly.

²⁶ It should also be noted that the enthusiasm of local NGOs was sometimes driven by complex motivations and often shaped heavily by outside forces, financial and ideological. For an excellent exploration of these issues, see L. Hovil and M.C. Okello, ‘Editorial Note, Civil Society, Social Movements and Transitional Justice’, *International Journal of Transitional Justice*, 5 (2011), 333.

parallel on the ground, in local communities where the ICC was focused, there was considerable expectation around the transformative potential of both investigations and the victim participation process. All this local support was infused with the ideological and financial commitment of a group of INGOs which had invested much in the creation of the Court and was now determined to see its first investigations bear fruit.²⁷ The one exception to this atmosphere was Uganda, where local NGOs were overwhelmingly resistant to the entry of the Court into the conflict dynamic, despite considerable pressure by INGOs and others to promote the engagement of the Court.²⁸

As a result of this sense of joint mission, intermediaries, their communities and sometimes even ICC staff saw intermediaries as emissaries of the Court on the ground. This identification with the Court would later prove problematic when the relationships fissured and it became clear that roles and responsibilities sometimes led in different directions.²⁹ In this heady atmosphere there was also little reflection by intermediaries on the complexities and dangers of engaging as active partners with the Court, both personally and for their communities. International justice was invested with huge expectations, interwoven with assumptions about the capacity of the international community and its mechanisms to deliver political transformation. As one intermediary put it, 'they told us we would be part of history'. This fever of expectation not only seized local and INGOs but also affected the Court itself. As a result, at an operational level there was little sober assessment of risks, responsibilities and necessary mitigating measures. As the years went by and there was little movement in judicial proceedings, not least with respect to arrests, conflict-affected communities in many places became restive. As the on-the-ground interlocutors for the Court, intermediaries bore the brunt of the discontent, especially as tensions around the work of intermediaries also came to the fore in The Hague.

²⁷ Baylis notes, for example, that one of the drivers for the 'increasing significance of third party investigations' is the fact that NGOs and the United Nations have consciously decided to 'train for and carry out extensive inquiries into atrocities specifically for the purpose of providing evidence for prosecutions in the new internationalized courts'. See, Baylis, 'Outsourcing Investigations', 126.

²⁸ See for example, 'A Poisoned Chalice? Local civil society and the International Criminal Court's engagement in Uganda', Discussion Paper 1: Just Justice? Civil Society, International Justice and the Search for Accountability in Africa, International Refugee Rights Initiative (October 2011).

²⁹ In one case encountered by the author, an intermediary who had assisted both the VPRS and the OTP was distressed when he discovered that the OTP had challenged the participation applications of certain victims.

Prosecutor v. Lubanga: intermediaries in the spotlight

The management of the relationship between the Court and intermediaries threatened to derail twice in the ICC's first trial: first as a result of the debacle surrounding the use and disclosure of material received confidentially by the prosecutor under Article 54 (4)(e) and later with respect to allegations of intermediary misconduct and interference with witness testimony.³⁰ The first issue that arose centred on the OTP's investigative strategy and the use of Article 54 (3)(e) confidentiality agreements under which the prosecutor can agree not to disclose information received in certain circumstances.³¹ As proceedings unfolded, it became clear that a significant amount of information had been collected by the OTP under the confidentiality seal of Article 54 (3)(e). The chamber found that the provision had been used to obtain evidence to be used at trial, rather than to generate new evidence.³² This, it said, constituted 'a wholesale and serious abuse, and a violation of an important provision which was intended to allow the prosecution to receive evidence confidentially, in very restrictive circumstances'.³³ In June 2008, the judges ordered the suspension of proceedings and the release of Mr Lubanga. It seemed very possible that the trial would collapse, causing huge concern on the ground for intermediaries and victim communities.³⁴

³⁰ For an account of some of the key decisions dealing with intermediary issues in the *Lubanga* case, prior to the final judgment, see De Vos, 'Case Note, "Someone who Comes Between One Person and Another"'.

³¹ Article 54 of the Rome Statute addresses, 'the duties and powers of the Prosecutor with respect to investigations'. Sub-section (3)(e) particularly provides that the prosecutor may 'agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purposes of generating new evidence, unless the provider of the information consents'.

³² By the end of the case it had emerged that the use of intermediaries in the case had been extensive: half of the OTP's witnesses had been contacted through seven intermediaries. The intermediaries employed had a wide variety of backgrounds from officers in the Congolese intelligence service to victims groups and they had engaged across various organs of the Court. A matter of grave concern for NGO intermediaries, it was also determined that three intermediaries might have persuaded a number of witnesses to provide partial or false evidence.

³³ Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled 'Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54 (3) (e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008', *Lubanga*, ICC-01/04-01/06 OA 13, Appeals Chamber, ICC, 21 October 2008, para. 12.

³⁴ See International Refugee Rights Initiative, 'ICC Decides to Release Lubanga; Prosecution Appeals', *Refugee Rights News*, 4:5 (July 2008).

As the matter went on appeal, local intermediaries and others who had provided the material under Article 54 (3)(e) – primarily NGOs and the United Nations Mission in the Democratic Republic of Congo, under the United Nations’ relationship agreement – became the focus of intense efforts by the OTP to secure confidentiality waivers which would permit transmission of materials to the defence. Suddenly, intermediaries, who until then had rarely figured in Court proceedings other than during examination of victim participation applications, became central to the continuation of the ICC’s first case. Civil society intermediaries became the objects of strong pressure, not only from the OTP to waive confidentiality, but also from others demanding that they *refuse* to cooperate. Some intermediaries who were perceived to have assisted the prosecutor were attacked and others were driven into exile. Meanwhile, the Appeals Chamber upheld the suspension but stayed Lubanga’s release. In November 2008, after the OTP had secured the necessary disclosure agreements, the trial commenced.

When the case moved into the defence phase of proceedings, however, the work of intermediaries was once again pushed centre stage as Mr Lubanga’s counsel indicated that he would seek dismissal on grounds of abuse of process. In particular, it was claimed that intermediaries had been involved in making payments to witnesses to induce testimony and then issuing threats to cover up the fraud.³⁵ As Judge Fulford noted in a rather testy exchange with the prosecutor’s representative in 2010, ‘The integrity of the intermediaries and their role is now a critical ingredient of this trial.’³⁶ Disclosure of the identity of intermediaries was sought, resisted and ultimately granted. Intermediaries ended up on the witness stand, becoming the pivot for the continuation of proceedings once again. In parallel use of intermediaries by the defence was also a focus of allegations by the OTP.³⁷

Ultimately, the Court did order the disclosure of intermediary identities and requested the OTP to give evidence on the use of intermediaries by the prosecution, revealing for the first time the extent and nature of their role. The Court subsequently found that although the use of intermediaries had raised serious issues and the exclusion of testimony was

³⁵ ‘Lubanga witness says he was paid \$200 to tell lies’, International Justice Monitor, *Lubanga Trial Website*, 8 February 2010, available at www.ijmonitor.org/2010/02/lubanga-witness-says-he-was-paid-us200-to-tell-lies/.

³⁶ Trial hearing 12 March 2010.

³⁷ The extensive use of intermediaries by the prosecution in the *Chui* and *Katanga* proceedings also drew censure from the Court and many of the same issues played out in defence and prosecution motions.

ordered, the circumstances as a whole did not reach the threshold for a stay of proceedings. The centrality of the intermediary issue to the trial was starkly demonstrated in the 125 pages of the final judgment that were devoted to it.

Attacks on intermediaries on the ground

At the same time as intermediaries were in the judicial crosshairs in the Lubanga case, they were also coming under fire from their own communities. Some were concerned that the proceedings in The Hague had done little apart from emboldening the perpetrators. Intermediaries were also attacked by those hostile to efforts to seek accountability for heinous crimes. As a result, and despite the reluctance by the Court to acknowledge it, many LNGOs and civil society actors, and particularly civil society intermediaries, suffered greatly for their collaboration – perceived and actual – with the Court. This took the form of harassment, detention, torture, attacks and sexual crimes against family members, dissolution of organisations, forced displacement and killing. Instances of such conduct occurred in all five situation countries.

The increasingly poisoned atmosphere around intermediaries was also complicated by the bitter contestation under way within the African Union (AU) around the role of the ICC, spurred by the issuing of an arrest warrant for the Sudanese president Omar Al Bashir and, subsequently, the charges brought in the Kenya case. The opposition to the Court being fanned in Addis was a major reversal in the Court's fortunes in Africa, which had seen significant Rome Statute ratification, three state-initiated referrals and (at the time) was the site of all of the Court's situation investigations. The charged political atmosphere affected local civil society on the ground, with rifts deepening around the role of the AU, the political posturing of the then prosecutor, and the appropriateness of any criticism of the Court.

The debate among African civil society organisations working on the ICC, and particularly those engaging in regional and sub-regional debates, became polarised. There was significant pressure from some in the international justice community on local actors to 'toe the line' in Africa's struggle around the ICC, notwithstanding that some of the operational decisions being made on the ground and strategically in the courtroom were open to serious question. The quality of judicial decision-making on significant ambiguities in the Rome Statute was also a legitimate cause of concern. In the context of a Court under siege, however,

any questioning of the ICC, whether in chambers or in terms of prosecutorial strategy, was viewed as a betrayal. As Chidi Odinkalu, one of the leading African human rights lawyers, acknowledged at the time, 'today mutual recrimination has replaced respectful dialogue, debates on the ICC often degenerate into epithets and supportive diplomacy is absent. Criticism of the court, no matter how constructive, risks being denounced as endorsing impunity; support for it, no matter how reasonable, is easily branded imperialism or its agent'.³⁸ This atmosphere of 'international justice fundamentalism', alongside co-optation of a coterie of international justice insiders, made it difficult for local civil society intermediaries to assert their own voices in demanding respect and clear dealing from the Court.

The power imbalances in the various relationships between the ICC and NGOs, and among NGOs themselves – particularly as intermediaries – affected communication with those working on the ground, who feared that direct criticism would damage the fragile link civil society interlocutors had developed with The Hague. In one situation country, for example, a group of civil society intermediaries came together one evening to draft a letter to the then Prosecutor Moreno-Ocampo to explain the difficulty of their situation and seek help. In the morning, however, the letter was torn up. In their words, 'We thought he would be angry with us'.

Confused ICC response and scarred relationships

The response from the Court, albeit under huge pressure and subject to cross-cutting mandates and political pressures, was confused and inadequate, compounding the sense of dislocation and abandonment felt by many intermediaries on the ground. The ICC was fragmented, both in terms of the way in which it engaged across organs with intermediaries (and sometimes even within sections of the same organ), but also with respect to how policy towards intermediaries was articulated publicly. The central issue that overshadowed all others was the extent to which the Court had a responsibility to extend the explicit obligation to protect victims and witnesses to intermediaries. Although legal or procedural protection (redaction, non-disclosure of identities, etc.) had been granted to intermediaries in many cases, *physical* protection (the putting in place of safety and security measures outside the courtroom) had been much harder to access.

³⁸ See C.A. Odinkalu, 'Saving International Justice in Africa', *Oxford Transitional Justice Research Working Paper Series* (August 2009).

One of the major problems was the ambiguity of the Rome Statute when it came to the intermediary role. The Statute and the Rules of Procedure and Evidence provide that not only witnesses and victims but also ‘persons at risk on account of the testimony of such witnesses’ are entitled to be assessed for, and receive, procedural/legal and physical protection from the Court where required. The OTP itself is also required to take ‘necessary measures, or request that necessary measures be taken, to ensure the confidentiality of information, the protection of *any person* or the preservation of evidence’.³⁹ The question was to what extent intermediaries could be interpreted as falling within the scope of these provisions.

In May 2008, two decisions were delivered by the Appeals Chamber, which confirmed that a broader category of persons than victims and witnesses could secure protection from the Court as ‘persons at risk on account of the activities of the Court’, or as potential prosecution witnesses.⁴⁰ The Appeals Chamber ruled 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’.⁴¹ This approach and formulation has been upheld in a series of decisions since that time.

Notwithstanding these decisions, intermediaries’ access to physical protection from the Court continued to be difficult. It is generally the Victims and Witnesses Unit (VWU) that has the lead responsibility for making and operationalising security assessments, although the OTP and, more recently, the Registry’s Security and Safety Section (SSS) also play a role. Individual risk assessments (IRAs) have certainly been carried out for intermediaries. Where an LNGO intermediary has ultimately fled his or her home, however, she/he has generally done so on her/his own steam or with the assistance of another partner, not the Court. The author did not come across any case where a decision was made by the Court to formally relocate an intermediary.⁴² At the same time, ICC staff members have acted informally in support

³⁹ Article 54 (3) (f), Rome Statute [emphasis added]. In addition, Rule 59 (2) of the Rules of Procedure and Evidence addresses the issue of the provision of notice in certain situations requiring that the issue of such notice be consonant with the duty of the Court regarding, *inter alia*, ‘the protection of any person’.

⁴⁰ Judgment on the appeal of the prosecutor against the decision of Pre-Trial Chamber I entitled ‘First Decision on the Prosecution Request for Authorisation to Redact Witness Statements’, *The Prosecutor v. Germain Katanga*, ICC-01/04-01/07 OA, Appeals Chamber, ICC, 13 May 2008.

⁴¹ *Ibid.*, para. 54.

⁴² Of course, it may have been that in all cases where a risk assessment was conducted the facts did not require it.

of relocation through encouraging, for example, a UN mission or other UN agency to take action within their area of competence. Steps to provide protection on the ground, however, have been taken by the Court such as reinforcing the safety features of an intermediary's home or office.

A range of justifications have been offered in different cases for this reluctance of the Court to act, some linked to legal determinations that purport to exclude the intermediary from the scope of responsibility, others on the basis of an alternative assessment of the facts. The biggest stumbling block has been the identification of a clear nexus between the apprehended threat and the engagement of the intermediary with the Court. Intermediaries often play many roles with respect to justice and peace in their communities and separating out a threat linked to ICC engagement has proven difficult. In some cases, for example, the responsible organ simply declared that as the individual's identity had not been disclosed formally in proceedings, the intermediary role could not have been known, and therefore no risk could have been created 'by the Court'. There are, of course, plenty of other ways for the work of an intermediary to be known beyond formal disclosure during proceedings.

Efforts to distance responsibility – through, for example, avoiding the conduct of a risk assessment – have also centred around suggestions that the individual was 'not an intermediary'. In one case it was claimed that the individual was not an intermediary as he had not been assigned an intermediary number.⁴³ In other cases, distinctions were drawn between what was identified as the function of a 'lead' and an 'intermediary'.⁴⁴ This distinction was deployed with some disingenuousness in one situation where an intense, repeated and directed relationship, over a long period around the conduct of a complex task, had been maintained with the intermediaries. It is hard to imagine how these interlocutors were anything other than 'intermediaries' (notwithstanding the questions as to whether the information gathered was eventually entered into evidence). In addition, strictly speaking, the concept of intermediary is irrelevant in terms of how the legal obligation to protect has been judicially formulated. The question is simply whether they are 'persons at risk on account of the activities of the Court'.

There were also internal tensions within the Court around how responsibilities for protection were to be shared across the organs. The

⁴³ This is the number used in proceedings to maintain anonymity, a form of legal protection.

⁴⁴ It is interesting that, in Annex 1 of the Guidelines, working as a 'lead' is identified as coming within the scope of intermediary tasks.

extent to which the OTP may be able to act independently of the VWU to protect individuals, for example, has been the subject of Court proceedings. A major challenge, particularly for the VWU, has also been resources and capacity: with literally thousands of victims and witnesses formally within its care, and potentially hundreds of thousands others, intermediary protection adds to an already great burden.⁴⁵

As a result, other actors were called to fill the protection gap. INGOs and LNGOs came under particular pressure to provide solutions for the security and protection problems faced by their partners. Some even found themselves helping intermediaries deemed to be in danger to relocate. Indeed, it seemed that where INGOs could be relied on as proxy protectors, the Court was less likely to acknowledge responsibility. The part played by the INGO community in providing protection to intermediaries at risk was significant and lifesaving, reflecting the strong ‘international justice constituency’ that had grown up around the Court. At the same time it was also ad hoc, done almost always without the involvement of security experts, and raising questions of appropriateness, responsibility and sustainability in the long-term. Years after they had initially fled, some intermediaries are still without durable solutions to their plight, surviving through the grace of personal rather than institutional support.

The struggles by, and around, intermediaries inside and outside the courtroom resulted in disappointments on both sides, significantly damaging the relationship between NGOs and the Court. Local intermediaries discovered that the confidentiality and anonymity promised by the ICC was not absolute once trials got under way. They also found that the international community was generally unable to protect them from the consequences of their cooperation and often unwilling to even acknowledge their plight. This lack of recognition increased the feeling of abandonment for many who had viewed their engagement with the Court as one of joint enterprise. Some of the disappointment experienced by intermediaries was certainly rooted in a misunderstanding of the limited capacity of the Court and its ‘international community’ supporters. The situation was also little helped by those inside and outside the ICC, however, who unrealistically promoted – particularly in fragile situations where there was a desperate thirst for change – the potential

⁴⁵ A rigid framework of physical protection responses also seems to curtail creative responses. For some intermediaries a period outside of the country on a reasonable premise, such as attending a course, would have been enough to diminish the risk level. Full-scale resettlement and relocation was not required.

impact of investigations, as well as the extent to which their solidarity could translate into practical support when intermediaries came under attack. This misunderstanding may have encouraged intermediaries to take greater risks.

As the *Lubanga* case spluttered forward there was also concern about how intermediaries were being characterised at trial. Although it was the unacceptable behaviour of a small number of intermediaries that came under the spotlight, the judges' criticism stung. Intermediary disillusionment with the Court was heightened also by the growing sense that the sacrifice had been in vain: only a few cases moved forward to trial, and the situation on the ground in countries that were the focus of investigations had actually worsened in some places. At the same time, some intermediaries acknowledged that they should have expected to suffer for their engagement. As one intermediary said in conversation, 'Why did we think it would be any different? We should have known.' Others viewed the symbolic value of the initiation of investigations by the Court as sufficient in itself to have justified their sacrifice: the mere fact that investigations had taken place fundamentally altered the imbalances of power that had fuelled impunity and might, in the long term, bear fruit.

The ICC too was re-evaluating its relationship with NGO intermediaries. Since the halcyon early days of investigations, when the OTP could be found openly soliciting cooperation, the Court had now become increasingly wary. With a growing number of situation investigations, however, it was also likely that intermediaries were going to be increasingly vital to its work. Would intermediaries act ethically and accountably? Could they be trusted? How much would they cost and to what extent would the ICC have to extend them protection? A starting point for these questions seemed to be the formal regulation of the intermediary function.

Developing a predictable framework for intermediary engagement

Developing a consistent policy for the Court on intermediaries has proven difficult, both technically and politically. The diverse nature of the identity and function of intermediaries and the fact that they may play multiple roles with respect to different organs and parts of the Court make a 'one-size' approach impossible. Issues surrounding confidentiality and information sharing across organs have also impeded the development of a standardised set of practices. With the decision in *Lubanga*

identifying 'lack of proper oversight' of intermediaries as a problem, however, the challenge became a judicial imperative.

In April 2012, a long and intensive Court-wide process ongoing since 2009 culminated with internal agreement on Draft Guidelines, a 'Code of Conduct' and a 'Model Contract'. NGOs and civil society had been invited to make detailed comments on previous drafts of the Draft Guidelines – although not on the Model Contract and Code of Conduct – through outreach to the Coalition for an International Criminal Court and the Victims' Rights Working Group.⁴⁶ Two years later, in April 2014, an amended version of these documents appeared on the Court's website with the announcement that they had been 'in force' since 17 March 2014.⁴⁷

It is heartening that the Guidelines have now been published. They contain a broad appreciation of the intermediary function and acknowledge the extensive tasks conducted. Alongside a framework for payment of expenses, it is also recognised that intermediaries can even be compensated for their work, in some circumstances. The Guidelines acknowledge the need for support, 'capacity building' and information sharing between the Court and intermediaries, including good practices on risk management. Critically for those on the ground, the Court's obligation to assess and to take into consideration the risks faced by the intermediary is clearly set out: 'The Court has a duty to prevent or manage security risk to intermediaries when those risks result from the intermediaries' interaction with the Court and the fulfilment of the intermediaries functions on behalf of the Court.'⁴⁸ An IRA is thus required before an organ or a party embarks on the intermediary

⁴⁶ The Victim's Rights Working Group is a network of over 300 national and international civil society groups and experts created in 1997 under the auspices of the Coalition for the International Criminal Court (CICC). See www.vrwg.org. Two INGOs, IRRI and OSJI, also led a process that coordinated input from local civil society intermediaries across five situation countries in a detailed section-by-section analysis, including recommendations on the penultimate draft. See 'Commentary on the ICC Draft Guidelines on Intermediaries', International Refugee Rights Initiative and Open Society Justice Initiative (2011), available at www.opensocietyfoundations.org/publications/commentary-icc-draft-guidelines-intermediaries ('IRRI and OSJI Commentary').

⁴⁷ Among the issues covered by the Guidelines are the definition and functions of intermediaries, formalisation of the relationship, support issues (materials, capacity building, compensation, psychosocial support), security (risk assessment, protective measures, confidentiality) and monitoring. The Guidelines contain a lengthy annex, setting out the main tasks conducted by intermediaries (by function and by unit/organ) and attach a Model Contract and a Code of Conduct.

⁴⁸ Guidelines 2014, 14.

engagement, and it must be reviewed as circumstances change on the ground.⁴⁹ Finally, it is acknowledged that there may also be a need for different organs or units of the Court to develop ‘specialised policies in accordance with any specific obligations under the Statute’.⁵⁰

At the same time, the Guidelines contain significant ambiguities, contradictions and potentially impractical elements. Divergent conceptions of the nature of intermediaries, their different functions and capacities, a bias against the bona fides of the local and fear of the ‘dangerous intermediary’, all permeate the Guidelines to some extent. Some reflections on the challenges to the workability and effectiveness of the Guidelines are offered here.

Challenges for the Guidelines

The Guidelines purport to create three categories of intermediaries – ‘contracted’, ‘unapproved’ and ‘affidavit’ intermediaries ‘approved by the Court’ – but leave them undefined. With respect to ‘unapproved intermediaries’, for example, the Guidelines stipulate that the ‘application of the present Guidelines is subject to determination on a case by case basis’. But the document fails to identify who makes this determination, and when. There is also no elaboration anywhere of the circumstances in which an ‘affidavit’ intermediary might come into being: the author has never heard of such an entity. To complicate the matter, attached to the Guidelines is a long list of tasks which are described as a ‘summary of main tasks conducted by intermediaries’.⁵¹ However, the Guidelines also provide that, ‘not everyone who carries out these [listed] functions will be considered intermediaries for purposes of the Guidelines’.⁵² The circumstances in which the relationships created by the performance of some of these tasks fall outside the scope of the Guidelines, and who makes this determination, are nowhere addressed. Meanwhile, the Code of Conduct appended to the Guidelines simply defines an intermediary as ‘an individual or organisation who, upon request of an organ or unit of the Court or Counsel, conducts one or more of the activities mentioned in Section I of the Guidelines Governing the Relations between the Court and Intermediaries’.⁵³

⁴⁹ As noted below, however, conduct of an IRA in every instance *prior* to engaging with an intermediary may be impossible as a matter of practicality.

⁵⁰ Guidelines 2014, 3. ⁵¹ See Annex 1, Guidelines 2014. ⁵² Guidelines 2014, 6.

⁵³ These ambiguities may mean less than they seem: as a matter of law the difference that being designated as an intermediary makes for critical issues, such as the extension of the Courts obligation to protect, may be little, in addition to the fact that the Guidelines are not considered to be legally binding.

The Guidelines are more specific about who and what are *not* intermediaries for their purposes. The core group excluded are entities described as, ‘covered by cooperation agreements (such as MoUs [Memoranda of Understanding] or national implementing legislation)’. These entities include, ‘United Nations, inter-governmental organisations, international non-governmental organisations based in the field, government bodies, and national authorities’.⁵⁴ It is not clear if this formulation purports to create two tiers of interlocutor: intermediaries subject to the Guidelines ‘regime’ and others subject to specially drafted agreements. If a local civil society organisation, for example, offered to sign an MOU would it be ‘exempt’ from the Guidelines and, indeed, what would that mean? Excluding state and intergovernmental entities from the Guidelines ambit is understandable, as they may be bound by other obligations and frameworks that could complicate adherence. (Interestingly, the TFV explicitly recognises that, ‘Intermediaries may include interested States, intergovernmental organizations’ in the context of its work.⁵⁵) INGOs, however, are frequently the lead partner and lead interlocutor in intermediary partnerships. It is hard to see the logic in exempting them from appropriate regulation where they play an operational role simply by virtue of their status as ‘international’. Although they may not need the same support from the Court in terms of materials and protective measures, there would seem to be no reason why they should not come under the ambit of the Guidelines.

The second and rather confusing explicit exclusion from the ambit of the Guidelines is contained in the statement that, ‘the services provided by an intermediary are generally provided on a voluntary basis and are distinguished from these provided through a contract between an organ or unit of the Court or Counsel and an individual or company’.⁵⁶ A few sentences later, however, the Guidelines assert, ‘the present policy applies to intermediaries working under a contractual relationship with an organ or Unit of the Court or Counsel’. The distinction intended by this phraseology is likely to be that between entities such as transport contractors providing logistics services, for example, and intermediaries providing support for investigations. The text, however, does little to assist and adds to the ambiguity.

The Guidelines in many respects embody the tension between the critical role intermediaries play in the functioning of the ICC and the desire to

⁵⁴ Guidelines 2014, 6. ⁵⁵ See Regulation 67, Regulations of the TFV.

⁵⁶ Guidelines 2014, 6.

‘ensure that intermediaries are not a substitute for staff for the implementation of the mandate of the Court’.⁵⁷ While the Guidelines recognise, therefore, that intermediaries ‘should not be called upon to undertake core functions’ it is also recognised that this distinction can be ‘blurred’.⁵⁸ On the ground, the delicacy and complexity of the tasks carried out by some intermediaries can look very much like those that staff conduct. In the Guidelines the onerous responsibilities placed on intermediaries are akin to those imposed on Court staff. For example, ‘intermediaries must uphold the highest standard of confidentiality and respect the impartiality and independence of the Court while carrying out their activities *in the same way as Court staff do*’.⁵⁹ The Code of Conduct further requires that an intermediary shall ‘adhere to the policies of, and conduct practices in accordance with, Court decisions, applicable law and policies and practices of the Court and Counsel, as well as any instructions from the relevant organ or unit’, albeit with the caveat of ‘as far as he/she/it is reasonably aware’.⁶⁰ Throughout the framework there is great emphasis placed on confidentiality and the non-disclosure of classified information, which, while understandable, may raise a conflict of interest and indeed obligations for intermediaries.⁶¹ Further, the Guidelines purport that such obligations are perpetual and do not cease upon completion of the intermediary’s functions.⁶²

Many of these obligations are not only onerous but also unrealistic. They seem to reflect the basic misunderstanding that was unfortunately articulated by the judges in *Lubanga* that, ‘the intermediaries were activists, most of whom were fully aware of developments within the sphere of international criminal justice and the objectives of the investigators’.⁶³ This is rarely the case; not only will most local *and* international intermediaries find it hard to keep up with a rapidly evolving field of international criminal law, the objectives of the investigators may be particularly difficult to fathom.⁶⁴ It is unlikely that a local intermediary’s

⁵⁷ *Ibid.*, 3. ⁵⁸ *Ibid.*, 2. ⁵⁹ *Ibid.*, 3 [emphasis added].

⁶⁰ Section 3.2, Code of Conduct, Guidelines 2014. The Guidelines note that the staff member appointed to supervise the work of the intermediary must ensure that the tasks are conducted consistently with the entire ICC legal framework, including ‘all relevant orders or decisions of Chambers’. Guidelines 2014, 11.

⁶¹ See Section 5.4, Guidelines 2014.

⁶² See also for more detail Article 9, Model Contract, Guidelines 2014.

⁶³ Judgment Pursuant to Article 74 of the Statute, *Lubanga*, ICC-01/04-01/06, Trial Chamber I, ICC, 14 March 2012, para. 184.

⁶⁴ Indeed in those proceedings, the OTP had submitted to the Court that intermediaries were ‘not supposed to know the objectives of the investigation team’. *Ibid.*, para. 183.

'objectives' in terms of his or her support to a particular investigation will be – or even should be – identical with the Court's. The obligation on the prosecutor to investigate exonerating evidence equally, for example, is not one with which all local NGOs may be always aware and comfortable.⁶⁵ Further, and most importantly, there may also be conflicts between these and an intermediary's parallel obligations, mandates and functions, either professional or with respect to service to his or her community. Many local intermediaries are driven to engage with the Court out of political conviction, seeing the potential of international justice to redress the balance of power in their society. Efforts to 'professionalise' or co-opt intermediaries to adopt the attributes of ICC staff may not always be either appropriate or possible.

Although the introduction to the Guidelines lauds the role played by intermediaries, the legacy of the *Lubanga* case's unmasking of the 'bad' intermediary is also evident. The Guidelines require local intermediaries to disclose 'all relevant information covering their mandate, memberships or affiliations, sources of funding, links to parties or participants in the proceedings, potential legal issues/criminal record(s), and motivation to co-operate with the Court or Counsel'.⁶⁶ However useful this range of information might be for the Court in assessing the nature of the information provided by an intermediary, it is overly broad and invasive and may even be contrary to national law if it were to be implemented.

The Guidelines also warn that protection may not be provided if an intermediary does not comply with good practices: 'The organ or unit should disengage or not proceed if an intermediary fails to observe and comply with best/good practices while engaged with the Court with the result that the intermediary falls outside of the framework of security measures for intermediaries.' Although adherence to good practice should be encouraged, whether this blanket exclusion from the ambit of the Court's protection is compatible with the Statute is questionable. The Model Contract further provides that non-compliance with the directions of the Court's staff or officials is a basis for breach of contract.⁶⁷ There is unfortunately no 'reasonable grounds' caveat appended. Local interlocutors in fact have a much greater capacity to judge what is safe and appropriate conduct than ICC staff, who are rarely based on the ground where intermediaries work.

⁶⁵ See Article 54 (1) (a), Rome Statute. ⁶⁶ See Guidelines 2014, 8.

⁶⁷ There have been times when the judgments or actions of the staff of the Court have simply been wrong in the local context, including with respect to security and safety.

Related to this, one of the key issues that intermediaries have emphasised is the 'importance of recognising the reciprocal nature of the relationship between the ICC and the intermediaries', including 'mutual respect and confidentiality' and the need to acknowledge their other roles and expertise.⁶⁸ By enshrining the principle that the 'Court's engagement with intermediaries incurs rights and duties for both parties', the Guidelines do suggest that the relationship is between equal parties. Yet the Model Contract is clear at the same time that nothing 'shall be construed as establishing ... a partnership', and it goes on to create obligations almost entirely on the intermediary side of the relationship. Further, and unlike the Guidelines themselves, the contract makes no reference to duties of care such as the obligation to respond to threats experienced by the intermediary or to other forms of loss or injury. This latter provision is particularly troubling in that at least one of the forms of contract being currently used by the OTP does contain a reference to indemnification of death or injury in certain (albeit very narrow) circumstances.⁶⁹

Some elements of the Guidelines, although laudable in ambition, are unrealistic in the context of complex day-to-day operations. The lengthy selection criteria if strictly applied, for example, would bar many current intermediaries. It may also be hard to do rigorous selection assessments in advance of the first engagement by the Court entity with an intermediary. Further, the greater the homogenisation of the category of those accepted to work as intermediaries, the less diverse the perspectives upon which the Court will be able to call. As Haslam and Edmunds have argued, professionalisation 'can work to the detriment of an ideologically-driven vision of broader participation, because it risks re-inscribing remoteness and hierarchies of knowledge'.⁷⁰ The requirement to conduct an IRA prior to working with an intermediary, while ideal, is also likely to be impractical. The VWU, for example, is often overwhelmed and unable

⁶⁸ IIRI and OSJI Commentary, 4.

⁶⁹ See Clause 7, Conditions of Service – Independent Contractors/Consultants, Second Report on the draft Guidelines, 30 October 2013: 'Individual contractors and consultants who are authorized to travel at Court expense or who are required under the contract to perform their services in a Court office, or their dependants as appropriate, shall be entitled in the event of death, injury or illness attributable to the performance of services on behalf of the Court while in travel status or while working in an office of the Organization on official Court business to compensation equivalent to the compensation which, under Appendix D to the Staff Rules, would be payable to a staff member at step V of the First Officer (P-4) level of the Professional category.'

⁷⁰ Haslam and Edmunds, 'Managing a New "partnership"'.

to keep up with current obligations and requests.⁷¹ Without a radical change in resources and capacity, waiting for the conduct of an IRA before commencing work with an intermediary in every case would paralyse operations. The number of documents requiring signature or endorsement as part of the intermediary framework may also need review.⁷² Finally, on a practical note, some documents to which the Guidelines make reference, such as the Good Practices on Risk Management and its specific country application, do not yet seem to have been made available to those who are not Court staff such as counsel, let alone to intermediaries themselves.

There are also areas of the Guidelines that may need further elaboration. They do not address, for example, whether an intermediary has the right to have visibility on proceedings where they affect his or her essential interests. For example, the Model Contract includes an explicit undertaking by the intermediary that he/she agrees to the disclosure of his/her identity to the 'relevant judicial authority'. But there is no reciprocal obligation on the part of the ICC to either inform the intermediary that disclosure has occurred or to seek to mitigate the impact of such disclosure (although this latter duty is likely to be implied).⁷³ It would seem reasonable that the Court could be required to advise if an intermediary becomes the subject of proceedings, so that he or she could make appropriate representations.⁷⁴ Also not addressed is the right to be heard where matters such as physical safety are at issue.

Further, what about the right to representation? A victim has a representative, and, as an asset in the defence or prosecution's case, witnesses also enjoy some form of representation. In addition, witnesses have been permitted separate representation where questions relating to detention

⁷¹ Other elements of the Court could take on this task, such as, for example, the Security and Safety Section (SSS) or the OTP. It is not clear, however, when the SSS would be called upon to take on such functions.

⁷² For example, an intermediary may be required to sign multiple types of contracts, including an intermediary contract, agreement for the receipt and use of ICC assets, signed acknowledgement that information has been provided on possible disclosure or a confidentiality agreement (if no intermediary contract has been signed).

⁷³ See Article 10, Model Contract, Guidelines 2014. It could also be argued, of course, that the presence of this clause implies a duty to inform the intermediary as to disclosure, especially where the effect may be to impact security or protection assessments. In terms of deliberate disclosure, the Court has set out quite a high threshold for disclosure of intermediary identities, including that it should only occur following a VWU assessment and the imposition of appropriate measures.

⁷⁴ This could include, for example, being advised of their intermediary number (where assigned), so that they can follow proceedings.

and asylum are under consideration. In this regard, are there rights of action for intermediaries that could be construed within the framework of the Guidelines? As the role of intermediary is elevated to a new status, for example, can an administrative decision that a person is 'not an intermediary' (whatever the meaning of that decision in legal terms) be challenged, or indeed any other administrative determination that might be unreasonable or *ultra vires*? Might there be a role for an independent counsel, from whom intermediaries could seek advice before embarking on the intermediary role or thereafter?

'Implementation' of the Guidelines

For two years after they were agreed in 2012, the Draft Guidelines were not formally promulgated, although in practice some organs and units are understood to have applied their provisions.⁷⁵ Politically, the operationalisation of the Guidelines was said to require explicit consent from the ICC's Assembly of State Parties (ASP). At two successive ASPs in 2012 and 2013, however, delegates simply 'took note' of the Guidelines, a half-hearted reference deemed insufficient to trigger implementation. While a fiscally sensitive ASP was clearly wary of institutionalising the intermediary role, reports by the Court to the ASP at the same time indicated that use of intermediaries was 'ultimately cost effective'.⁷⁶ The ongoing stalemate suggested that there were deeper issues at play in how the Court's powerful constituencies viewed the intermediary role.

It is not clear what exactly caused the blockage to shift. When the Guidelines (including the Model Contract and the Code of Conduct) finally appeared on the Court's website in mid-April 2014 there was little fanfare, although a facilitator/focal point on intermediaries for the ASP had just been appointed shortly before. The brief text accompanying the posting declared that the documents would 'clarify the relationship of the Court and the Intermediaries, and their implementation will have a positive impact on the integrity of the Court's judicial proceedings by

⁷⁵ Conversation with the Deputy Registrar (The Hague, October 2012). At the same time it was clear that the text of the then Draft Guidelines was not to be distributed to intermediaries themselves. Further, it is clear that some victims' counsel, for example, had never seen copies of the Guidelines or were aware they existed until April 2014.

⁷⁶ See, Second Report on the draft Guidelines (30 October 2013), para. 19: 'while there are unavoidable costs for the Court in implementing the draft Intermediaries Guidelines . . . the use of intermediaries is ultimately cost effective for the Court. Intermediaries undertake work that would be extremely costly for the Court to perform.'

ensuring the proper oversight of all intermediaries and also contribute to the safety of victims and witnesses'. After all the challenges surrounding their adoption and dissemination, however, the Guidelines themselves provide that they 'do not in any way bind or limit the Chambers' exercise of their powers'.⁷⁷ Further, the text accompanying the website link describes the Guidelines simply as 'standards' to which the organs of the Court will 'aspire'.⁷⁸ At the same time, the Guidelines provide that they 'enter into force on the 17 th March, 2014', indicating the existence of a timeline for the creation of obligations and expectations.⁷⁹ It remains to be seen to what extent they may be relied upon in proceedings. Could they be used to found arguments based in administrative law principles around the creation of a legitimate expectation? This will all have to be judicially determined.

Despite all the challenges and new questions that have been raised by the Guidelines' current form, the mere fact that something has been put in writing on the intermediary relationship is a welcome development. In a best-case scenario their existence could give NGOs a baseline to negotiate their relationship with the Court on a more equal footing, provide critical information and set up more realistic expectations. This could result in safer and more effective engagements. Court staff may also be constrained to act in a more predictable way, thus shifting the balance of power. At the same time, there is a danger that the process will impact intermediary independence and freedom to act, as has been experienced by some intermediaries operating under contracts to date. In addition to the implementation of the Guidelines themselves, there are also additional framework issues to be ironed out: some of the organs such as the OTP, for example, are developing their own specialised regulations and it is not clear how these processes will interact and what visibility intermediaries will have on their development. There is much to be tested.

Fortunately, the Guidelines are intended to be a living framework and their review is integral to implementation. During the first two years, a

⁷⁷ Guidelines 2014, section 4.

⁷⁸ '[W]ith the exception of the model contract, Intermediaries guidelines are not legally binding, but represent standards for the Organs of the Court to aspire to in their interactions with intermediaries.' 'ICC adopts Guidelines on Intermediaries', Legal Texts and Tools-Strategies and Guidelines, *International Criminal Court*, available at www.icc-cpi.int/en_menus/icc/legal%20texts%20and%20tools/strategies-and-guidelines/Pages/default.aspx.

⁷⁹ It should be noted that they were only posted in mid-April 2014. ICC Weekly Update #207 announced the publication of the Guidelines and provided the link in its 14–18 April 2014 edition. See www.icc-cpi.int/iccdocs/PIDS/wu/ED207_ENG.pdf, 5.

six-month review will be carried out by the Working Group on Intermediaries and 'permanent observation mechanisms for reviewing recommendations and the exchange of experiences and information' will be established. A detailed review will also be conducted after 18 months of the Guidelines being in operation.⁸⁰

Conclusion

The experience of local civil society intermediaries before the ICC is a microcosm of many of the challenges that are inherent to, and continue to thwart, the ambition of the Rome Statute. Setting forth on an experimental path of implementation, monitoring and review of the Guidelines will pose difficult, but necessary, questions about the Court and its relationship with 'victim communities', and more broadly, about the role of international criminal justice itself.

Intermediaries are needed by the Court for their intimate entwinement with, and capacity to mediate, interpret and influence, the local. At the same time they are expected to act as emissaries of an impartial global mechanism of international criminal justice corralled by contracts and codes that decontextualise and depoliticise. This austere vision of the intermediary role is juxtaposed with the reality that intermediaries usually have local responsibilities to bear witness and work as agents for change in a context where the ICC is conceived as a political instrument.⁸¹ Intermediaries and the Court may therefore sometimes share goals and ideological discourse, but almost always have divergent obligations and interests.

As one commentator has put it, 'whereas the International Court of Justice and other international authorities presuppose a community of nations, the ICC rests on an assumption of world citizenship and, as a result, its success depends on the cooperation of global civil society'.⁸² In many ways, the engagement of local intermediaries on the ground can be idealised as the manifestation of this vision of the Court: a democratic

⁸⁰ See Section 6.1, Guidelines 2014. It is likely also that the Guidelines will have to be amended in response to directions from chambers.

⁸¹ Local intermediaries are not always representatives of the places where the ICC engages, but they are often, in how they work with the Court, the nearest communities may get to a relationship which those who are telling their story in the courtroom.

⁸² See A. Thomas, 'Non-governmental Organisations and the International Criminal Court: Implications of Hobbes' Theories of Human Nature and the Development of Social Institutions for their Evolving Relationship', *Emory International Law Review*, 28 (2014), 435, 437.

mechanism, working with, and responsive to, local communities, challenging the powerful, and ensuring the existence of multiple truths through safeguarding, ‘the delicate mosaic of humanity’. At the same time, the Court promotes itself as a strictly controlled criminal judicial mechanism, permitting and defining only certain categories of persons and story to be heard in the construction of its own singular narrative.⁸³ ICC intermediaries are caught in the middle, occupying a space between what Emily Haslam has described as civil society as object and civil society as subject within the practice of international criminal law.⁸⁴ More broadly, the intermediary struggle for recognition before the Court reflects the larger struggle around the question of ‘what justice and whose justice’ gets done by the ICC. Who mediates the activities of this chimera of ‘impartial and universal’ international criminal justice in the complex social, cultural and political realities of particular investigations, in the real world, on the ground?

⁸³ Kendall and Nouwen have described how the ‘victim’ before the Court has also become a depoliticised cipher. They have written of the ‘overdetermined presence of the figure of “The Victims” as a rhetorical construct obscures the representative challenges faced by conflict-affected individuals in accessing the form of justice that is practiced in their (abstract) name’. S. Kendall and S. Nouwen, ‘Representational Practices at the International Criminal Court’, 235.

⁸⁴ See E. Haslam, ‘Subjects and Objects: International Criminal Law and the Institutionalization of Civil Society’, *International Journal for Transitional Justice*, 5 (2011), 221.