

REDRESS

Ending Torture. Seeking Justice for Survivors

Comments on the Draft Guidelines Governing Relations between the Court and Intermediaries

15 October 2010

REDRESS welcomes the opportunity to comment on the International Criminal Court's (ICC) *Draft Guidelines governing the relations between the Court and Intermediaries* made available ahead of discussions scheduled for 18 October 2010, in the context of the ICC-NGO Bi-annual Consultations (hereinafter "Draft Guidelines"). It is unfortunate that the French version of the Draft Guidelines was only made available a week before the meeting, with little opportunity for local actors in the Democratic Republic of Congo and Central African Republic to make informed comments. REDRESS underscores the importance of carrying out field-based consultations on the issue of intermediaries. This paper builds on a previous comments made by the Victims' Rights Working Group in February 2009, which provided a preliminary review of the role and relationship of intermediaries with the ICC, reflecting the types of work and challenges faced by them in their daily work.

The Court's Draft Guidelines provide a useful basis upon which to establish clear mutual responsibilities and entitlements between the Court and those assisting with the implementation of its mandate at ground level. In order to further enhance the document's utility, it would help to ensure that it is as much of a set of working guidelines for Court staff as for the intermediaries themselves. As an organisation working closely with its own partners in the field, REDRESS welcomes the acknowledgment of the Court's dependence on local actors, such as intermediaries, to facilitate its work and the efforts being undertaken to make these relationships effective.

REDRESS supports the Court's endeavours to harmonise practices and policies and provide clear definitions of respective roles. While efficiency and accountability may motivate the Court to work with intermediaries, it is the intermediaries' interest as stakeholders in the justice process that generally motivates their work. The work undertaken by intermediaries will often put them at risk, but in the hope for justice, these risks may in their view be worth taking. Thus, it is appropriate to acknowledge that intermediaries will often have a personal or professional stake in the Court's success. Indeed, from the intermediaries' perspective, the Court is a service provider for the benefit of justice in their own society, so to refer to intermediaries as "assets" to be "managed" is misplaced, and might weaken the basis for fruitful, mutual understanding and sustainable working relationships. A partnership should be strived for whereby both parties work together within their separate competencies to implement the Court's mandate. The use of language referring to intermediaries as working "with" the Court/Counsel instead of "for" them would better reflect this aim.

Comments are provided below in relation to specific sections of the Draft Guidelines, though the comments do not cover every aspect or section. We have sought to highlight issues of central concern to REDRESS. We welcome the opportunity to discuss these further and are happy to clarify any of the points raised below.

Comments on ‘Introduction’ and ‘Context’

The Guidelines would benefit from a clearer recognition of the type of experience and expertise that intermediaries contribute given the broad range of assistance¹ they afford in the implementation of the Court’s work. A full understanding, recognition and respect of each others’ expertise are central to a healthy collaboration. For instance, the Office of the UN High Commissioner for Refugees’ (UNHCR) Operational Manual highlights that in order to build effective partnerships, UNHCR and its operational partners should strive to understand each other’s point of view, should seek opportunities to learn from each other and should think in terms of win-win benefits in their interactions. Rather than seeking individual advantage, partners should strive for ways to ensure mutual benefit, etc.² An often-used methodology to promote this recognition in practice involves ensuring that partners, or in this case intermediaries, participate in the identification and design of activities they will undertake. For example, involving intermediaries in the identification and design of outreach activities and messages could ensure that those fully suit the actual needs and realities in differing contexts.

The assertion that intermediaries may assist and support the Court, but should not be called upon to undertake core functions, is consistent with our position as previously expressed in the Victims’ Rights Working Group (VRWG)’s comments of 6 February 2009 on the Role and Relationship of ‘Intermediaries’ with the International Criminal Court.³

Information sharing should be incorporated fully into the Guidelines and thereby constituting a guiding principle. When discussing the establishment of partnerships, UNHCR emphasises that “for the partnership to be effective, all the partners should commit to transparency and information-sharing”. Not only will this facilitate decision-making, but it will help prevent misunderstandings and frustration. Information needs to flow not only up and down, but also sideways between actors where appropriate (e.g. outreach); though this may not always be possible in view of confidentiality. Effective information sharing can ensure that information is available to those who need it as and when required, allowing practical and policy responses to be made in a timely manner.⁴

The four principles identified in the Draft Guidelines are that: i) intermediaries should uphold the highest standards of confidentiality; ii) should not be substitutes for staff; cooperation should not prejudice a fair trial and iv) intermediaries have the right to protection if at risk on account of the activities of the Court. It is suggested that a

¹ The word ‘assistance’ instead of ‘assets’ represents better the relationship the Court should aim at reaching with intermediaries.

² UNHCR Operations Manual, section 1.6 highlights that in order to build effective partnerships UNHCR: its operational partners should strive to understand each other’s point of view (para 3.5); should seek opportunities to learn from each other (para 3.6); think win-win in their interactions with each other. Rather than seeking individual advantage, partners should seek ways of working with each other so that all parties benefit (para 3.10); should plan and solve operational problems together (para 3.12); respect each other’s expertise. Each partner will bring expertise to the operation which, if harmoniously and wisely combined, will strengthen overall implementation capacity (para 3.14). The UNHCR Operations Manual is available at: www.unhcr.org/4a39f7706.html.

³ VRWG comments on the Role and Relationship of ‘Intermediaries’ with the International Criminal Court, 6 February 2009, p 3; Available at www.vrwg.org/downloads/publications/05/VRWG%20intermediaries%206%20Feb%2009%20FNL.pdf.

⁴ Operations Manual, Section 1.6, paras. 3.8 and 3.11.

principle on equal treatment, non-discrimination and inclusion should be included in view of ensuring the Court's commitment to gender equity in its field operations.

With reference to intermediaries being subject to "the Court's general system to assess risks and its general principles of risk management", further information about such systems should be made available to intermediaries so as to ensure an informed engagement with the Court.

Existing Legal Framework, Court Decisions and Policies

Intermediaries, whatever their function, should be included within the broader category of persons potentially at risk on account of the activities of the Court. We do not agree that "the issue of whether the Court has a duty, if any, to protect them and adapt (some) protective measures should be determined on a case by case basis."⁵ Indeed, it would seem that this statement is inconsistent with the principle set out in the introduction, namely that "intermediaries at risk on account of the activities of the Court have a right to protection". Whilst it is clear that the need for, level or type of protection must be determined on a case by case basis having regard to an assessment of the actual risk faced by the person or group in question, the duty of the Court to protect persons at risk on account of the activities of the Court cannot be optional,⁶ and in this sense, the starting point should be that intermediaries are an appropriate category of persons to benefit from protection, the sole question being whether there is an identified risk.

It may be useful to reassure potential intermediaries that the Court has internal criteria to identify the level and type of risk and the types of protection measures that may be afforded in relation to such risks, even though these internal criteria cannot be made public. Those at risk may find some comfort in knowing that procedures exist. It is unclear from the Draft Guidelines whether internal guidelines on the level and/or type of protection differ as between intermediaries, participating victims and witnesses.

Section 1 - Definition and Functions of Intermediaries

Identifying the tasks carried out by intermediaries is useful in seeking to define the term 'intermediaries'. While it is understood that not all who cooperate with an organ or unit of the Court or with Counsel will be considered an intermediary, it is important that consistency in the usage of terms is achieved. For instance, entities such as the United Nations, intergovernmental organisations, international NGOs, etc. are not considered as intermediaries for the purpose of the Draft Guidelines, when in fact these entities are included as potential intermediaries in Regulation 67 of the Regulations of the Trust Fund.

As for the statement that intermediaries may act with or without a contractual relationship with an organ or unit of the Court or Counsel, this flexible approach seems appropriate, though more could be said regarding the need for mutual respect in what is effectively a form of collaboration. With reference to their assistance "over an extended period of time" it should be stressed that intermediaries' ability to use their own resources in one instance should not be assumed to recur in other similar instances.

With regard to whether intermediaries should be duty bound to disclose prior engagements with other entities of the Court, REDRESS is not convinced that this would be the most

⁵ Draft Guidelines, p4.

⁶ The Chamber has recognised its duty "to protect the safety, physical and psychological well-being, dignity and privacy of persons at risk on account of the activities of the Court", Trial Chamber 1 decision, ICC-01/04-01/06-2434-Red2 of 31 May 2010 in the Lubanga case, 137.

appropriate approach. It is acknowledged that the Court's organs need to identify potential conflicts of interests. However, obliging intermediaries to disclose prior engagements, particularly if non-contractual, might in fact lead to security breaches on the ground. It may be difficult for intermediaries to know how far a prior contact amounted to a significant engagement, which staff persons are relevant and how much information they should or should not be disclosing. Given the very confidential nature of some of their engagements, it would be highly problematic if these were revealed to individuals other than those absolutely needing to know the information. The more individuals that are party to confidential information, the greater the risk of leakage. In view of protecting both the intermediaries' and the Court's work, it is suggested that other means are found to ensure that the Court shares information internally, perhaps in the form of a secure database accessed by relevant organs, or the use of liaisons or contact points within organs.

As has been demonstrated in the Lubanga case, an intermediary might work with separate organs of the Court or Counsel and this may be used as a line of defence to challenge their credibility or the credibility of the witnesses. In this light, the Draft Guidelines should specifically address areas of conflict or multiple engagements that could affect their work or that of another organ/counsel. This is particularly important as new situations and permutations of conflicts of interest may arise.

Section 2 - Identification and Selection of Intermediaries

REDRESS supports the proposed approach on the identification and selection of intermediaries, whereby the relevant organs will assess capacities and collate profile information relating to a potential intermediary. As mentioned above, we would also encourage efforts to safely share information regarding engagements with potential intermediaries across the different units and organs and where appropriate with counsel,⁷ instead of passing this burden to the intermediary him or herself.

Overall, it is important for the Court to disclose to the intermediary the reasons for deciding whether to start, modify or end collaboration. In cases where the Court envisages ending collaboration, full regard should be had to the ongoing relationships that the intermediary has with audiences or individuals that the Court is seeking to reach. This is particularly important if the reason for modifying or ending collaboration stems from the intermediaries' limited capacity, in which case strengthening their capacity might be a more useful approach given the challenges associated with introducing new 'intermediaries' into complex local environments.

Selection Criteria

While the criteria identified in relation to intermediaries' selection appears appropriate, it is questioned whether these should be any more than guidelines only to be applied formally to certain types of intermediaries⁸. In practice many intermediaries are 'self-selected'.⁹ The criteria may assist in identifying how best to support intermediaries in such circumstances, but requiring a formal selection process could be artificial and may add to the bureaucratic burden of staff operating in the field.

⁷ For instance, reasons for the discontinuation or modification of a relationship with a said intermediary might assist other organs which are considering approaching that organisation/individual with regards to their own activities.

⁸ In deciding which intermediaries might require a more formal approach, the Court might be guided by principles of proportionality between the procedure and the nature of the work to be conducted.

⁹ For instance victims may have their own chosen intermediary.

The selection criteria or guidelines should be explained to potential intermediaries. The process should be as open as possible, and feedback should be provided where appropriate and possible so that those who do not meet the criteria understand why and have an opportunity to respond. Intermediaries should be kept informed of developments relating to their relationship as these arise.

Policies and Practices

It is accepted that intermediaries should be required to confirm their willingness and ability to adhere to and conduct their activities in accordance with the Court's decisions, procedures, policies and practice.¹⁰ Decisions, policies and codes of conducts, as well as these Guidelines should be shared extensively so as to ensure that intermediaries' willingness to adhere to certain standards is coupled with a full understanding of what these entail.

We nevertheless underscore that often, the willingness and ability to respect confidentiality, dignity and protection requirements will necessitate support and guidance from the Court. For example, for protection issues, experience demonstrates that a one-off training on best practices is insufficient and that regular follow-up is required.¹¹

Capacity, Knowledge and Experience

REDRESS is in agreement with the criteria provided in the draft Guidelines in relation to capacity, knowledge and experience. The Court might also wish to consider additional criteria in relation to intermediaries' ability to deal with trauma as well as their ability to ensure gender-specific strategies in their work. Women and girls should not just be referred to in relation to victims - strategies to reach women should be applied to all areas of intermediaries' work; local women's groups or activists might be selected on the basis of this criterion where others might not. Feedback relating to the Report *The Impact of the ICC on Victims and Affected Communities*¹², has highlighted that the Court needs to do more to reach and involve women in its work given the disproportionate levels of mass victimisation of women and girls and corresponding impunity.

In relation to capacity, knowledge and experience relating to victims, the Court should add "appropriate" to qualify prior experience of working with victims and refer to "working" with as oppose to "dealing" with victims.

With respect to potential intermediaries' access to resources, such as secure offices or storage space, in addition to providing such resources or the funding to enable the intermediaries to arrange such facilities directly, it may be mutually beneficial for the Court to assist intermediary organisations with fundraising, e.g., by supplying lists of potential funders and/or available fundraising training programmes, or endorsing intermediaries' applications for funding and/or providing references. The Court should consider whether it or another organisation might directly apply for funding in order to be able to support a range of intermediaries with similar resource needs. As many intermediaries' primary challenges include safe and well-functioning internet access, the Court might also arrange for intermediaries to access facilities available on the ground

¹⁰ For example, when establishing formal relations with partners one of the selection criteria for UNHCR is the partner's willingness to adhere to the rules and procedures of UNHCR for project implementation, to follow UNHCR's established policies, and to comply with the laws and policies of the country in which they operate, UNHCR Operations Manual, Section 1.6, para 2.2, p 31.

¹¹ Provision of security equipment such as encrypted USB sticks, or data protection software will not be sufficient if such software is not kept up to date, and the passwords are not changed regularly. Often basic IT skills support may be necessary for individuals to effectively benefit from such technology.

¹² VRWG Report, *The Impact of the ICC on Victims and Affected Communities*, April 2010, www.redress.org/downloads/publications/Stocktakingreport2010.pdf.

either in its own offices or within other institutions such as the UN or international agencies.

Section 3 - Formalising the Relationship

Contract / Agreement

With regards to formalising the relationship, tasks within the framework of an agreement should be conceived in a spirit of “partnership” in order to ensure fruitful working relations. The emphasis appears one-sided underlining duties and obligations, without acknowledging the mutual interest and the Court’s corresponding responsibilities in the relationship. It may not be effective to treat intermediaries as passive actors who are “tasked”, “briefed”, and “informed”; engagement with intermediaries should be mindful and respectful of the invaluable contribution they bring in achieving common goals.

Further details may need to be included with respect to areas such as the Court’s liability and responsibility in the event of death, loss or injury, as well as mechanisms to address potential conflicts.¹³ Provisions regarding termination of the contract on the grounds of misconduct, incompetence or breach of confidentiality could also be added to the Guidelines.¹⁴ Where the intermediary is an organisation, it would be useful to require the organisation to append a list of persons from that organisation who would be entrusted with ICC-related activities.

Section 4 - Support to Carry out Duties as Required

The section on support might be usefully incorporated into section 3 on ‘Formalising the Relationship’, or constitute a prior section, so that support does not appear to be an afterthought but integral to the relationship. Intermediaries should be able to discuss conditions with the Court/Counsel instead of them “being made clear” to intermediaries, which again is one-sided. While the Court might not be at liberty to vary these substantially, it is paramount to have a genuine meeting of the minds and the establishment of mutual trust to prevent possible acrimony if expectations diverge during the course of the working relationship.

REDRESS welcomes the statement that support, as well as policies surrounding support, must be transparent, and commends the inclusion of this requirement in the Guidelines. Indeed, the availability of support services should be openly shared with intermediaries to ensure that all are treated equally, and that those less able to access information have the same opportunities to avail themselves of support.

¹³ With regards to liability and responsibility for claims, UNHCR for example will not accept any liability for claims arising out of the activities performed under the agreement, or any claims for death, bodily injury, disability, damage to property or other hazards that might be suffered as a result of the work pertaining to the project. However, UNHCR will ensure that all project personnel are fully insured against accident, the cost of the insurance being potentially deductible under the agreement. Operations Manual, Appendix C1 para 15.8; Appendix C2 para 4.03.

¹⁴ When establishing contracts with personnel recruited or seconded under UNHCR sub contracted projects, the following elements are required: (a) a description of duties and functional responsibilities; (b) remuneration, including applicable benefits and employment termination indemnities; (c) period of contract including a defined probationary period; (d) provisions for the termination of the contract on the grounds of misconduct, incompetence or breach of confidentiality. Operations Manual, Appendix C1 para 15.6.

Reimbursement of Expenses / Compensation for Time / Lost Earnings

Transparency and consultations with local organisations should be ensured to avoid misperceptions of what intermediaries might gain from their collaboration with the Court. Standard reimbursement rates might usefully be broken down further to regions within countries where applicable. Costs for transport and accommodation in capitals will not necessarily be the same as the ones in remote locations. Similarly, communication-related expenses will vary based on location. As already highlighted, it is important to underscore that collaborating in a manner that builds trust and respects the role that local actors play is the basis to ensuring honest financial relations. In this regard developing strong relationships requires effective inter-personal skills and Court staff may benefit from guidance in this regard.

In cases where the relationship with the intermediary has not been formalised, there should be clarity as to what constitutes an explicit request for reimbursement of expenses. For example, it is not clear whether intermediaries who are tasked to collect further information from victims in relation to their applications to participate in proceedings can request the Court to contribute towards their expenses.¹⁵

With respect to reimbursements, the very term suggests post-facto claims. The need for prior agreement as to expenses and specific terms such as not exceeding agreed travel dates should be reviewed favouring greater flexibility. From experience it can be quite difficult to foresee expenses and costs when travelling to remote areas, and it may be difficult for intermediaries to plan ahead for such reimbursement, or not to exceed agreed travel dates due to unforeseen events. In order to ensure that intermediaries are not out-of-pocket, or that operations are not hampered by disproportionate bureaucracies, the Court may benefit from reviewing its financial rules and regulations to increase flexibility along the lines of other international organisations operating in post-conflict or humanitarian contexts.¹⁶

Further discussion may be needed on the issue of compensation for time/lost earnings. REDRESS agrees that this issue should be covered in the Guidelines. The Guidelines might usefully emphasise that while intermediaries will be afforded fair compensation in line with the stipulations set in the Guidelines, working as an intermediary does not necessarily result in financial gain.

Material Support

In some circumstances, material support will be central to ensuring intermediaries' ability to abide by the Court's standards. When intermediaries have access to confidential information, ensuring they are able to store that information, as well as share it with the Court/counsel in a safe manner is vital. Costs relating to material support need not amount to fully supporting an office; often specific equipment or training will be enough to reduce risks. The provision of documents such as the Court's information materials and standard application forms should be seen simply as Court materials as oppose to the provision of "support" to intermediaries.

¹⁵ Often, in cases of victims applying to participate in ICC proceedings, additional information will be required in order for their application to be transmitted to the Chamber. However, as legal aid is usually only granted once victims' status in a case has been recognised, it is the intermediary who assisted the victim to fill in the form who will often be tasked to obtain this additional information. It is not clear whether this very common type of situation would qualify for reimbursement of the intermediary's expenses.

¹⁶ For instance the European Commission, Humanitarian Procurement Centre's Charter, adopted in October 2009, establishes a number of principles, including transparency, proportionality, equal treatment and non-discrimination. The principle of *proportionality* governs the relationship between the procedures followed and the value of contracts. See: http://ec.europa.eu/echo/files/about/actors/HPC_Charter_26-10-09_%20EN.pdf.

Capacity Building

REDRESS supports the recognition in the Guidelines of the need for training and technical assistance to strengthen expertise and capacities, and would welcome a stronger commitment to that effect. Sensitisation on the Court's mandate should be routine, and repeated frequently. Experience has shown that single sensitisation workshops are insufficient for individuals who will, by the nature of their role, become multipliers communicating the Court's work to others.

With respect to building intermediaries' capacities in Protection and Security, it is fundamental that these areas also encompass psychosocial protection. In accordance with the Court's Strategy on Victims, intermediaries would also need to be sensitised on best practices in working with traumatised and vulnerable victims, not least on gender sensitivity with particular reference to their work.¹⁷

Furthermore, considering the complementarity principle, capacity building should ideally be seen as a core part of working with intermediaries. Indeed, persons or organisations that have assisted the Court could play a central role in ensuring national procedures are put into place and best practices from the Court are reproduced at the national level.

Psycho-social Care and Support / Security and Protection

REDRESS welcomes the provision for psychosocial support and welcomes the clear recognition that the Court understands that it "has a duty to prevent or manage security risks to intermediaries, resulting from the intermediaries' interaction with the Court and the fulfilments of the intermediaries' functions on behalf of the Court." We would add to the list of duties, the need to share information with the intermediary and to ensure that he/she is consulted on these issues. Indeed, consultation and involvement of the intermediary will ensure appropriateness as well as commitment to protection measures that are put in place.

Section 5 - Security and Protection

Prevention and Limitation of Risk

REDRESS agrees that best practices should be used by the Court's staff, counsel and intermediaries. An annex should define what is meant by best practices. Also, country specific best practices should be developed in consultation with intermediaries. Organisations and individuals will be more likely to implement these if they are involved in identifying and developing them.

While we fully support making Good Practices on Risk Prevention and Management available to intermediaries, we would encourage a more proactive approach. Training on this topic should be systematic rather than optional.

Protective Measures and Security Arrangements

Regarding protective measures and security arrangements, REDRESS fully agrees that the Court must take measures to manage risks in the event that an intermediary is at risk on account of his/her work with the Court, but also more broadly irrespective of whether an actual risk materialises. In doing so, the Court should ensure that the intermediary is kept

¹⁷ The language should be shifted to "working with" rather than "dealing" with traumatised or vulnerable victims as victims' experience of justice can be undermined if they are not empowered and put at the centre of the process, rather than merely being an entity that needs to be managed or controlled.

fully informed of assessments and the results thereof. Indeed, where individuals have felt at risk, they have not always known whom to approach to address their concerns. Questions have also been raised by intermediaries as to the criteria being used to make a determination regarding the risk/ threat faced.

REDRESS' view is that understanding the basis for decisions related to protection will help to ensure the psychological well-being of the person who has reason to believe he/she might be at risk. Providing clear indications of whom they should contact to discuss safety-related issues would also assist.

Section 6 - Monitoring & Review of Guidelines

REDRESS agrees that implementation of the Guidelines should be monitored. It also suggests that they should be periodically reviewed so as to incorporate lessons learned. Subject to confidentiality requirements, each Organ should be required to maintain data on the number of intermediaries, including dates of contract, gender and age, information about their involvement in Court-organised training sessions¹⁸ and records relating to security incidents.

When reviewing the Guidelines to incorporate lessons learned, it is recommended that intermediaries be involved and consulted to ensure that their views are integrated and that learning is shared.

¹⁸ It is suggested that feedback or evaluation forms be systematised for training and sensitisation workshops directed at intermediaries in particular.