

VICTIMS RIGHTS WORKING GROUP

Comments on the Role and Relationship of ‘Intermediaries’ with the International Criminal Court

6 February 2009

The Victims' Rights Working Group (VRWG) is a network of national and international civil society groups and experts created in 1997 under the auspices of the NGO Coalition for the International Criminal Court. Its members include international NGOs and experts and NGOs from a wide array of countries around the world including those countries affected by ICC investigations and prosecutions.

The VRWG provides these Comments on the role and relationship of ‘intermediaries’ with the ICC in response to the Registry’s consultation on this issue. The VRWG welcomes this consultation. Indeed, the VRWG and many of its member organisations have been in contact with the Registry and other organs of the Court, in particular about the very pressing concern of protecting ‘intermediaries’; and on ensuring that ‘intermediaries’ receive the necessary support to carry out tasks for the Court.

A meeting on the question of ‘intermediaries’ between NGOs and organs of the Court was held on 20th June 2007. The current consultation provides a useful way in which to follow up on some of these previous discussions, and to determine ways in which to resolve any outstanding concerns and foster continuing dialogue. The VRWG hopes that these comments, and the outcome of any further consultations on the role of ‘intermediaries’ will be given due consideration by the Court in the further development of its Strategy on Victims and in the further development and implementation of its Strategic Plan.

As part of our work to consult members of the VRWG, many organizations and networks working in ‘situation’ countries expressed an interest in carrying out more intensive consultations with local actors and ‘intermediaries’ on the ground. These local consultations are ongoing. Consequently the comments set out in this document should be considered as preliminary.

1. Who is an intermediary

There is no definition of ‘intermediary’ in the Rome Statute or Rules of Procedure and Evidence. The VRWG understands the term ‘intermediary’ to include local NGOs or grassroots associations, individuals or any other associations or groupings which in some way link the ICC (including the Trust Fund for Victims) to its constituents (victims, witnesses or others) in countries of concern to the ICC, or link the ICC’s constituents to the ICC (including the Trust Fund for Victims). An ‘intermediary’ may also be a local NGO or grassroots association, an individual or any other association or grouping which in some way links a legal representative (typically a legal representative of victims) with its clients in remote locations and vice versa. In certain circumstances it may also be an international organisation or agency operating in the situation country or a local or international organisation operating in any other country to which victims have fled.

Given the role that ‘intermediaries’ thus defined may play, particularly in assisting the constituents of the ICC to be in contact with the ICC, they may or may not be acting on the basis of any contractual relationship with the ICC. This is the case chiefly because the ICC does not determine who may be in contact with it. In fact, it is mandated to receive information from individuals, organisations and others, including applications from victims. The general public and the victims may contact the ICC directly. However, due to problems of logistics, distance and other challenges operating particularly in the locations in which the ICC is most engaged, it is necessary and appropriate that especially victims will need conduits to be in touch with the ICC. Were the ICC to choose and limit the persons or organisations who could serve as conduits, it would prove problematic for victims who may have a range of reasons for wishing not to use a particular local conduit.

It should be noted that, in many cases, there is not simply one ‘intermediary’ serving as a conduit between the ICC and victims. Often, a larger organisation working regionally may be working with a number of local grassroots groups locally and the chain of contacts may require a series of steps (in either direction).

2. What are the various tasks carried out by ‘intermediaries’?

The VRWG is aware of the following different types of work that have been undertaken by ‘intermediaries’: (this list should not be taken as exhaustive and will naturally evolve over time)

General Cross-Cutting Work with Victims who are involved with ICC proceedings

- Assist victims to keep a low profile and minimise any negative repercussions following their contact with the Court;
- The first point of contact for victims, ‘intermediaries’ receive from the victims their concerns about their security situation and provide victims with general advice;
- Periodically visit victims whose cases are before the Court to be assured about their situation and monitor how it evolves. This may include evaluating socio-economic condition, psychological and health needs, suicide risk, and whether they have suffered reprisals or harassment;
- Locate and/or provide medical and other assistance, psychological support and other services for those who are injured, sick or traumatised or economically deprived;
- Keep track of the number of deaths, those who lose interest in their case, and those who have moved, and assist the relevant organs of the Court to keep track of the situation;

Work with the Office of the Prosecutor

- Assist the Office of the Prosecutor to track down and contact witnesses and other investigative leads, and/or to maintain contacts between the OTP and the witness (for both investigation and protection purposes), particularly where it is adjudged to be too insecure for OTP staff to do so directly;
- Assist the Office of the Prosecutor to track down and collect documents and other evidential materials;

Work with the Registry

- Provide general information to victims about their right to participate in legal proceedings and about the Court process generally;
- Assist Registry staff (including the VWU and the VPRS) to correspond with victims and witnesses, by helping victims and witnesses to provide information, fill in application or other forms and/or provide any evidence or additional documentation in support of applications;
- Help Registry staff to provide information to victims (applicants or participating victims) (general as well as specific information about proceedings in which the victims are already involved);
- Assist staff of the Secretariat of the TFV to identify potential projects and correspond with victims, and to implement projects of the TFV for the benefit of victims and their families.

Legal representatives

- Assist legal representatives (both for victims and for the defence) to convey information to clients or potential witnesses, gather evidence for a particular submission, determine victims’ views and concerns and/or obtain instructions;
- Assist the Office of the Public Counsel for Victims (OPCV) to communicate with victims.

Outreach and public information

- Assist with outreach, both in helping the ICC PIDS to assess outreach possibilities and in carrying out outreach in cooperation with or on behalf of PIDS.
- Organise capacity building workshops for or with other local actors and NGOs about the international justice process in general and, for example, the documentation of international crimes, such as crimes of sexual violence, for the purposes of gathering information for the ICC).

The VRWG underscores that the same ‘intermediaries’ are often solicited by several organs and units of the Court, simultaneously and without coordination. Not only does this place an even heavier burden on the limited resources of ‘intermediaries’, it might also further strain the ‘intermediaries’ security, and could also create a conflict of interest. The Court should give some consideration to ways in which correspondence with ‘intermediaries can be better coordinated’ – with due consideration of confidentiality requirements and security needs.

3) How has the work with the Court impacted groups acting as ‘intermediaries’?

The general sense of ‘intermediaries’ consulted on their role and relationship with the Court is that of frustration. They feel that the various organs of the Court have been asking a tremendous amount from ‘intermediaries’ to accomplish basic Court tasks; the work undertaken by ‘intermediaries’ is not being sufficiently recognised by the Court; and that the most basic needs of ‘intermediaries’ resulting from this work, especially their need for protection and for logistical and other support, is not recognised by the Court.

‘Intermediaries’ have helped the Court to establish itself and to function, in spite of enormous risks they have been facing and continue to face, and for roles that are not really theirs. Whilst happy to contribute to the work of the Court in fighting impunity and deterring future crimes, the ‘intermediaries’ consulted felt that the tasks they are asked to perform continue to increase, and that many of these are not tasks they should be responsible for.

In some instances, the Court’s lack of resources in its own budget has been used to assign tasks onto ‘intermediaries’ which is regrettable. The core functions of the Court should be undertaken by officials of the Court. ‘Intermediaries’ may assist and support but should not be called upon to undertake core functions.

The work for the Court has been a source of stress to the organisations’ regular work. Very time-consuming, the ‘intermediaries’ work has had a negative impact on their regular work. The fact that their work has been largely without reimbursement (for time and for costs), has been very difficult for ‘intermediaries’.

Moreover, the work has caused security problems for them. Some ‘intermediaries’ have been killed, attacked and many threatened. This has led some ‘intermediaries’ and their families to leave their homes, even to flee their areas altogether. Given the sensitivity of the ICC in many of the countries concerned, ‘intermediaries’ who are known to work with the Court have faced ostracisation from other members of the local civil society as well as more broadly within their communities.

The fact that the Court’s own outreach is so limited means that the ‘intermediaries’ receive the brunt of the society’s complaints about the functioning of the Court. ‘Intermediaries’ are also at the receiving end of the complaints from victims when the victims see that their cases have not advanced or have not been recognised by the Court. Victims have a range of concerns about the Court process, including the selectivity of charges. Not only is this unfair to ‘intermediaries’; it also further blurs the distinction of who and what the Court is (and who represents it), and heightens security risks for ‘intermediaries’.

4) Are there problems of capacity – are ‘intermediaries’ able to do the work that is entrusted to them?

The main problems facing ‘intermediaries’ include: lack of funds and staffing to do the work, lack of security to carry out the work effectively, and inability to easily reach remote areas made worse by poor local infrastructure. In some cases, intermediaries lack training on the specific issues that they are entrusted to discuss with victims, in particular when they are entrusted to explain complex legal proceedings or to obtain instructions on behalf of the Registry/VPRS or legal representatives.

Many of the tasks coming from or relating to the ICC are complex and do not relate to the realities on the

ground. Training alone will not rectify the problem. The ICC procedures must be made to fit with the local realities on the ground.

5) What type of support do ‘intermediaries’ require from the Court?

In general it was felt that the Court as a whole should do more to recognise the existence of ‘intermediaries’ and the fact that much of what the Court accomplishes relates in one way or another to the range of relationships the Court has with organisations and individuals working locally. The Court should thus formally recognise the status of ‘intermediaries’.

a) Protection :

To date, the Court has failed to proactively protect ‘intermediaries’ when there are serious and imminent threats to their safety. The explanation the Court gives lies in a restrictive interpretation of the Court’s protection mandate. According to Article 43.6 of the Rome Statute, “protective measures and security arrangements, counseling and other appropriate assistance” must be provided to “witnesses, victims who appear before the Court, **and others who are at risk on account of testimony given by such witnesses.**” [emphasis added]

It is thus argued that ‘intermediaries’ are not covered by this provision. Pre-trial Chamber I has failed to “redact” the names of ‘intermediaries’ in the copy of the victim application forms which is transmitted to the Defence and the Prosecution [ICC-01/04-374, paras. 30-31]. This is unfortunate. The justification given is that the groups have chosen to become ‘intermediaries’ voluntarily. It must be noted, however, that, in many cases, the line between having voluntarily accepted to become ‘intermediaries’ and their responding to formal or informal requests coming from the Court, can be very fine. In this respect, a decision of the Appeals Chamber has acknowledged that there are provisions in the Rome Statute and the Rules of Procedure and Evidence “aimed at ensuring that persons are not put at risk through the activities of the Court and which are not limited to the protection of witnesses and victims and members of their families only.” [ICC-01/04-01/ 07-475, para. 43]

The VRWG submits that the Court is obligated (both legally and morally) to tackle the question of protecting intermediaries. Indeed, this relates to the positive obligation to ensure that persons are not put at risk through the activities of the Court. Threats, intimidation and reprisals against ‘intermediaries’ which can be said to be linked to witness intimidation may indeed constitute offences against the proper administration of justice in accordance with Article 70 of the Statute, and should be pursued vigorously by the Court.

The ICC should establish an appropriate protection plan for ‘intermediaries’ from the first contact with them. ICC staff should always exercise best practices when interacting with ‘intermediaries’ so as to avoid or minimise exposure to risk inasmuch as possible. In this regard, the ICC should make certain that ‘intermediaries’ are made aware of the risks and implications of cooperation with the Court so that their consent to assist and support the ICC’s work is fully informed.

It should be borne in mind that the level of insecurity faced by ‘intermediaries’ is not necessarily proportional to the task each of them undertakes ‘on behalf of the Court’ (although assisting the OTP might be considered to be a more risky task than conducting outreach). These differences are sometimes not relevant on the ground. Organisations or individuals acting as ‘intermediaries’ are often simply identified as having a close relationship to the Court as a whole.

Protection plans should include mechanisms for evacuation, relocation and obtaining identity papers including a visa for abroad. It is worth clarifying that most ‘intermediaries’ requiring help or advice in relation to their safety, are not asking to enter the Court’s protection programme or to be relocated. However, there may be instances in which this will be required and the ICC should be prepared to act in such exigent situations.

Additional measures that could be useful for ‘intermediaries’ include:

- to issue a (public) statement from the Court calling for their protection;

- to support their requests for passports or visas;
- to be referred to a list of telephones or addresses to which they can resort to in case of emergency;
- to strengthen rapid reaction systems with 24hr coverage, e.g., networks at the local and national level (prevention measures such as facilitating transport and moving of home for ‘intermediaries’; assistance with evacuation and escort by police or security officers, establish a communication network with organizations and individuals identified and informed of the situation);
- to assign ICC resource people to help deal with and coordinate fast services for evacuation.

Again, not all measures of protection should and can be undertaken by ICC protection staff alone; however, the ICC has a role in key urgent situations. Further, the ICC has a role in working with the range of national and international security actors to ensure that effective systems are in place to protect ‘intermediaries’ working with the Court. It is incumbent on the ICC to take this small but important step.

The court should protect ‘intermediaries’ on the basis of criteria of ***need*** and ***urgency***. This should happen regardless of whether the Court has formalised its relationship with the ‘intermediary’.

In addition to the physical protection of ‘intermediaries’, the ICC should take appropriate measures to ensure that ‘intermediaries’ who experience trauma and related consequences as a result of their work for the Court obtain the necessary psychological care and support. In particular, those who assist the court to deal with victims and witnesses, e.g., those facilitating the Court’s access to survivors of sexual violence may experience trauma as a result of such work.

b) Financial, logistic and material support

‘Intermediaries’ repeatedly stress that there are huge demands on their time and their resources with very little and mostly no support.

It is to be noted that the different organs of the Court and units within organs appear to have different approaches to financial, logistical and material support. Some organs, such as the OTP, are said to provide reimbursement for certain costs. Others, such as the VPRS, which in many ways has required the most from ‘intermediaries’, has provided the least in terms of protection, support and assistance. The rationale of the VPRS appears to have been twofold: i) it has no money; ii) it does not want to be seen as encouraging victim participation. With respect to the first point, it is the view of the Victims Rights Working Group that the VPRS cannot shift core functions to ‘intermediaries’ and then fail to pay their basic expenses. With respect to payment, the issue would seem to relate to whether the VPRS or any other Court body is asking the ‘intermediaries’ to do something that the Court itself is obligated to do. If so, it is, in a sense contracting its services, and should pay appropriately. With respect to the second issue, of ‘encouraging victim participation’, it is underscored that the Court should ensure that its procedures are well known in the areas where victims are located. This is not promotional advertising or encouragement. It is the provision of information, a key obligation under the Rome Statute.

Some of the very specific financial, logistical and material challenges that have been noted by ‘intermediaries’ include:

- Lack of internet access (for purposes of communicating with the Court);
- Costs of transport to reach victims in the most remote locations;
- Paper and photocopying;
- Telephone costs;
- Time and resources away from other organisational priorities.

c) Training

Many of the organisations and individuals working as ‘intermediaries’ do not have prior experience of dealing with Courts or judicial proceedings. Some ‘intermediaries’ are human rights NGOs with experience in documenting human rights violations; others may be grassroots networks providing humanitarian or other

support to victims. There are a variety of training needs for such NGOs, however, the main concern of ‘intermediaries’ was not training; the concern was that the ‘intermediaries’ were being asked to do more and more complex work which should really be performed by the Court, without any recognition for it. The answer is not to provide more precise training for such NGOs, but to ensure that there is a proper distribution of tasks that reflects the capacities and local context of ‘intermediaries’, and which properly recognises their roles.

6) Selection of intermediaries

The VRWG is not aware whether the different organs or units of the Court have developed criteria to select ‘intermediaries’. In this respect the VRWG underscores that:

- (i) It will not always be possible for the Court to select ‘intermediaries’. As indicated in the outset of this commentary, ‘intermediaries’ link the ICC to its constituents (victims, witnesses or others), but just as importantly, *link the ICC’s constituents to the ICC*. This process of two-way communication means that the ICC will not have control over who interacts with it. These organisations that communicate with the Court on behalf or in respect of victims or other constituents may suffer the same negative repercussions from their association with the Court as any other organisation pre-selected by the Court;
- (ii) The Court may, however, wish to select certain ‘intermediaries’ to undertake key functions for it, e.g., to carry out certain outreach activities or to correspond with certain individuals or groups. In the experience of members of the VRWG, the key element for an organisation or individual to become an ‘intermediary’, is its proximity to the affected population and/or specific groups of victims. Such proximity must not only be physical, but it refers mainly and above all to the relationship of trust relationship established with the community, even long before the ICC started operating in the relevant area.