

Towards Mature Justice: Expanding the ICC's Independent Oversight Mechanism

Written by Emily Tsui

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EMILY TSUI, OCT 11 2015

Towards Mature Justice:

Expanding the Mandate of the International Criminal Court's Independent Oversight Mechanism

“Peace and justice are indivisible.” – Kofi Annan, 1997[1]

The International Criminal Court (ICC) exists to put the perpetrators of the most heinous crimes on trial. In fulfilling this goal, the Court can deprive a national of a state of his or her individual freedom.[2] It is a *sui generis* institution that combines civil and common law, requiring the co-operation of many actors, including third-party intermediaries, across vast geographic and cultural distances to bring justice to conflict and post-conflict societies. In gaining the acceptance of local and national governments, the ICC must act in a way free from conflicts of interest and corruption.[3] The Court has done much in recent years to achieve this goal, including the establishment of the Independent Oversight Mechanism (IOM) in 2009 to improve oversight of the Court's activities. However, footnote 6 of Article 27 of Resolution ICC-ASP/12/Res.6 establishing the IOM's operational mandate explicitly removed intermediaries from its jurisdiction.[4] This paper will argue that this exclusion of intermediaries used in the Office of the Prosecutor (OTP) from the IOM's mandate is detrimental to public perception of the ICC, the IOM's goal to enhance the efficiency and economy of the Court, and the judicial process. It will illustrate this point by assessing the status of intermediaries at the ICC, varying interpretations of the Rome Statute from the views of the OTP and the Assembly of States Parties (ASP), and the mandate and budget of the IOM as well as various ICC cases.

Scope of the Issue

The ICC's first cases brought forward a number of issues. This paper will focus mainly on the absence of accountability measures for the use of intermediaries in the OTP. Accountability is defined as per Frédéric Mégret's explanation, that it “can be seen as a process (and the procedures that go with it), or an end-state, a quality (that of being accountability).”[5] Thomas Lubanga was the defendant in the Court's first trial and was eventually convicted of the enlistment and conscription of children under 15 in his army in the Democratic Republic of Congo (DRC).[6] This trial was riddled with problems which included twice the stay of proceedings, once in 2008 and the second in 2010, for the OTP's resistance to the Trial Chamber to disclose information surrounding intermediaries accused of committing offenses against Article 70[7] of the Rome Statute.[8] The Trial Chamber recognized the extent of this problem, indicating its concern with how the OTP dealt with intermediaries in a condemnation taking up 125 of 593 pages of its judgment delivered in 2012.[9] In particular, the trial judges found that intermediaries 143, 316, and 321 may have directly violated Article 70 by coaching witnesses to provide false testimonies.[10] Half of the witnesses were contacted by just nine intermediaries. Of the nine who testified to have been child soldiers, none of them were deemed acceptable by the Court.[11] This issue of intermediaries is a lacuna that the ICC must address. Unfortunately, the *Lubanga* trial is not an isolated incident.

In the 2012 *Prosecutor v. Mathieu Ngudjolo Chui* case, Ngudjolo, also from the DRC and charged with three crimes against humanity and seven war crimes, was acquitted partially because the Trial Chamber dismissed “child soldier”

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witnesses as unreliable.[12] In a more recent case, *Prosecutor v. Uhuru Muigai Kenyatta*, the Kenyan president was charged with crimes against humanity but was acquitted in 2014. Again, serious accusations of the OTP's intermediaries' misconduct were prevalent throughout the Defense's arguments.[13] As the OTP is now investigating crimes in Uganda, Darfur, Libya, Côte d'Ivoire, Mali, and is conducting preliminary examinations on a number of other countries, the need to regulate intermediaries grows.[14]

Defining Intermediaries

This paper will use the 2014 Court document "Guidelines Governing the Relations between the Court and Intermediaries" (Guidelines)'s definition which identifies an "intermediary" as "someone 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 and/or affected communities more broadly on the other." [15] In the OTP, these agents are particularly critical for an investigation because of budgetary and staffing limitations, language and cultural differences, and geographical separation of many cases from the trials.[16] They are also useful for their links with non-governmental organizations and the United Nations, ability to travel where the ICC is unwelcome, and capacity to transmit information correctly.[17] Therefore, prohibiting the use of intermediaries is neither possible nor desirable, and maintaining their co-operation through confidentiality agreements is a chief priority. However, the OTP has traditionally held these protective measures to a sometimes unreasonable degree.[18]

Since Fatou Bensouda has assumed the ICC position of Chief Prosecutor, steps have been taken to improve investigations, signalling a departure from the previous Prosecutor Luis Moreno-Ocampo's position that the judges had been "overly harsh" in their criticism of the OTP in the *Lubanga* case.[19] However, while actions such as the Guidelines are welcome in the Court, they do not override a need for the IOM to take responsibility in regulating the OTP's relations with intermediaries. An examination of the IOM's history and the legal position of intermediaries at the ICC will help explain why its mandate to exclude intermediaries is outdated and needs correction.

Legal Status of Intermediaries and the IOM

Before the establishment of the Guidelines, intermediaries existed in a legal vacuum at the ICC, and were not addressed in the Rome Statute and Rules of Procedure and Evidence.[20] However, the IOM has existed since the beginning of drafting the Rome Statute, with a provision under the ASP's powers in Article 112(4) that allows for the establishment of "an independent oversight mechanism for inspection, evaluation, and investigation of the Court, in order to enhance its efficiency and economy." [21] The ASP first discussed the possibility of realizing the creation of an IOM during its fourth session in 2005, but it was not until the eighth session in 2009 that a resolution was passed that established the basic structure of the IOM.[22] This mandate called upon the investigative function of the IOM to be implemented immediately, but the evaluation and the inspection function was to be clarified in the next session.[23]

This coincided with developments in the *Lubanga* trial, where the Defense began to identify inconsistencies in the witnesses' statements and argued that investigations by the OTP on its intermediaries could result in a conflict of interest.[24] Between the eighth and the ninth session, Moreno-Ocampo protested loudly that the proposed *proprio motu* powers of the IOM would be in conflict with Article 42 of the Rome Statute which guaranteed prosecutorial independence[25]. Tensions between the Court's Chambers and the OTP began to flare up.[26] It appears that it was at this time that the IOM's intended mandate to oversee disputes of contractors, which implicitly included intermediaries,[27] was removed as differences in the 2009 and 2010 resolutions show. Resolution ICC-ASP/12/Res.6 identifies the IOM's mandate to build on the "efficiency and economy" provisions of Article 112(4), but also qualifies in Article 30 of this mandate to exclude investigations of the Article 70 of the Rome Statute's nature. In the *travaux préparatoires*, there was no intention to exclude the IOM's mandate from these violations and there was always a possibility for the mechanism to investigate new issues as they arise.[28] Article 70 and the need for the IOM to oversee intermediaries are inextricably linked as developments in the *Lubanga*, *Ngudjolo*, and *Kenyatta* cases shows. During this time, there were calls for a code of conduct for intermediaries to be formalized, and the first draft was created in 2009. It was later refined in 2012 in reflection of the *Lubanga* judgement.[29] The

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final Guidelines in 2014 seem to fill the hole in the ICC's accountability mechanisms to formalize violations of the Rome Statute's Article 70 issues by intermediaries. This is not enough as there is no provision for a mechanism to oversee how these Guidelines are being respected, and instead the IOM should fill in this gap. As it will be shown, this inclusion of the IOM's mandate to inspect violations of Article 70 by intermediaries will be beneficial to the Court.

Furthermore, providing the IOM the powers to conduct investigations on intermediaries is not contrary to the independence of the OTP as initially feared, but instead expands on the Court's overall effectiveness. The current operational mandate indicates that the IOM must consult with the Head of the Organ on which it is about to conduct an investigation on, and there are quite extensive provisions to promote co-operation with the organ.[30] Combined with the Guidelines, the IOM is granted a significant opportunity to more effectively perform the functions of investigations, inspection and evaluation as per Article 112(4) of the Rome Statute. The Bureau of the ASP even indicated in a study of the IOM that the latter's main function was to "ensure that staff misconduct does not go unpunished, [and] that staff have a right to due process, and that complaints are investigated and an effective remedy provided." [31] As well, part of the justification for doing so is that it would make the OTP less prone to criticism in the case of misconduct by one of its intermediaries, and as will be shown, will help to improve public perception, the efficiency and economy of the court, and positively contribute to the judicial decisions of the Court.

Public Perception

The actions and decisions of the ICC have immense implications for post-conflict societies and the international community, and thusly public perception of the Court in these domains is a key reason to include intermediaries into the IOM's mandate.

Implications for Post-Conflict Societies

At the heart of this issue are acts of misconduct by the intermediaries and ICC judgements that directly affects transitional justice in post-conflict societies. For the wider public, intermediaries are the face of the ICC and the standard to which the ICC's effectiveness can tangibly be measured.[32] It is also a way for the locals to evaluate their trust in this organisation and ultimately, degree to which further co-operation is deemed desirable or fruitful.[33] In the *Lubanga* Case, the stay of proceedings resulting from misconduct is particularly troublesome to victims and those who assisted the Court as they may potentially become subject to revenge. Furthermore, if intermediaries are unable to find proper witnesses, the victims may lose out on a chance to speak and have a chance to present their story.[34] As a result, their opportunity at writing the historical narrative of the conflict is drastically reduced. This can especially be seen in the *Lubanga* case, where he was convicted on the use of child soldiers with zero of nine alleged former child soldiers' testimonies.[35] However, in upholding principles of accountability and citing irrelevance, the OTP has refused to charge any intermediary that was alleged to act in violation of Article 70 of the Rome Statute.[36] On this account, the IOM's mandate should be amended to include the inspection of these violations while working with the OTP. As well, by allowing the IOM *proprio motu* powers in consultation with the OTP, there is a chance to effectively protect intermediaries who are performing their jobs correctly by making the corrupt individuals better accountable for their actions.

Implications for the International Community

States party to the Rome Statute are also scrutinizing the effectiveness of the Rome Statute in carrying out justice and any potential damages to its reputation. As the Rome Statute derives its powers from states, it is therefore accountable to the ASP which has a vested interest to see the Court function in its most efficient manner and receive the greatest marginal returns.[37] For states that have not signed the Rome Statute, misconduct by intermediaries gives them further excuses to not be a party to the Court's jurisdiction. Incidents such as the ICC's arrest warrant in 2013 for an OTP intermediary charged with contempt of court are especially damaging to the Court's reputation and will deter the desirable expansion to global membership.[38] Furthermore, as one of the main purposes of the ICC is to develop a "human rights culture" and respect by fair trial, it is imperative that it lead by example for national justice systems.[39] It is therefore in the best interest of the IOM to identify effectiveness and reputational gaps in the ICC and close them.

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Improving Efficiency and Economy

The use of intermediaries can be seen as positively contributing to the “efficiency and economy” of the Court, but to maximize this potential, regulation of their activities by the IOM is needed. For the purposes of this paper, the term “efficiency” will be used as per the United Nations Office of Internal Oversight Services’ (UNOIOS) definition, which refers to it as “a measure of how well inputs (funds, staff, time, etc.) are converted into outputs.”[40] “Economy” will be defined by the International Organisation of Supreme Audit Institutions as “minimising the cost of resources used for an activity, having regard to the appropriate quality.”[41] An effective and neutral IOM that has *proprio motu* powers can promote “good governance” by conducting internal reviews and making recommendations on how to improve the Court’s overall performance and productivity.[42] The Bureau of the ASP went as far as to note that “as long as the Court has no independent oversight mechanism, it can only deal with misconduct internally, ‘which is not objectively credible.’”[43] As already seen, including intermediaries into the IOM’s mandate will address this credibility gap, and as will be shown, increase the efficiency and economy of the Court through working with the OTP.[44]

Improving Efficiency

The efficiency of the Court can also be improved through effective oversight as it will allow the OTP to better convert the work of its “inputs,” intermediaries, into “outputs,” evidence collection and building witness connections. As stated, the use of intermediaries is good practice for the OTP. However, it is also in the best interest of that organ to check its process in selecting individuals that may negatively influence the evidence and stress the OTP’s limited resources.[45] In particular, it will allow the OTP to better assess the security situation on the ground. Without strict control, intermediaries are granted the opportunity to exaggerate reports of the security situation on the ground in order to justify relocation of witnesses, as seen in the *Lubanga*, *Prosecutor v. Germain Katanga*, and *Ngudjolo* cases.[46] Relocation was regarded as a mechanism of last resort for the OTP to relocate witnesses, but was used frequently to assure witnesses of their safety. This procedure is expensive and reduces the incentive for intermediaries to look for real witnesses instead of buying fraudulent ones. Criticisms by the Trial Chamber noted that efficiency was sacrificed in the *Lubanga* case in favour of protective measures.[47] Allowing the IOM to examine this issue will increase this potential to improve efficiency by encouraging the OTP to assess the claims that the intermediaries are making with greater diligence, and to craft a strategy for the OTP in the future to determine best practices in contacting intermediaries. It will reinforce existing disciplinary structures to make its “inputs” the most effective they can be.[48]

Improving Economy

In improving the economy of the Court, the IOM holds much promise to create expertise in oversight, reduce unnecessary overlapping financial expenditures in accomplishing the same task, and cutting down on frivolous costs. The IOM will be headed by a P-5 level professional[49] and will be staffed with a team devoted to accomplishing its mandate with assistance from the specialized UNOIOS.[50] Instead of the OTP needing to deal with cases of misconduct on a costly ad-hoc basis, the professionalization of an investigative force will improve the Court’s economy. Furthermore, the IOM has currently a separate budget of about 373 thousand euros, established independently of any other organ.[51] This would reduce the strain on the OTP’s already overstretched resources to allow it to focus on prosecution.[52] Furthermore, the witnesses in the *Lubanga*, *Katanga*, and *Ngudjolo* cases alleged that they were bribed with money, education and free re-housing to give false testimonies.[53] Besides from the obvious problematic implications this has on the Court’s credibility, corruption and bribery are costly, and an IOM that can oversee mishandling of expenses will allow for optimization of the Court’s budget. Furthermore, the defensiveness of Moreno-Ocampo in protecting the intermediaries’ identities resulted in a delay of the start of the *Lubanga* trial, driving up costs significantly and hampering the overall judicial process.

Improving the Judicial Process

A consequence of the intermediaries’ acts of misconduct is a skewed Court decision and delays in the judicial process, and a sentence reduction may be seen as acceptable as a way to compensate the Defense for mishaps.[54]

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In confronting problems with the OTP, the Court must achieve a delicate balance between public interest and individual rights in the administration of justice. Unfortunately, intermediaries can cast a shadow on the judicial process, as they can lead the OTP to misevaluate the local situation and cause an omission of both important exculpatory and inculpatory evidence.

Exculpatory Evidence

The OTP's resistance in the *Lubanga* case to provide the Defense with the identity of sources who were alleged to have held potential exculpatory evidence calls into question the ability of the Court to investigate misconduct, especially Article 70 violations, effectively.[55] The IOM mandate, if extended to fill this gap, stands to allow for an independent assessment of the extent to which confidentiality agreements are so strictly held that they are not disclosed to anyone outside of the OTP, and the existence of exculpatory evidence. Theoretically, it is the responsibility of the Pre-Trial Chamber to conduct investigations before such problems arise in Court, but there also must be an independent third-party to assess situations in the cases which they do not catch flaws. The Defense in a number of cases has lamented the extent of identity protection for the OTP's intermediaries. Although in almost all these instances the confidentiality agreements are rightfully used, the potential for exculpatory evidence to exist and go unchecked is in violation of the Court's Rules and Procedures of Evidence. An IOM with a broader mandate to investigate these claims will improve the Court's overall accountability and judicial process.

Inculpatory Evidence

There was a serious missed opportunity for the intermediaries in previous cases to effectively collect inculpatory evidence that must be rectified for future cases. The Trial Chamber convicted Lubanga on charges independent from those witnesses who claim to have been the subjects of his crimes.[56] Had the intermediaries been able to spend their resources on contacting the real victims of his crimes, the judgement may have been more just to his victims and may have corrected the historical record better.

Conclusion

As this paper has shown, the Court would benefit from an extension of the IOM's mandate to include the oversight of intermediaries used in the OTP as it will improve public perceptions, the efficiency and economy of the Court, and its judicial process. Recent moves by Bensouda shows promise in reconciling the previous antagonism between the OTP and the ASP over the IOM. The ASP must seize this opportunity by working in collaboration with the OTP to develop a more effective accountability mechanism for intermediaries which serve a critical role in the Court in advance of the IOM's operational review during the ASP's fifteenth session. As the Court grows in its adolescent phase,[57] it becomes necessary to be consistently reviewing existing structures and to make appropriate modifications such as this in order to allow it to flourish in adulthood.

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[16] Edmunds and Haslam, "Managing a New," 50.

[17] Buisman, "Delegating Investigations," 34.

[18] This is especially seen in the *Lubanga* case, where Moreno-Ocampo refused to disclose his intermediaries' identities to the Defense, even when it would have been protected from the public.

[19] *Ibid.*, 77.

[20] Edmunds and Haslam, "Managing a New," 34.

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[24] Jennings and Koech, "Limited Remit."

[25] Turner, "Policing International," 242.

[26] Markovic, "The ICC's Prosecutors," 203.

[27] In all the subsequent resolutions after 2009, the resolutions clearly indicated in a footnote that contractors were separate and distinct from intermediaries. The IOM would not be responsible for overseeing intermediaries. However, the 2009 resolution had no qualification of that sort.

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Written by: Emily Tsui

Written at: University of Toronto

Written for: Professor Kennedy and Professor Kolenda

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