UNIVERSITY OF KENT- KENT LAW SCHOOL

IN-BETWEEN SPACES, INTERMEDIARIES AND THE INTERNATIONAL CRIMINAL COURT: UNCOVERING NEW SITES FOR OPPORTUNITY AND CHALLENGE

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Abstract

Approaches to the practice of international criminal justice have largely focused on the relationship between institutions, states and communities. This has overlooked the role of other actors, such as intermediaries, in justice processes. This thesis examines the place of intermediaries in international criminal justice with a particular focus on the International Criminal Court (ICC). Through this examination it is argued that international criminal justice also takes place in in-between spaces. The central insight of the thesis is that in-between spaces are productive of particular forms of international criminal law practices. These in-between spaces are not captured in dominant international criminal law literature and they are hardly capable of regulation. Furthermore, much of the literature on intermediaries overlooks the existence of these practices because it tends to study the relationship between intermediaries and the ICC through global/local lenses. The thesis develops the concept of in-between spaces, both analytically and empirically, to illuminate these practices of international criminal justice to which intermediaries give rise. To that end, the thesis conceives intermediaries as mediators of the Court's work in in-between spaces and that opens up new conversations about the way in which knowledge is produced, subjects are represented and power is exerted in these in-between spaces. Next, the thesis discusses the question of security. I argue that the Court is unable to fully protect intermediaries in in-between spaces. Therefore, it should partner with other stakeholders. Lastly, this research discusses the issue of accountability. I argue that intermediaries' accountability is complex because in-between spaces produce different accountability registers. While the Court captures a small fraction of intermediaries' accountability, intermediaries are accountable to other actors such as donors and states. What is more, the current framework of accountability does not provide for the Court's accountability toward intermediaries. The thesis concludes that the ICC should enhance its partnership with intermediaries and change some of the ways in which it currently relates to them because in-between spaces are productive of a new kind of practice of international criminal justice which is not captured by existing literature and law. Despite the challenges that such engagement may bring, intermediaries are indispensable to the Court's work on the ground.

List of Abbreviations

AC	Appeals Chamber (ICC)
AI	Amnesty International
ASP	Assembly of States
DRC	Democratic Republic of Congo
HRW	Human Rights Watch
ICC	International Criminal Court
IRRI	International Refugee Rights Initiative
LRA	Lord's Resistance Army
OPCD	Office of the Permanent Counsel for Defence
OSJI	Open Society Justice Initiative
OTP	Office of The Prosecutor
PTC	Pre-Trial Chamber (ICC)
TC	Trial Chamber (ICC)
VRWG	Victims Rights Working Group

INTRODUCTION: The Unseen Practice of International Criminal Law –*In-between spaces, Intermediaries and the ICC*

Since the 1990s there has been a proliferation of international criminal institutions designed to try the most responsible individuals for international crimes of genocide, crimes against humanity and war crimes.[1] As these relatively new international courts and tribunals evolved, there has also been an increase of interest in post-conflict justice mechanisms which amplified the development of international criminal law literature. However, contemporary debates about the practice of international criminal law largely overlook the practice of other actors, such as intermediaries. This thesis argues that intermediaries operate in in in-between spaces, that are productive of a particular kind of international criminal justice practice. However, although intermediaries assist, resist and sometimes sabotage the day to day operation of the international criminal court (ICC)'s work on the ground, dominant accounts of the ICC's work, in situation countries, have tended to focus on issues relating to state cooperation.[2] This is one but not the only illustration of how traditional approaches to the practice of international criminal law overlook practices of international criminal justice performed by actors other than international criminal institutions or states.

[1] Since the establishment of UN ad hoc Tribunals for former Yugoslavia (ICTY) and Rwanda (ICTR), the international community has also witnessed the creation of the International Criminal Court (ICC), five hybrid courts, the East Timor Special Panels (UNTAET), internationalized domestic courts, regional instigated courts and most recently an Impartial and Independent Mechanism (IIM) to assist investigations in Syria and help Iraq Preserve evidence. For detailed history of international criminal institutions see Rick J., 'Analysis: A History and Typology of International Criminal Institutions', available at < http://www.kirschinstitute.ca/history-typology-international-criminal-institutions/>, Accessed 22 November 2018.

[2] See for example Wartanian A., 'The ICC Prosecutor's battlefield: Combating Atrocities While Fighting for States' Cooperation –Lessons from the U.N. Tribunals Applied to the Case of Uganda', (2004) 36 *Georgetown Journal of International Law* 1289-1316; Oko O., 'The Challenges of International Criminal Prosecutions in Africa', (2008) 31 *Fordham International Law Journal,* at 380-7; also see Dicker R, and Keppler E., *Beyond the Hague: The Challenges of International Justice,* in Human Rights Watch World Report 2004: Human Rights and Armed Conflict, (2004), p207-08. On traditional approaches to the practice of international criminal justice see Stahn (ed.), *The Law and Practice of the International Criminal Court,* (OUP:2016).

This doctorate is about in-between spaces in which international criminal justice also takes place. In-between spaces are sites of mediation created by encounters between institutions, individuals and ideas. The thesis focuses on five in-between spaces including in-between status, in-between parties, in-between intermediaries, in-between regulation and in-between transitional justice and political transition.[3] The central argument of the thesis is that, in-between spaces produce particular forms of international criminal law practices. Dominant literature in international criminal justice limits the operation of international criminal law to international criminal institutions or domestic legal mechanisms. Yet intermediaries work in these in-between spaces that are not captured by orthodox approaches to international criminal law, that cannot be easily regulated but which enable important aspects of the day to day operation of international criminal justice. In order to make these arguments, I also move away from analytical frameworks such as global/ local and use in-between analysis to examine the opportunities and challenges that come with those practices.

The thesis contends that the Court should enhance its partnership with intermediaries and change some of the ways it currently relates to them because in-between spaces are productive of a new kind of practice that is not captured in literature and law. I argue that enhanced relationships between in-between agents and the Court will strengthen its work on the ground and, as such, contribute to the development of international criminal law more broadly. Arguments that support increased 'local' engagement run the risk of being challenged for perpetuating 'paternalist and missionary features and structural inequalities' as Carsten Stahn puts

[3] Further discussion of what in-between spaces are and how they operate for the purposes of the thesis can be found in chapter 3.

it.[4] However, I argue that the way forward should not be about avoiding more engagement but engaging differently.

This thesis asks the following questions: What is the place of intermediaries in international criminal justice? Specifically, what is the place of intermediaries at the ICC? This is the main question that this research project seeks to answer. In order to answer the first question, it is first necessary to address the following question: What is the most suited analytical frame to analyse the place of intermediaries in international criminal justice? The final question that this thesis seeks to answer is: what are the effects of in-between spaces on international criminal justice? Specifically, what are the effects of in-between spaces on ICC processes?

In order to understand what in-between spaces are and their effects on international criminal justice, the thesis focuses on the relationship between intermediaries and the international criminal court. Though not explicitly mentioned in the founding statute of the Court, intermediaries' role in the functioning of the ICC is paramount. Without intermediaries it would be difficult for the Court to carry out its work on the ground. Intermediaries are essential to the work of all the units of the Court. In the early stages of the Court's work, for example, individual intermediaries assisted the Office of the Prosecutor (OTP) investigative team in the Democratic Republic of Congo (DRC) with on ground expertise. They performed a variety of tasks for the OTP including sharing local intelligence because they knew people and places, they were involved in translation, locating witnesses, and arranging for meetings, among other tasks.[5] This practice was followed in other cases and it set the tone for subsequent intermediary work.[6]

[4] Stahn C., 'Justice civilisatrice? The ICC, post-colonial theory, and faces of 'the local', in De Vos C., Kendall S., Stahn S. (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions,* (Cambridge University Press: 2015), p 50.

[5] On Intermediaries' tasks see for example: *Prosecutor v. Thomas Lubanga Dyilo,* Transcript of Deposition (closed session) 2010, TC I (ICC-01/04-01/06-Rule 68 Deposition) 16 November 2010, p 51 (line 22); p 52 (line

As regards the role of entities, Non-Governmental Organizations (NGOs) have and continue to play a vital role in areas relevant to the ICC. Their input is manifested through data collection about conflicts, victims and perpetrators. Over the years, the data collected by NGOs (community, country or international levels) and organs of the United Nations (UN) on the ground further assists units of the Court in their work because these organisations are usually located in situation countries before international prosecutions even begin. In fact the prosecution has, on several occasions, been accused of over-relying on data collected by third parties instead of conducting its own investigations.[7] Thus intermediaries can be individuals, grassroots associations and other types of NGOs.

In general, intermediaries are either called upon by ICC staff or they voluntarily offer to act as bridges between local communities and the ICC. They assist victims in the exercise of their rights before the Court, the prosecution and the defence teams in their investigations, witnesses who wish to testify in proceedings, the Trust Fund for Victims (TFV) and they are an essential part of the ICC's outreach program. If one takes into account all the countries that are under the Court's jurisdiction, it is difficult to imagine the relationship between the ICC and its constituents without intermediaries. As key contributors to the Court's work on the ground, intermediaries exercise a certain level of power as they have the ability to act in a

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5), p 53 (lines 21-23); also see *Prosecution v. Thomas Lubanga Dyilo,* Judgement pursuant to Article 74 of the Statute, TC I (ICC-01/04-01/06-2842), [196].

[6] Other cases such as *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus,* Defence Application to restrain legal representatives for the victims a/1646/10 and a/1647/10 from acting in proceedings and for an order excluding the involvement of specified intermediaries, PTC I , (ICC-02/05-03/09-113), 6 December 2010, [14-20]; *Prosecution v. Thomas Lubanga Dyilo,* Judgement pursuant to Article 74 of the Statute, (supra n. 5), [178-182]; Institute for War & Peace Reporting, ICC Intermediaries Allegedly Concocted Evidence, 12 February 2010; *Prosecution v. William Samoei Ruto and Joshua Arap Sang,* Public redacted version of 'Ruto defence request to appoint an amicus prosecutor'', 2 May 2016, TC V(A) (ICC-01/ 09-01/11-2028-Red), 2 May 2016, [1-4].

[7] For more on problems associated with outsourcing investigations see Buisman C., 'Delegating Investigations: Lessons to be Learned from the Lubanga Judgment', (2013) Vol 11:3 *Northwestern Journal of International Human Rights;* Baylis E.A., 'Outsourcing Investigations' (2009) 14 University of California, *Los Angeles Journal of International Law and Foreign Affairs* 121.

way that influences outcomes in international criminal justice. By way of illustration, their involvement with witnesses, victims or even accused persons contributes to the identification and labelling of who becomes a witness or a victim in relevant proceedings before the ICC. In that capacity, intermediaries are important actors in the operation of the Court's work on the ground. However, legal academic literature on how intermediaries interact with the Court, to date, has been limited. Specifically, existing literature has not engaged with the question of theorising intermediaries' role at the ICC. In addition, existing analytical devices to examine the relationship between intermediaries and the Court are limited. This thesis seeks to fill that gap.

Turning now to the question of what tools are best suited to study in-between spaces, this thesis contends that if we think about intermediaries through existing analytical frameworks we may not see nor understand the practice of international criminal justice to which intermediaries give rise. For instance, a large body of literature has investigated the relationship between the ICC and communities affected by its proceedings through a global/ local framing.[8] While these approaches have played their part in, for example, starting conversations about 'social processes that span multiple boundaries',[9] literature on intermediaries is still in its infancy and as such conversations about analytical devices are also just starting. As Leila Ullrich observed, thinking through global/local or top/bottom limits our understanding of conflicting justice visions within the ICC and in the communities affected by its

[8] See Waldorf and P. Hazan (eds), *Localizing Transitional Justice: Interventions and Priorities after Mass Violence*, (Standford University Press: 2010); Other critiques and analyses include Ullrich L., 'Local Intermediaries, Victims and the Justice Contestations of the International Criminal Court', (2016), Vol. 14: 3, *Journal of International Criminal Justice*, 543-568. McGregor L., 'International Law as a 'Tiered Process': Transitional Justice at the Local, National and International Level, in McEvoy K. & McGregor L., *Transitional Justice from Below,* Grassroots Activism and the Struggle for Change, (Oxford, Hart Publishings: 2008) and Goodale M., 'Locating Rights, Envisioning Law between the Global and the Local', in Goodale M. and Merry S.E., *The Practice of Human Rights: Tracking Law between the Global and the Local*, (Cambridge University Press: 2007).

[9] Goodale M., 'Locating Rights, Envisioning Law between the Global and the Local', (supra n. 8), p 14.

proceedings.[10] Most significantly, contemporary intermediaries cannot be easily fitted in global or local categories. To address some of these challenges and to take the conversation in a different direction this thesis advances the concept of in-between spaces as an analytic frame for conceptualising and examining the relationship between intermediaries, the Court and the communities affected by its proceedings.

I build on existing definitions of the term intermediary which suggests that an intermediary is a person or entity who comes 'between' one and another.[11] To this I add a complex conceptualisation of 'in-between' as a dynamic site of interactions in which different in-between spaces run at the same time and in where different actors interact for different purposes. Furthermore, the thesis exposes the opportunities and challenges that these particular forms of international criminal justice practices offer to intermediaries and those who rely on their services. In-between spaces are rich and dynamic sites of interaction in which intermediaries mediate and negotiate the day to day operation of the Court's work on the ground and other times they are mediated by those who rely on their services. For instance, the court mitigates a number of issues through intermediaries. It manages problems such as poor state cooperation, lack of funding, distance or language.[12] In some in-between spaces intermediaries act as the primary mediators but in others they are mediated by those who rely on their services. However, this mediating site that

[10] Ullrich L., 'Local Intermediaries, Victims and the Justice Contestations of the International Criminal Court', (2016), 14: 3 *Journal of International Criminal Justice*, 547.

[11] Detailed analysis of the term intermediaries can be found in chapter 1. However, since 2014 the ICC adopted non-binding guidelines on intermediaries. In this document intermediaries are conceived, by policy makers at the ICC, as 'someone who comes between one 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.' International Criminal Court, 'Guidelines Governing the Relations between the Court and Intermediaries' for the Organs and Units of the Court and Counsel working with intermediaries (2014), p 5. (Hereinafter 'the guidelines on intermediaries')

[12] See Haddad N. H., *The Hidden Hands of Justice –NGOs, Human Rights and International Courts,* (Cambridge University Press: 2018), p 140-155.

intermediaries occupy is not captured by dominant international criminal law literature.

With respect to the third question that this thesis is concerned with, I discuss the effects of in-between spaces on ICC processes in relation to knowledge production, representation and power in chapter 4. The claim that the in-between spaces in which intermediaries operate affect their visibility and the knowledge we have of them, has a number of implications. As is shown in chapter 4, for instance, intermediaries' partial invisibility causes them to be overlooked at the ICC. In addition, some their practices are not capable of regulation. Still those practices are taking place. Secondly, in-between spaces produce particular forms of representational practices. For instance, lawyers at the ICC represent intermediaries' views before judges even though their functions are limited to prosecuting suspects of international crimes, defending accused persons or representing victims. In addition, there are other forms of representation that also take place through outside of the courtroom which become visible when we examine the in-between space between intermediaries. Since intermediaries operate in different types of in-between spaces, they rely on representation to access and participate in other in-between spaces. As is shown throughout this thesis, intermediaries operate at different levels of social, economic and political power. As such, less powerful intermediaries, such as community based intermediaries, rely on powerful or capable intermediaries to represent their views on international platforms. These representational practices are also not captured by dominant international criminal law literature. The final claim that runs through chapter 4 is that, in-between spaces produce particular forms of power. As primary mediators, intermediaries exercise considerable power in deciding who gets to participate in ICC proceedings as a victim or witness or the kind of information comes in and out of their communities. In other words, thinking through in-between analysis helps understand some of the ways in which intermediaries promote, resist or sabotage the Court's work on the ground as well as how the Court responds to local needs.

Next, I examine the effects of in-between spaces on security. I argue that in-between spaces produce particular forms of security opportunities and challenges. Essentially, different in-between spaces expose different types of intermediaries to different security risks and these are different from what we understand the risks to be when we consider intermediaries through global/local analytical approaches. Thinking through in-between analysis shows that international criminal justice takes place in-between justice transition and political transition. While the Court's protective framework for intermediaries is limited, states can also be unreliable to ensure the security of those who risk their lives for the Court's work on the ground. However, existing literature has tended to put all the responsibility on the Court. Yet as can be seen in chapter 5, even if the Court had the means to protect intermediaries, its ability to protect them would still be limited. Given that intermediaries are sometimes put at risk as a result of Court processes, it is difficult to imagine a framework in which the Court is the only responsible entity for the protection of intermediaries. Furthermore, the thesis shows that in post-conflict societies states are not always reliable to protect those who live or work on their territories. Therefore, the thesis argues that current efforts to address intermediaries' security issues through regulation alone are likely to fail. What is needed is a development of partnerships between those who can provide security such as states, international institutions (for example the ICC, the UN or the AU), capable international NGOs and those who need to be protected such as less powerful intermediaries.

Lastly, this thesis examines the ways in which in-between spaces affect accountability. The issue of accountability in relation to intermediaries has generally been left unaddressed in international criminal law literature. To this end, this thesis contributes with a discussion of intermediaries' accountability in chapter 6. The idea that in-between spaces are productive is further illustrated by the multiple accountability registers that intermediaries navigate. Thinking through in-between

analysis goes deeper than identifying *lacunae* in the law on intermediaries. It exposes the Court's missing responsibility toward intermediaries while also discussing intermediaries' accountability to the Court. Secondly, the thesis demonstrates how in-between analysis operates and what it allows us to see that global/local approaches hide. Overall, thinking through in-between analysis allows us to see that intermediaries are accountable to many different organizations and through different accountability registers and this is welcome because the Court would be unable to capture all aspects of intermediaries' accountability.

Before introducing. in more detail. what in-between spaces are and how the concept operates in this thesis, the following section will review the literature on intermediaries in international criminal law.

1. Growing literature on Intermediaries in international criminal law

The history of intermediaries at the ICC can be traced back to its very early investigations in the Democratic Republic of Congo.[13] Although, there are precedents of relying on in-between agents in African colonial history and possibly at other international courts and tribunals,[14] it was not until 2008 that contemporary scholars paid attention to them. As I review the literature on intermediaries in this section, I will also highlight its limits and the gap that this thesis seeks to fill.

Literature on intermediaries in international criminal law is small. At the time of writing this thesis, less than ten authors engaged with the question of

[13] See for example *Prosecutor v. Thomas Lubanga Dyilo*, Redacted Decision on Intermediaries, TC I (ICC-01/04-01/06-2434-Red2), 31 May 2010.

[14] The question of whether or how *ad hoc* tribunals (ICTR and ICTY) and other international tribunals were/are supported by local agents or NGOs is beyond the scope of this thesis. However it has been suggested that the ICTY and ICTR investigators also worked with 'local people acting as liaisons between them and the communities affected by them'. See Buisman C., 'Delegating Investigations: Lessons to be Learned from the Lubanga Judgment', (supra n. 7), at 56.

intermediaries. However, there have been a number of important contributions from NGOs such as VRWG, REDRESS Open Society and IRRI.[15] Generally, the idea that the Court should partner with intermediaries for its work on the ground is viewed positively.[16] Intermediaries' assistance to the units of the Court on the ground is without doubt essential because of their knowledge of the places and communities affected by ICC proceedings. In terms of investigations for example, some have argued that NGO networks and UN entities may have more expertise or at least complement OTP investigators.[17] Similarly, Christian De Vos argued that the Court should "establish a more formalised relationship between the OTP and intermediaries" because he continues, "doing so would clarify the duties and obligations of the OTP to its local interlocutors and would help to build a greater sense of partnership between the Court and affected communities".[18] Despite the OTP's heavy reliance on intermediaries to collect evidence,[19] it has and continues to struggle with integrating intermediaries into its investigative processes and tends to adopt a top-down relationship with them. In doing so, the OTP sends a confusing message to the Court about the place of intermediaries in the Court's work on the ground. Some of these problems are caused by a simplistic conceptualisation of who intermediaries are and how they operate. Thinking of intermediaries as in-between agents through whom the Court can collect information when it wants and how it

[15] Open Society & IRRI, 'Commentary on ICC Draft Guidelines on intermediaries', available at < https://www.opensocietyfoundations.org/sites/default/files/icc-intermediaries-commentary-20110818.pdf> accessed 07 March 2018; REDRESS, 'Comments on the Draft Guidelines Governing Relations between the Court and Intermediaries', (15 October 2010), available at < http://www.redress.org/downloads/publications/Comment_on_draft_guidelines_on_intermediaries_15_Oct_2010.pdf> and Victims Rights Working Group, 'Comments on the Role and Relationship of 'Intermediaries' with the International Criminal Court' VRWG, (6 February 2009), available at < http://www.vrwg.org/VRWG_DOC/2009_Feb_VRWG_intermediaries.pdf>; IRRI, 'Steps Towards Justice, Frustrated Hopes: Some Reflections on the Experience of the International Criminal Court in Ituri', Just Justice? (2012) Civil Society, international Justice and the Search for Accountability in Africa, Discussion paper no 2.

[16] Additional examples can be found in Haddad's work. Haddad N. H., *The Hidden Hands of Justice –NGOs, Human Rights and International Courts,* (supra n. 12), p 147-148.

[17] Baylis E.A., 'Outsourcing Investigations', (supra n. 7).

[18] De Vos M.C., 'Investigating from Afar: The ICC's Evidence Problem', (2013) Vol 26:4 *Leiden Journal of International Law*, at 1012.

[19] See Baylis E.A., 'Outsourcing Investigations', (supra n. 7); Buisman C., 'Delegating Investigations: Lessons to be Learned from the Lubanga Judgment', (supra n. 7).

wants ignores on ground social-political realities and therefore their true contribution to international processes. Intermediaries are, in many situations, human rights activists and social justice fighters who are willing to do their work without compensation and sacrifice their lives for justice.[20]

Despite intermediaries' evident usefulness on the ground, dominant discussions at the ICC tended to focus on dishonest intermediaries. Intermediaries hit international criminal justice headlines for allegedly encouraging witnesses to be economical with the truth in the Lubanga.[21] As I will show in chapter six, some of the allegations against intermediaries were substantiated but others were not. Yet, intermediaries continued to be portrayed, mostly by defence teams, as a liability.[22] According to Groome, intermediaries should not even be involved in any interviews or exchange of substantive evidential information between the investigators and witnesses.[23] This is unfortunate because intermediaries contribute to the day to day operation of the Court's work on the ground in ways that are necessary for international investigations or for victims to participate in proceedings. There needs to be a revision of the ways in which the Court engages with intermediaries if it is to achieve its mandate. Throughout this thesis I argue that thinking about intermediaries through the framework of in-between spaces opens up new opportunities for the Court to engage with intermediaries differently.

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[20] De Vos C, 'A catalyst for justice? The International Criminal Court in Uganda, Kenya and the Democratic Republic of Congo', Ph.D Thesis Leiden University, p106-7.

[21] ICC Orders Release of Thomas Lubanga, *Radio Netherlands Worldwide,* available at < https://www.rnw.org/archive/icc-orders-release-thomas-lubanga> , accessed (29 March 2018); Recent Developments in the ICC Trial of Thomas Lubanga, *Human Rights Watch,* (16 July 2010) available at < https://www.hrw.org/news/2010/07/16/recent-developments-icc-trial-thomas-lubanga>, accessed (29 March 2018).

[22] *Prosecutor v. Thomas Lubanga Dyilo*, Redacted Decision on Intermediaries, (supra n. 13), [25], [35], [36] and [39]. Also see academic references Buisman C., 'Delegating Investigations: Lessons to be Learned from the Lubanga Judgment', (supra n. 7), at 37 and Ullrich L., 'Local Intermediaries, Victims and the Justice Contestations of the International Criminal Court', (supra n. 10), at 554.

[23] Groome D., 'No Witness, No Case: An Assessment of the Conduct and Quality of ICC Investigations', (2014) Vol 3:1 *Penn State Journal of Law and International Affairs,* at 23.

Some of the problems relating to the Court's current engagement with intermediaries have been discussed in the little literature there is on intermediaries. For instance, it has been argued that the Court should avoid professionalization tendencies that seem to have wormed their way into international criminal law. According to Emily Haslam and Rod Edmunds, the introduction of guidelines on intermediaries exacerbate the process of professionalization which inculcates a semi-institutionalised status for intermediaries.[24] For them this tendency [to professionalise] is marked by a channelling of counter-hegemonic voices that might otherwise arise from the participation of non-state actors in international criminal law.[25] This work marks a shift in academic discussion on intermediaries. Intermediaries were now this 'new category' of actors whose work for the court is essential even if their views might contradict the Court's vision of justice.

In addition, the Court has been criticised for relying on intermediaries' labour without compensation. According to Emily Haslam and Rod Edmunds, the Court's behaves as though intermediaries are 'volunteers intended to compensate the Court's lack of financial, human resources and physical proximity'.[26] ICC judges have been said to applaud savings made by the OTP from working with intermediaries.[27] Sara Kendall's work goes even further as it explores the relationship between the political interests and material conditions that sustain the work of the ICC. She demonstrates the connections between the Court's limited presence on the ground, the heavy reliance on intermediaries and the underfunded field of international criminal law. What emerges from this work is that even if the Court was well funded, greater issues remain. While the Court focuses 'on the judicial rather than on victims

[24] The Guideline regulating the relationship between the International Criminal Court and the ICC were adopted in 2014. Though welcomed by members of the civil society, these non-binding guidelines are almost unanimously critiqued by scholars for many different reasons. Guidelines on intermediaries, (supra n. 11), I will come back to this in chapter 1.

[25] Haslam E. and Edmunds R, 'Managing A New 'Partnership': 'Professionalization', Intermediaries and the International Criminal Court (2012) 24:1 *Criminal Law Forum*, at 53.

[26] Ibid, at 67.

[27] Clancy D., "They told us we would be part of history' Reflections on the civil society intermediary experience in the Great Lakes region', in De Vos C., Kendall S., Stahn S. (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions,* (Cambridge University Press: 2015), p227.

and by extension on intermediaries, its key audience seems to be states and the shareholder constituency of international criminal justice'.[28] As I will show in chapter 2, the practice of relying on local agents for the purposes of mitigating financial costs is an old staffing solution used by colonists on the African continent. That said, thinking through in-between analysis allows us to see that the Court should not be the only entity to take financial responsibility for intermediaries. States and other donors also play a role in providing funding for intermediaries and we need to interrogate the ways in which other stakeholders support intermediaries. Though the issue of labour is beyond the scope of this research project, existing literature on intermediaries has tended to approach this issue only from the perspective of the Court. Yet, thinking through in-between analysis can help us ask different questions and have new conversations because it reveals a practice that is productive of a different way of doing international criminal justice.

Some authors have also brought into discussions the voices of African intermediaries and those who rely on their services such as ICC staff through interviews. Deirdre Clancy documented the complex relationship between intermediaries and the ICC from an empirical perspective. Her work is the first to give an account of what intermediaries say about their relationship with the Court. Her research shows how intermediaries came under attack both inside and outside the courtroom as a result of their engagement with the Court's units on the ground. For instance, some intermediaries saw the lifting of confidential clauses in agreements between them and the OTP as a demonstration of carelessness (or negligence) by the Court. One of the ways the Court sought to address these problems is captured in the guidelines on intermediaries adopted in 2014.[29] Though these guidelines are non-binding they crystallised important aspects of the Court's relationship with intermediaries. And so, for Deirdre Clancy, what is needed is a deliberate and thorough testing of the

[28]Kendall S., 'Commodifying Global Justice - Economies of Accountability at the International Criminal Court', (2015) Vol. 13:1 *Journal of International Criminal Justice*, at 134.

[29] Guidelines on intermediaries, (supra n. 11).

guidelines on intermediaries. This, she argues, ought to be accompanied by a transparent review procedure for the guidelines on intermediaries.[30]

Continuing this socio-legal strand in 2016, Leila Ullrich's work challenges the global/local framework which some scholars and practitioners have used to discuss the relationship between intermediaries and the Court thus far. Her work focuses on victims' engagement with the Court through intermediaries. During her research, she was able to travel to countries where communities affected by ICC proceedings live and she had a chance to meet with intermediaries and to incorporate the views of ICC staff on key issues. She argues that exploring the Court's engagement with victims through a more nuanced theory of justice which she frames as the 'interactional justice' is more helpful than top/down or global/local approaches. Her alternative framework is based on the premise that the meaning of justice at the ICC is in flux and so the Court's bureaucrats, lawyers and intermediaries are all at the centre of the justice analysis.[31] According to her, thinking through interactional processes shows that justice contestations take place at the ICC as well as on the ground. She also makes an important point about how different actors in international criminal justice pursue diverse and sometimes contradictory justice agendas.[32] The main difference between her approach and the approach adopted in this research is that those interactions take place in the global, the local but also in in-between spaces. In addition and as is shown throughout this thesis, thinking through in-between analysis shows that some of those justice interactions are not represented in dominant literature and they cannot be regulated by international criminal law.[33]

[30] Clancy D., ''They told us we would be part of history' Reflections on the civil society intermediary experience in the Great Lakes region', (supra n. 27), p222.

[31] Ullrich L., 'Local Intermediaries, Victims and the Justice Contestations of the International Criminal Court', (supra n. 10), at 556.

[32] Ibid, at 547.

[33] The idea that some justice interactions cannot be regulated is further developed in chapter 4.

Conversely, De Silva views the Rome Statute as a global system in which 'the Court is the focal regulatory intermediary, functioning as a court of last resort with the independence and expertise to legitimately prosecute and punish international crimes.'[34] She positions the ICC as a key intermediary between states and the prosecution of international crimes. Then, she positions NGO intermediaries as 'sub-intermediaries' or 'secondary intermediaries' whose authority comes from the primary intermediary through delegation and orchestration.[35] Generally, it can be said, from a textual reading, that her use of the term intermediary or intermediaries is rather different from the ways in which other authors use these terms, including myself.[36] In her work, the term intermediary is used in the most literal sense. Essentially, she argues that the regulatory regime for international crimes which state regulators have sought to mitigate by creating the ICC, main institution for prosecuting, punishing and thus regulating international crimes faces a number of challenges.[37] These include, for example, states' failure to provide the necessary cooperation, resources and enforcement action.[38] Furthermore, she continues, 'the ICC is limited in terms of its capacity to extend its reach to the local communities and to legitimize its regulatory activities'.[39] Consequently, the ICC uses secondary intermediaries (such as NGOs) to mitigate some of those challenges and 'increase its operation capacity, legitimacy and influence on state regulators and targets.'[40] What emerges from her work, on the whole, is that despite the ability of different actors to influence regulatory governance, states retain 'the greatest influence in regulatory

[34] De Silva N., 'Intermediary Complexity in Regulatory Governance : The International Criminal Court's Use of NGO's in Regulating International Crimes', (2017), Vol. 670:1, *The ANNLS of the American Academy of Political and Social Science,* at 176.

[35] Ibid*,* at 172-176 and 178-182.

[36] While explaining NGOs' advocacy strategies, De Silva describes how they have opened up a way for state regulators to get involved in issues pertaining to 'legal aid for defence and the use of intermediaries.' However it is not clear whether she is talking about the intermediaries governed by the guidelines on intermediaries or whether the term intermediary is used to include all who perform intermediary work. Ibid*,* at 182.

[37] Ibid, at 184.

[38] Ibid, at 184.

[39] Ibid, at 185.

[40] Ibid, at 185.

governance'.[41] That said and as is shown throughout this thesis, thinking through in-between analysis uncovers sites of mediation in international criminal law that are not capable of regulation. In addition, in-between analysis allows us to see nuances between how different intermediaries respond to ICC intervention whereas De Silva's work assumes that intermediaries share the Court's vision of justice.

Both approaches, interactional justice and the RIT model of regulatory governance, are unhelpful to answer the questions posed in this research such as what is the place of intermediaries in international criminal law or how might we conceptualise intermediaries' relationship with the Court and communities affected by its proceedings. Though I rely on Ullrich's empirical research, I use it to interrogate in-between spaces and analyse some of the effects of in-between spaces on intermediaries and those who rely on their services. In addition, while De Silva seems to be concerned with power dynamics between the already powerful constituencies, this research primarily focuses on unseen practices of international criminal law.

To sum up, the literature on intermediaries in international criminal law is very diverse but small. It started with presenting intermediaries as resources for the Court despite the possibility they might potentially harm the integrity of legal processes. Presenting intermediaries in this way might have a link with the allegations of influencing witnesses that intermediaries were facing in the early stages of the first case before the ICC.[42] Then, intermediaries earned the qualification of new actors in international criminal justice. Intermediaries are capable of influencing outcomes in international criminal law due to their position as in-between agents. Intermediaries may facilitate victims' engagement with the Court but they also have the ability to block, change, and influence that engagement. This is the context in which intermediaries' voices were introduced into academic discussions. While, most

[41] Ibid, at 170-188.

[42] This was in the case against Mr Lubanga, *Prosecution v. Thomas Lubanga Dyilo,* Judgement pursuant to Article 74 of the Statute, (supra n. 5), [193]. Further discussion of these allegations can be found in chapter 6.

authors view the Court's partnership with intermediaries as an opportunity for international criminal justice, they also critique the ways in which the Court is currently interacting with intermediaries. What is missing up until now is the conceptualisation of intermediaries as in-between agents whose in-between status produces effects.

2. Thinking through 'in-between spaces': Unveiling sites for opportunity and challenge.

While I borrow the term 'in-between space' from Homi Bhabha's writings, I use it differently. First of all, I use in-between spaces as an analytical tool and in-between space as description of intermediaries' reality. Both concepts are interlinked as in-between space (reality description) informs in-between spaces (analytical frame).[43] Secondly, Homi Bhabha uses the term in-between space to signify "spaces that provide the terrain for elaborating strategies of selfhood that initiate new signs of identity and innovative sites of collaboration, contestation, in the act of defining the idea of society itself".[44] Homi Bhabha thus uses the term in-between space to refer to sites where differences between identities are articulated.[45] However, the thesis focuses on in-between spaces as sites of mediation in which intermediaries are either the primary mediators or where they are mediated by those who rely on their services. Throughout this thesis, I highlight and analyse in-between spaces that are produced by encounters between individuals (human actors such as investigators, victims, or individual intermediaries), institutions (ICC, the UN or States) and ideas (justice contestations, legal categories, and others). And so I use in-between analysis to explore and examine sites of mediation between different stakeholders of in international criminal justice both inside and outside the ICC courtroom. In order to

[43] For clarity purposes, I use the term in-between analysis to signify in-between spaces as an analytical tool.
[44] Bhabha H.K., *the location of Culture,* (Routledge: 1994), p 2.
[45] Ibid*,* pp 112-116.

understand what in-between spaces are and how they operate, I will discuss three aforementioned effects of in-between spaces.

Thinking through in-between analysis does more than challenging existing dichotomies such as global/local in that it allows deeper analyses of interactions between diverse networks of public, private and hybrid forms of power.[46] As those in-between spaces become visible and vocal, the effects and limits of the law become apparent. For example, using in-between analysis to interrogate the in-between space between parties allows us to see the ways in which parties (prosecution, defence, victims' representatives) present intermediaries' issues, which issues are presented and how judges rule on these matters. This in-between space is a site where intermediaries are mediated through formal exchanges (e.g. submissions, responses, transcripts, motions, orders and judgment) between the prosecution, the defence, legal representatives for victims and judges at the ICC. In this in-between space, intermediaries are for the most part absent and therefore what we learn about them comes from different parties in pre-trial and trial processes.[47] Exceptions include instances where intermediaries are called to answer for their actions or appear as witnesses in certain procedures. In this example and as I will show in chapter 4, thinking through in-between analysis uncovers sites in which forms of representation that take place in international criminal law become visible.

[46] Pahuja S., 'Trading Spaces: Locating Sites for Challenge within International Trade Law', (2000) Vol. 14, *Australian Feminist Law Journal,* 38-54.

[47] For example Court processes expose intermediaries to security risks. Looking at the ways in which intermediaries' security is presented and contested by the parties within the Court, we see that intermediaries can be exposed due to legal processes. The most notable example of the ways in which intermediaries find themselves between parties can be seen in the Lubanga case where intermediaries' security problems came to the surface in heated disputes between the defence, the prosecution and Trial Chamber I. At the time, the prosecution presented intermediaries' security problems and defended intermediaries against Trial Chamber I orders to disclose their [intermediaries] identities to the Defence. But the Defence made the question of intermediaries (including their security) a matter of contestation and made it a central part of Defence strategy in the case against Lubanga and other cases before the Court. Intermediaries soon found themselves in-between parties' arguments during the proceedings and this had an impact on their security in the field and on their willingness to assist the Court.

In my conceptualisation of in-between spaces as sites of mediation, they are created by encounters between individuals, institutions and ideas all of which involve intermediaries. As I will show in chapter 3, there are potentially multiple sites of mediation in international criminal law, but I will focus on four of these: in-between parties (created by encounters with prosecution, defence and victims representatives within an institution), in-between intermediaries (created by encounters between other intermediaries), in-between regulation (created by encounters between institutions) and in-between transitional justice and political transition (created by encounters between ideas). Empirically, these in-between spaces cannot be easily separated from one another as they are fluid and can overlap. In addition, I identified in-between status as the overreaching in-between space common to all in-between spaces. In doing so, this thesis contributes to existing literature with a new analytical frame through which the relationship between intermediaries and the ICC may be understood. In addition in-between spaces as an analytical tool serves to articulate critiques of the Court practices, especially in terms of its dealings with intermediaries and also power dynamics in international criminal justice. However, there are limits to what can be achieved with in-between spaces as an analytical tool. What constitutes 'in-between' envelopes countless in-between spaces which cannot be clearly separated from one another and so questions about the usefulness of such a theoretical frame may be raised. Even so, thinking through in-between analysis opens up new sites for opportunity and challenge.

I begin this new conversation in chapter 4 where I explore dynamics of knowledge production, representation and power in the relationship between intermediaries and the ICC. I show how particular forms of knowledge, representation and power take place in in-between spaces. For example, thinking through in-between analysis allows us to understand that while intermediaries produce knowledge for the Court,

very little is known and knowable about them because of the in-between spaces in which they operate.

Then in chapter 5, I show how thinking through in-between analysis helps us understand security differently. I will examine additional sites in which intermediaries are put at risk as a result of their work for the Court. I argue that while the Court has a great responsibility to protect intermediaries it is limited. That said, it should not only improve its current approach to intermediaries' security but also partner with other international criminal justice stakeholders.

I argue further –in chapter 6- that because of the in-between spaces in which intermediaries operate individual intermediaries are accountable to multiple actors in international criminal justice including the ICC, NGOs, donors, states and in rare situations communities affected by ICC proceedings. In addition, intermediaries mediate accountability issues between those who rely on their services and the communities they claim to serve. Thinking through in-between analysis, therefore, helps us understand how accountability operates in in-between spaces.

Together, the last three chapters of the thesis show this new practice of international criminal justice that takes place in in-between spaces. Through a different reading and interpretation of the Court's documents and existing empirical research, the thesis exposes the opportunities and challenges that come with those practices. A great deal of questions addressed in these chapters was inspired by African colonial intermediaries (discussed in chapter 2). Though African colonial intermediaries are fundamentally different from contemporary intermediaries there are similarities, at least in terms of practices, which can serve as a starting point for thinking differently about the operation of international criminal law on the ground.

3. Methodology and Sources

As the reader navigates through the chapters of this thesis, they will come across formal legal sources, NGO reports or commentaries as well as references to scholarly work published in international criminal law, transitional justice, history and political science. In order to better understand the ways in which intermediaries navigate different in-between spaces and the impact of those spaces on justice processes, I relied on literature from different disciplines partly because very little has been written about intermediaries in international criminal law scholarship and partly because the law on intermediaries can only capture a fraction of the complex relationship between intermediaries and the Court or the communities affected by the Court's proceedings.

The chapters of this thesis focus on intermediaries in their broader context, paying attention to textual accounts from the ICC, academic literature and professional commentary on intermediaries. First, this work refers to formal legal sources throughout, including the Rome Statute, decisions of the pre-trial, trial and appeals chambers, transcripts, witness testimonies, judgments and non-binding legal sources such as the guidelines on intermediaries. It also refers to submissions made by the office of the prosecutor, the defence and victims' representatives in relation to intermediaries. Together, these texts have provided me with the necessary resources to analyse the relationship between intermediaries and the Court in terms of the law and aspects of practice.

As the reader moves forward, it is important to bear in mind some of the limitations I met in writing this thesis. The most significant limitation is that I did not interrogate intermediaries myself to find out how they navigate the different in-between spaces what the status of intermediaries means to them or what their concerns are. I also could not interrogate members of communities affected by ICC proceedings, ICC

Staff, UN Staff or NGOs because this project is a first step toward conceptualising in-between spaces as productive sites of a particular practice of international criminal justice. Though I did not conduct empirical research myself, I rely on the existing empirical work conducted by scholars such as Deirdre Clancy and Leila Ullrich.[48] I also make references to NGO reports in which intermediaries expressed themselves such as the Berkely report.[49] Since this data was collected for other purposes, there limits to how far it provides us with insights into the ways in which intermediaries navigate in-between spaces. Three main reasons motivated my decision not to conduct empirical research in this project. First, this work is the first step toward conceptualising intermediaries' relationship with those who rely on their services. Secondly, from an integrity perspective the analytical frame I adopted poses a challenge as it would require to be immersed in the communities affected by ICC proceedings without relying on intermediaries. Thirdly and probably most importantly, intermediaries often work in documented dangerous zones in terms of security. Without the appropriate training it is difficult to penetrate into the communities affected by ICC proceedings.

Secondly, this work uses literature outside of traditional international criminal law sources such as historical literature work on African colonies which I found to be very helpful. This literature is useful to show that there is a broader historical context in which intermediaries operate. My focus on African intermediaries in this project is in part due to the ICC's focus on the African continent and by extension the majority of intermediaries are based or working in Africa; and in part because African intermediaries have a long history of acting as bridges between their people and

[48] See Clancy D., ''They told us we would be part of history' Reflections on the civil society intermediary experience in the Great Lakes region', (supra n. 27) and Ullrich L., 'Local Intermediaries, Victims and the Justice Contestations of the International Criminal Court', (supra n. 10), at 543-568.

[49] Human Rights Center, 'The Victims' Court?' A study of 622 Victims Participants at the International Criminal Court, (UC Berkely School of Law: 2015), < https://www.law.berkeley.edu/wp-content/uploads/2015/04/VP_report_2015_final_full2.pdf> accessed, 10 November 2017.

outsiders. Initially, the aim of chapter 2 was not to examine whether there are continuities between colonial African intermediaries and contemporary intermediaries. However there are blatant similarities, in terms of practices, which are difficult to ignore. Consequently, the broad context in which African intermediaries translated and negotiated power between colonial masters and their communities serves as a source of inspiration for my analytical frame and for the questions I raise about knowledge, power and accountability. This context is useful to begin to understand what it means to be and to act as an intermediary between African communities and outsiders but also how the status of intermediary challenged pre-existing power structures. Lastly, this thesis benefits from literature on NGO accountability drawn from politics and public administration literature. This literature is useful for thinking about in-between spaces as complex and dynamic sites in which different types of intermediaries interact with each other. This can shed crucial light on the political implications of representation discourses. Most importantly, it enriches reflections on power, representation, security and accountability in international criminal law.

4. Thesis Outline

Chapter one sets out the law on intermediaries according to the case law and the guidelines on intermediaries. It offers a thorough description of who intermediaries are, their importance to different organs of the Court as well as to local communities affected by ICC proceedings. Most importantly, this chapter introduces the notion that intermediaries are in-between actors whose in-between status produces effects. In doing so, the chapter shows that even though much of what emerges from ICC documents gives insights into how the Court's units interact with each other on issues that relate to intermediaries, these insights are limited in that they only concern a narrow category of intermediaries. The chapter therefore shows gaps in

existing literature and prepares the reader for subsequent arguments about in-between spaces and their impact on intermediaries.

Chapter two builds on the previous chapter's concerns with gaps in literature by introducing literature on intermediaries outside international criminal law. African intermediaries have a long history of acting as bridges between their communities and foreigners. Yet despite the ICC's focus on Africa, this perspective is missing from current ICL literature on intermediaries. Historians have traced the reliance on intermediaries by European colonial masters in the early stages of colonialism in Africa. This background prepares the reader to understand the concept of in-between spaces as sites of mediation and negotiations between different actors who may have competing interests. Most importantly, this chapter shows how local politics determines who becomes an intermediary and why. I draw on similarities between African colonial intermediaries and contemporary intermediaries in terms of practices to raise questions about knowledge production, the influence of local politics and power relations (chapter 4), security (chapter 5) and accountability (chapter 6).

Chapter three marks a move toward conceptualising and theorizing the place of intermediaries in international criminal law. Essentially, this chapter is designed to explain my conceptualisation of in-between analysis and in-between spaces (as sites of mediation), which in-between spaces will be analysed in subsequent chapters and why using in-between analysis is the most helpful tool to understand interactions between actors in international criminal law, as opposed to global/local framings. The thesis analyses the following in-between spaces: in-between parties, in-between intermediaries, in-between regulation and in-between transitional justice and political transition. These are produced by encounters between individuals, institutions and ideas that involve intermediaries. Lastly, this chapter ends with a brief discussion of the limitations that come with using in-between spaces both as an analytical tool (in-between analysis) and empirically (description of reality).

Chapter four tackles questions of power, knowledge production and representation in relation to intermediaries. First, it argues that intermediaries' invisibility in ICC public records reflects institutional fragmentation and obscures sites of power and representation. Second, this chapter argues that because of the in-between spaces in which intermediaries operate, intermediaries engage in forms of representations in their dealings with the Units of the Court, other intermediaries and communities affected by ICC proceedings. Lastly, this chapter focuses on two case studies - Burundi and Kenya - to demonstrate how local politics influences who becomes an intermediary and why. In doing so, I show how in-between analysis can help uncover new sites of inquiry in international criminal law.

Chapter five considers the ways in which intermediaries' security issues are articulated and responded to by relevant actors. I argue that because of the in-between spaces in which intermediaries operate, different actors in international criminal law have an impact on their security. Using in-between analysis, I will show that there is an inherent vulnerability in acting as an intermediary for the ICC which is produced by in-between spaces and which the Court cannot address by itself. The chapter starts with a critical examination of the Court's protective framework for intermediaries. I argue that the Court's approach to dealing with intermediaries' security issues is limited for the following reasons: On the one hand internal solutions (meaning ICC) concerning intermediaries' security problems are still in development. On the other hand the responsibility to protect intermediaries is not limited to the ICC and intermediaries alone. I will show that other actors such as States, the UN and NGOs also play a role in protection of intermediaries. What is more, this chapter further reiterates the usefulness of using in-between analysis as an analytical frame which allows us to think differently about the security of ICC staff, intermediaries, victims, witnesses and other individuals who are connected or whose work is connected to the ICC.

Chapter six examines the issue of intermediaries' accountability. I argue that, because of the in-between spaces in which intermediaries operate, they are accountable to several actors in international criminal justice. These different actors include international institutions such as the ICC or the UN, donors and NGOs. What I will show in this chapter is that thinking through in-between analysis expands our understanding of intermediaries' accountability in that it is not limited by international criminal law framings. Rather, thinking about accountability through the lenses of in-between spaces brings to light the many different and sometimes competing accountability registers that run in parallel with international criminal justice processes. Generally, the concept of accountability has not received much attention in international criminal law literature. As a result, I relied on Koppel's framework of accountability to be able to conduct my analysis.[50]

As a whole, this thesis investigates the relationship between intermediaries and the court through the lenses of in-between analysis. I will focus on effects produced by in-between spaces on 1) knowledge production, representation and power, 2) security and 3) accountability. By interrogating the ways in which in-between spaces operate I demonstrate that international criminal law takes place in sites that have, up until now, been unnoticed. In doing so, the thesis contributes to literature on intermediaries with a different perspective on contemporary problems about the Court's work on the ground and with a critique of Court practices in relation to intermediaries.

This thesis expands existing definitions of intermediaries with a broader understanding of who intermediaries are and what they do by taking into account the complexity of what it means to inter-mediate or act in-between two or more sites. By focusing on knowledge production, security and accountability, this

[50] Koppel J.G.S., 'Pathologies of Accountability: ICANN and the Challenge of "Multiple Accountabilities Disorder', (2005) Vol. 65: 1 *Public Administration Review,* 94-108.

research shows some of the effects that in-between spaces have on intermediaries and those who rely on their services.

In entirety, the chapters of this thesis display the unique contribution that intermediaries bring to international criminal justice. The thesis concludes that the ICC should change the way it currently relates to intermediaries because in-between spaces are productive of a particular practice of international criminal justice which is not captured by existing literature and legal frameworks. Despite the challenges that such engagement may bring, intermediaries will continue to be indispensable to the Court's work on the ground. The thesis also helps demonstrate the usefulness of in-between analysis as an analytical frame through which intermediaries' relationship with the Court can be conceptualised. In addition, the ICC, international NGOs and country level NGOs might find this research useful to re-thinking the current relationship between intermediaries and the Court. The analysis conducted in this project, especially chapters 4, 5 and 6, may also serve as a basis for consultations between other key players such as states, the UN and NGOs and the ICC.

CHAPTER I: Intermediaries as In-Between actors at the ICC

It was one of the most important events since the establishment of the international criminal court when the Court issued its very first judgment. Delivered in 2012 against Mr Thomas Lubanga, this judgment was ground breaking for many different reasons as can be seen in the commentaries, news reports and academic literature that followed the verdict.[1] For the purposes of this thesis, the judgement against Mr Lubanga was the first of its kind in the history of international criminal proceedings for dedicating close to 21% of its pages to intermediaries.[2] Though such exposition pointed to the importance of intermediaries in justice processes at the ICC, the Court is still struggling with its partnership with them.

In this chapter I argue that instead of conceiving an intermediary as a person who comes 'between one and another' as the ICC does, this thesis views that 'in-between' spaces as sites of mediation in which intermediaries are either the primary mediators or where they are mediated by those who rely on their services. These sites are productive and those who navigate them (such as intermediaries, ICC staff, or members of communities affected by ICC proceedings) pursue different and sometimes competing interests. I will examine the ways in which ICC judges have come or fail to define the term intermediaries, what understandings we learn from ICC case law how regulators through the guidelines have engaged with this question. In addition, I will review relevant NGOs commentaries and reports that might help us better our understanding of how they interact with the Court. Together these

[1] See for example Cole A., 'Lubanga judgment marks milestone in the path towards accountability', *The Guardian,* (14 March 2012), available at < https://www.theguardian.com/law/2012/mar/14/lubanga-icc-milestone-accountability> accessed, 30 March 2018; ICC finds Congo warlord Thomas Lubanga guilty, *BBC,* (14 March 2012), available at < http://www.bbc.com/news/world-africa-17364988>, accessed 30 March 2018; ICC/ Lubanga –Intermediaries in Lubanga case could face charges of "offence", *Hirondelle News Agency,* (21 march 2012) available at< https://www.justiceinfo.net/en/component/k2/24337-210312-icclubanga-intermediaries-in-lubanga-case-could-face-charges-of-offence.html> Accessed 30 March 2018.

[2] *Prosecution v. Thomas Lubanga Dyilo,* Judgment pursuant to Article 74 of the Statute, TC I (ICC-01/04-01/06-2842), 14 March 2012, [90 -220].

sources help begin conversations about who intermediaries are and how they assist different organs of the Court. Such conversations are needed among scholars and practitioners particularly because despite the Court's reliance on intermediaries' services, the Rome Statute as well as the Rules of Procedure and Evidence do not provide a framework through which the Court ought to interact with intermediaries. And so a reflection on how intermediaries interact with the Court is essential to examine aspects of the Court's work on the ground. Unlike ICC staff members or consultants, victims or perpetrators intermediaries have received little attention from policy makers. Yet, intermediaries are referred to, although in passing, in Regulation 97 of the Regulations of the Registry as well as Regulations 67 and 71 of the Trust Fund for Victims.[3]

In brief, intermediaries are either called upon by ICC staff or they voluntarily offer to act as bridges between local communities and the ICC. They assist victims in the exercise of their rights before the Court, they assist the Office of The Prosecutor (OTP) and the Defence in their investigations, they assist victims who wish to participate in proceedings, they assist the Trust Fund for Victims (TFV) and they are an essential part of the ICC's outreach program. Despite being overlooked at the Rome Conference, intermediaries' presence in the structure of the Court is paramount as without them the Court would not be able to engage with relevant people or have access to relevant data necessary for the prosecution of international

[3] **Regulation 97 (1) of the Regulations of the Registry** "Where required for reasons of safety and security of the victim, the Registry shall take all necessary measures within its powers to ensure the confidentiality of the following communications: (…) and between the Court and persons or organizations serving as intermediaries between the Court and victims."
Regulation 67 of the trust Fund for Victims "The Trust Fund may decide to use intermediaries to facilitate the disbursement of reparations awards, as necessary, where to do so would provide greater access to the beneficiary group and would not create any conflict of interest. Intermediaries may include interested States, intergovernmental organizations, as well as national or international nongovernmental organizations working in close proximity with the beneficiary groups", See Resolution ICC-ASP/4/Res.3, p 15 [67].
Regulation 71 the trust Fund for Victims "The Trust Fund may identify intermediaries or partners, or invite proposals for the implementation of the award", See Resolution ICC-ASP/4/Res.3, p 15 [71].

crimes.[4] And so my discussion will raise questions about some of ways in which intermediaries perceive themselves (from the limited yet useful perspective of the Court) and how they interact with communities affected by ICC proceedings.

In the following sections I will, first, show how existing definitions are limited and limiting through an extensive discussion of the term intermediary(ies). ICC case law, regulation and even academic literature on intermediaries do not engage with the concept of in-between even though it is fundamental to being and acting as an intermediary in international criminal law. Second, this chapter describes how intermediaries assist the court's work on the ground and why they merit academic attention. To do so, I rely on the Court's documents, case law the guidelines on intermediaries and academic literature which I interpret through the lens of in-between analysis. Intermediaries perform different tasks, for different units, at different times and level which makes it difficult to discern exactly what they do. Consequently, I propose in the third section of this chapter categories that might help us better understand their contribution in ICC justice system. More importantly, these categories are necessary to understand my interpretation of the Court's documents and my arguments in chapter 4, 5 and 6.

1. Intermediaries : A term with many definitions

Since the Rome Statute and the Rules of Evidence and Procedure do not provide a definition of the term, defining who intermediaries are has been a challenge for almost all parties at the ICC including judges. The challenge for whoever attempts to define the term that they run the risk of providing either an over-inclusive or under-

[4] The Court's recognition of intermediaries' usefulness on the ground can be seen in *Prosecutor v. Thomas Lubanga Dyilo*, Redacted Decision on Intermediaries, TC I (ICC-01/04-01/06-2434-Red2), 31May 2010, [58] and [88]; and International Criminal Court, 'Guidelines Governing the Relations between the Court and Intermediaries' for the Organs and Units of the Court and Counsel working with intermediaries, (2014) International Criminal Court. (Hereinafter the guidelines on intermediaries).

inclusive definition. Different chambers at the ICC use the term intermediary but none of them have actually taken the time to explain what it means. There is one exception which concerns the TFV, I will come back to this later. Here it is sufficient to keep in mind that defining intermediaries as subjects of international law emerged from scholarly work and not from ICC case law. In the following paragraphs, I will give examples of how different actors in The Hague, have tried to define or challenge the meaning of the term intermediary. What emerges from reading their different submissions is that different organs of the ICC use the term differently.

1.1. ICC Chambers' missed opportunities to define the term intermediary

Pre-Trial Chambers and Trial Chambers are the parts of the Court most confronted with issues relating to intermediaries. In the early stages of the Court's work, the definition (or lack of it) of this key term by different chambers came to be fiercely contested and remain deeply significant. Yet each one of the opportunities to define what it means to be or act as an intermediary was not taken. For example, Judge Sylvia Steiner even described the concept of intermediaries as being "too vague" in the Katanga and Ngudjolo case.[5] On another occasion, the Trial Chamber I was presented with issues concerning the Prosecution's reliance on intermediaries but it missed the opportunity to define what exactly it meant by term intermediary in a decision it partially titled 'decision on intermediaries'.[6] Yet the meaning of the term intermediaries is important to discern what this new or unusual position at the ICC is, how it is understood by other actors of international criminal justice and how intermediaries themselves understand their role. The lack of a definition simply speaks to the complexity of the role played by intermediaries in international criminal justice generally and at the ICC particularly. In addition, it exhibits the struggle of recognizing intermediaries that the Court continues to face.

[5] *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Prosecution requests for redactions pursuant to rule 81(2) and 81(4) of the Rules and for an Extension of Time pursuant to regulation 35 of the Regulations of the Court, PTC I (ICC-01/04-01/07-312) 11 March 2008, p 6.

[6] *Prosecutor v. Thomas Lubanga Dyilo*, Redacted Decision on Intermediaries, (supra n. 2), [88].

One of the most quoted statements in the scholarship on ICC intermediaries was made by former ICC prosecutor Luis Moreno Ocampo in the early stages of the case against Mr Lubanga. The prosecution stated that intermediaries "undertake tasks in the field that staff members cannot fulfill without creating suspicion; they know members of the community, and they have access to information and places that are otherwise unavailable to the prosecution".[7] This quote is often referred to as a way of demonstrating the importance of intermediaries for the Court. But is it true? Which intermediaries is the prosecution referring to here? Can intermediaries from Kampala access information in Northern Uganda without raising suspicion? What about experts, human rights activists who are often well known in their communities? My point in asking these questions is to highlight how the prosecution' statement is incomplete because not all intermediaries know members of the community or are able to access the kind of information that is useful for the prosecution. The issue of course is that ICC judges do not engage with these questions and therefore neglect the impact caused by the lack of a clear definition.

Overall, ICC judges have been presented with several opportunities to clarify the concept of intermediary especially where it has been shown that intermediaries impact the operation of international criminal justice on the ground. Consequently, different chambers have come to use the term intermediary differently and these differences have legal implications.

1.2. Defining the term intermediaries through regulation

On June 2007 the ICC Registry organized a consultative forum on intermediaries with different organs of the Court and NGOs. A subsequent consultative meeting was held in January 2009.[8] At the time, defining the term intermediary had become a pressing

[7] Ibid.

[8] International Bar Association (IBA)/ICC Monitoring and Outreach Programme, 'The ICC's trials: an examination of key judicial developments at the International Criminal Court between November 2009 and

issue, especially because intermediaries were accused of tampering with witnesses in the case against Mr Lubanga. Following these meetings, guidelines on intermediaries were drafted and different actors were given the opportunity to give comments or feedback.[9] Among those invited to make comments were Open Society and IRRIN who correctly pointed out in their commentary on the draft guidelines that in trying to define the term intermediary, emphasis was put on the 'essence' of intermediary rather than on set characteristics or standards that qualify an intermediary.[10] It is to be noted that in the language of the draft guidelines intermediaries are referred to as a 'notion' which adds to 'concept' used by the aforementioned Judge Steiner.[11] Together, these elements contribute to my own conceptualization of intermediary roles but first it is necessary to discuss how regulators have come to define the term intermediary.

In brief the definition of the term intermediary was officially adopted in 2014 in the guidelines governing the relationship between the Court and intermediaries. In these non-binding guidelines, intermediaries are defined as:

> "Someone who comes between one person and another; 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".[12]

Some scholars have pointed out that the definition of the term intermediary in the guidelines is 'in loose terms', 'vague' and 'unclear'.[13] One possible explanation might

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April 2010', (2010) available at < https://www.icc-cpi.int/RelatedRecords/CR2010_03706.PDF> Accessed 07 March 2018, p 26.

[9] International Criminal Court, 'Draft Guidelines Governing the Relations between the Court and Intermediaries', (2001). (Hereinafter the draft guidelines on intermediaries).

[10] See Open Society & IRRI, 'Commentary on ICC Draft Guidelines on intermediaries', available at < https://www.opensocietyfoundations.org/sites/default/files/icc-intermediaries-commentary-20110818.pdf> accessed 07 March 2018, p7

[11] See for example the draft guidelines on intermediaries, (supra n.9), p9.

[12] The guidelines on intermediaries, (supra n. 4), p6.

[13] Haslam E. and Edmunds R, 'Managing A New 'Partnership': 'Professionalization', Intermediaries and the International Criminal Court (2012) 24:1 *Criminal Law Forum*, at 184 and Ullrich L., 'Local Intermediaries,

be that intermediaries are extremely diverse and operate in different ways at different times.

Another example can be found in the Lubanga case where the OTP explained its selection process and stated that, "an intermediary was simply someone who could perform that role".[14] Therefore, it could be said that, the definition of the term intermediary as it is provided in the guidelines on intermediaries is intentionally broad and consequently unhelpful.[15] Yet, the guidelines as a whole are not applicable to all intermediaries, 'not everyone who carries out the functions of intermediary is an intermediary for the purposes of the guidelines'.[16] Furthermore, it is stated that 'whether the relationship between an intermediary and the Court is covered by the guidelines depends on the nature of the function of an intermediary'.[17] For example, international NGOs such as Human Rights Watch and Amnesty International have played an important role in collecting data about armed conflicts or writing reports which assisted the prosecution in the early stages of the Libyan cases and yet these entities may not qualify as intermediaries according to the guidelines even though they perform the same tasks that are enumerated in the guidelines. The guidelines use a number of criteria to include or exclude those who fall within its definition of the term. They include those who have a formal intermediary contract and exclude

Victims and the Justice Contestations of the International Criminal Court', (2016), Vol. 14: 3, *Journal of International Criminal Justice*, 552.

[14] *Prosecution v. Thomas Lubanga Dyilo,* Judgment pursuant to Article 74 of the Statute, (supra n. 2), [195].

[15] Haslam E. and Edmunds R, 'Managing A New 'Partnership': 'Professionalization', Intermediaries and the International Criminal Court, (supra n. 13) and Ullrich L., 'Local Intermediaries, Victims and the Justice Contestations of the International Criminal Court', (supra n. 13), at 552. Another linked issue pointed out by academics is that such a broad definition is likely cause implementation and enforcement problems. However, the ICC reported to the Assembly of State Parties (ASP) that it has been able to implement the guidelines on intermediaries 'to some extent' given their limited resources. See Report of the Court on the implantation in 2013 of the revised strategy in relation to victims, ICC-ASP/12/41, 20-8 November 2013 (Twelfth Session of the Assembly of States Parties) [44-5].

[16] The guidelines on intermediaries, (supra n.4), p 6.

[17] Ibid, p 6.

those who have cooperation agreements with the Court and those who do not have any contract.[18]

However, if defining the term intermediaries is about capturing the 'essence' of intermediary, it is regrettable that distinctions are made based on the existence of formal intermediary contracts because the essence of intermediary work goes beyond such contracts. Failure to recognise intermediaries based on their assistance and services provided such as data collection or on ground intelligence has real implications for people's lives. It means that the intermediaries who interact with the Court without a formal contract would, for example, not benefit from the Court's protection.[19] Though the link between the status of intermediary and protective measures is clearly a disadvantage for 'unrecognised' intermediaries, it is not necessarily the case for the Court. The assistance provided by unrecognised intermediaries is still useful for the Court's work on the ground. This can be seen in Sara Kendall's work which exposes intermediaries as an essential workforce of the Court on the ground. According to her, intermediaries' work is widespread in the Court's informal economy, it is unpaid and exposes intermediaries to security risks which the Court does not provide security for.[20]

In addition, the guidelines on intermediaries are limited because they exclude entities whose relationship with the Court is based on cooperation agreements including MoUs, national implementing legislation, the United Nations, inter-governmental organizations based in the field, government bodies and national authorities.[21] Yet such intermediaries are also in-between actors who participate in the practice of international criminal justice in in-between spaces by, for example, negotiating how the Court interacts with its beneficiaries on the ground. As is shown in chapter 5, even though these entities are unlikely to require the Court's

[18] Ibid, p 7.

[19] Ibid, p 6.

[20] Kendall S., 'Commodifying Global Justice - Economies of Accountability at the International Criminal Court', (2015) Vol. 13:1 *Journal of International Criminal Justice*, at 128.

[21] The guidelines on Intermediaries, (supra n. 4),p 7.

protection, the security needs of less powerful intermediaries could be mitigated through these capable intermediaries. In fact these entities are recognised elsewhere in the documents of the court. For example, Regulation 67 of the TFV intermediaries includes States, intergovernmental organizations, as well as national or international nongovernmental organizations working in close proximity with the beneficiary groups.[22]

Overall it can be said that the guidelines provided a definition that could serve as reference for intermediaries and those who rely on their services. However, there are persistent problems. On the one hand the guidelines' definition is too broad which means that there are likely to be implementation and enforcement problems. On the other hand the guidelines exclude an important number of intermediaries that are recognised in other documents of the court. Defining the term intermediary(ies) has and continues to be problematic. Though ICC judges have not been expressly asked to define the term, there have been several opportunities for different chambers to provide one. Instead, chambers (unwittingly) set a precedent whereby different units work out their own definitions. This is particularly visible in the Kenyan situation where a Defence team proposed a definition for the purposes of proceedings against their client despite the fact that the guidelines on intermediaries had already been adopted. What then, one might ask, is the purpose of the guidelines if parties demonstrate the necessity to revisit how intermediaries are defined without making any reference to the guidelines? It appears therefore that there is a gap between regulation on intermediaries. This gap reflects the complexity of the relationship between intermediaries and the Court. Consequently, it could be said that further discussions about the definition of the term intermediary(ies) are needed and judges at the ICC could play a role in that by clarifying ambiguities around this term.

[22] Resolution ICC-ASP/4/Res.3, p 15 [67].

1.3. Defining the term intermediary for specific cases

The Prosecution is not the only unit that has attempted to define the term intermediary at the ICC. Defence teams at the ICC have been very active in challenging the prosecution's reliance on intermediaries. Generally speaking, Defence teams at the ICC are of the view that the prosecution over-relies on intermediaries in ways that harm the rights of the accused. I will come back to this in the final section of this chapter. What I wish to highlight here is that on at least one occasion a Defence team in the case against Mr William Ruto and Mr Joshua Sang proposed its own definition of the term intermediary. At the time, the term intermediary was already in use by all other units of the Court including different chambers. Also, the guidelines on intermediaries had already been adopted and yet the Defence team for Mr Ruto and Sang found it necessary to 'have' their own definition which is as follows:

> "any individual (whether acting in an individual capacity or on behalf of an organization, agency or State) other than [the Victims and Witnesses Unit] staff members: (a) through whom initial contact was made on behalf of the Prosecution with any Prosecution trial witness; (b) who has had any contact (directly or indirectly) with any Prosecution trial witness at the request of the Prosecution; (c) [REDACTED]; and/or (d) who has provided benefits, support, or assistance to a Prosecution trial witness at any time - knowing or believing such individual to be either a Prosecution trial witness for the Kenya Situation."[23]

In response, the Prosecution contested the last sub-section (sub-section d) and submitted that a person who is not acting as an agent for the prosecution should not be considered as an intermediary unless the person in question has been asked to act as an intermediary by the prosecution. In the latter case, the prosecution insisted that such a person would already fall under the first three sub-sections of the definition which the prosecution accepted.[24] Trial Chamber V(A) agreed with the prosecution by finding that this last element of the definition was indeed

[23] *Prosecutor v. William Samoei Ruto and Joshua Arap Sang,* Decision on Disclosure of Information related to Prosecution Intermediaries, TC V (A) ICC-01/09-01/11 (4 September 2013), [35].
[24] Ibid*,* [36].

problematic.[25] Though important parts of this decision are redacted, the issue at stake in this case was disclosure. The Defence argued that Prosecution failed its duties to disclose information about all intermediaries' identities which was material to the preparation of Mr Ruto's defence. Trial Chamber V(A) agreed with the Defence for some intermediaries but it said that the Defence had only succeeded to demonstrate materiality for only a few intermediaries. Reacting to this decision, the prosecution argued that it was given an 'unfair burden' to demonstrate the necessity of protective measures for information related to intermediaries. They argued that they would be required to asses potential risks, apply for redactions and justify those redactions or apply for other protective measures which would result in delays. However, Trial Chamber V(A) rejected the prosecution's application for leave to appeal on the basis that the above stated claims were 'speculative'.[26]

This example of Mr Ruto's case illustrates how defining the term intermediary is necessary to determine what information is material and for what purpose in the course of any given case at the ICC. Unfortunately, none of the parties in this case made reference to the definition provided by the guidelines on intermediaries. This would have shed light on how exactly the Court applies the guidelines on intermediaries. Instead, it exhibits the guidelines' weakness and adds to the perception of insignificance (or even purposelessness) of regulating intermediaries. It makes one question whom the guidelines are written for since the defence, the prosecution and even Trial Chamber V(A) do not make any reference to the regulatory efforts that have been mobilized to define the term intermediary(ies).[27]

[25] Ibid*,* [37].

[26] *Prosecution vs. William Samoei Ruto and Joshua Arap Sang,* Decision on Prosecution's Application for Leave to Appeal the 'Decision on Disclosure of Information related to Prosecution Intermediaries', TC V(A) ICC-01/09-01/11, (8 October 2013), [14].

[27] There seems to be a consensus among scholars that without enforcement mechanism the guidelines on intermediaries are likely to be ineffective. I will come back to different issues in the guidelines on intermediaries throughout this thesis.

In any event the Defence effort to define the term intermediary is limited in that it is only relevant for a specific case and the units of the Court that are parties to these particular proceedings. That being said, these exchanges can help us begin to understand how intermediaries are mediated by lawyers, how judges decide on these issues and most importantly how impactful intermediaries are in the operation of criminal proceedings in The Hague. The concept of in-between actors cannot be ignored or disregarded in discussions about the Court's work more broadly.

Looking at all the definitions put forward this far, it is the element of in-between that I find most helpful in conceptualising what it means to be an intermediary for the ICC. The idea of in-between is fundamental even in the literal meaning of the word intermediary and this is somewhat the dominant concept in discussions about defining the term intermediary in international criminal law. Intermediaries are in-between agents of the court and as such in-between actors in international criminal justice. To define intermediaries as in-between agents is a form of describing the reality of their function. That is an office through which information circulates from one point to another, one institution to another and/or one geographical location to another. In the very particular context of international criminal proceedings, an intermediary is also an agent through whom the Court's vision of justice reaches any community affected by ICC proceedings independent of possible social, economic or political barriers and vice versa. What this new conceptualization adds to existing definitions is that it questions the concept of in-between. Intermediaries are not limited to facilitating contact between one person and another, they also act in-between institutions (example between the ICC and states), or in-between ideas (example between political transition and transitional justice). Thinking of intermediaries in this manner brings to the surface problems that have been left unaddressed in the literature on intermediaries such as knowledge production, security or accountability.

2. What do intermediaries do?

Intermediaries perform a variety of tasks which are different depending on the type of intermediary in question but it is also possible these categories may overlap where an intermediary has multiple functions. Intermediaries' tasks vary in nature, from case to case, in time and space. Here the objective is to highlight some of the key roles played by intermediaries as featured in documents of the Court and in the guidelines on Intermediaries.[28]

2.1 Intermediaries assist the Office of The Prosecutor

The OTP is the only Unit of the Court which has been accused of over-relying on intermediaries for their work on the ground. The OTP, compared to other Units of the Court, has been the most vocal about the usefulness of intermediaries' services in relation to investigations and witnesses. The former ICC Prosecutor stated that his office depends on intermediaries' services as they "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 to the prosecution",[29] a statement that is often referred to reiterate the importance of working with intermediaries and securing future partnerships. Yet little is known about intermediaries' perspective on this relationship.

Intermediaries assist the OTP to "conduct investigations by identifying evidentiary leads and/or witnesses and facilitating contact with potential witnesses".[30] However, their tasks are more diversified. According to ICC records, in the early stages of investigations in the DRC, there were two categories of intermediaries.[31] Those in the

[28] The description of intermediaries' tasks and functions in this section might be different in practice. For instance, it would be interesting to know how intermediaries define their functions and how the communities they serve define them.

[29] *Prosecutor v. Thomas Lubanga Dyilo*, Redacted Decision on Intermediaries, (supra n.4), [88].

[30] The guidelines on intermediaries, (supra n. 4), p 6.

[31] *Prosecutor v. Thomas Lubanga Dyilo,* Transcript of Deposition (closed session) 2010, TC I (ICC-01/04-01/06-Rule 68 Deposition) 16 November 2010, p 49, line 10; also see *Prosecution v. Thomas Lubanga Dyilo,* Judgment pursuant to Article 74 of the Statute, (n.2 above), [190].

first category assisted to identify witnesses and facilitated contact between witnesses and investigators.[32] These individuals, who were often activists, were said to be reasonably professional in their management of the safety and security of the witnesses.[33] Intermediaries in this category generally contacted the investigators because of information in their possession or because they knew witnesses who could be helpful.[34] Following a request from investigators, intermediaries would collect the witnesses from their homes, organise meetings and ensure they were not seen with the investigators.[35]

The second category of intermediaries assisted investigation teams in contributing to the evaluation of the security situation.[36] These individuals included some members of the United Nations Organization Stabilization Mission in the DRC (MONUC); soldiers of the Congolese armed forces; and anyone with useful information on the security situation.[37] An intermediary could be anyone who could perform this role apart from those who had been involved in the fighting or who had perpetrated crimes.[38] In some instances the tasks performed by intermediaries –such as providing information on the security situation[39] - became so important that the team decided to formalise their relationship with contractual agreements.[40]

The status of intermediaries could also change depending on what tasks they carry. In *Kantanga & Ngudjolo* case, the prosecutor applied for redactions of a particular intermediary's identity. Pre-Trial Chamber I rejected this demand on the basis that the situation of the said intermediary was similar to another person hired

[32] Ibid, lines 11 – 13.

[33] Ibid, lines 17 – 20.

[34] Ibid, p 61, line 25 to p 62, line 2.

[35] Ibid, lines 10 – 15.

[36] Ibid, p 50, lines 17 – 21.

[37] Ibid, p 51, line 22 to p 52, line 5.

[38] Ibid, p 53, line 14 – 16.

[39] Ibid, p 51, line 22 to p 52, line 5, also see Prosecution v. Thomas Lubanga Dyilo (Article 74 Decision) (n.2 above), [193].

[40] *Prosecutor v. Thomas Lubanga Dyilo,* Transcript of Deposition (closed session) 2010, (supra n. 31), p 53, lines 21-23; also *Prosecution v. Thomas Lubanga Dyilo,* Judgment pursuant to Article 74 of the Statute, (supra n. 2), [196].

temporarily and that the said intermediary should therefore be considered as a temporary staff member rather than just an intermediary.[41] Thus, whilst the OTP considered this person to be an intermediary, the Single Judge's decision here shows that functionally, certain intermediaries could be considered as staff members. Sadly, this also means that status change leads to different security protocols such as redactions. In the end, this person did not receive procedural protection.

2.2 Intermediaries assist the Defence

Similar to the prosecution, Defence teams at the ICC are also assisted by intermediaries.[42] In the early stages of the Court's work, Defence intermediaries were rarely mentioned however there are increasing cases in which defence intermediaries are visible. In the case against Mr Thomas Lubanga, the Prosecution attempted to have Defence intermediaries brought before the chamber over a dispute about the reliability of prosecution witnesses.[43] There is also the case against Mr Jean Pierre Bemba in which defence intermediaries were brought to trial on charges of bribery.[44] These intermediaries acted between the accused and certain witnesses.[45]

As regards the guidelines on intermediaries, Defence intermediaries are missing from the processes that led to the adoption of the guidelines as well as the final document.[46] Nevertheless, the Defence teams have been very active in challenging the use of intermediaries at the ICC. They have raised some of the most important

[41] *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui,* Public Redacted Version Decision on the Prosecution requests for redactions pursuant to rule 81(2) and 81(4) of the Rules and for an Extension of Time pursuant to regulation 35 of the Regulations of the Court, PTC I (01/04-01/07-312) 11 March 2008.

[42] *Prosecution v. Germain Katanga and Mathieu Ngudjolo Chui,* Review of the "Decision on the Conditions of the Pre-Trial Detention of Germain Katanga", PTC I (01/04-01/07-702) 18 August 2008, p 8.

[43] *Prosecutor v. Thomas Lubanga Dyilo*, Prosecution's Provision of Information on the witnesses dealing with the abuse of process and intermediaries, PTC I (ICC-01/04-01/06-2473-Red) 18 June 2010, [42].

[44] *Prosecutor v Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu, Narcisse Arido,* Judgement pursuant to Article 74 of the Statute, TC VII (ICC-01/05-01/13) 19 October 2016.

[45] Deeper analysis of this case can be found in chapter 6.

[46] See Haslam E. and Edmunds R, 'Managing A New 'Partnership': 'Professionalization', Intermediaries and the International Criminal Court', (supra n. 13).

questions regarding the fairness of proceedings at the ICC in relation to intermediaries. However, very little is known about the ways in which Defence teams interact with intermediaries. In one sense it is inevitable for the Defence to be less transparent on this aspect given that they are only linked to the Court through the Registry. To have a judicial system in which the Defence is independent is fundamental but as far as intermediaries are concerned it is difficult to examine their relationship with Defence teams.

2.3 Intermediaries assist Victims

Intermediaries assist victims, victim-witnesses and liaise between legal representatives and victims for the purposes of victim participation or reparations.[47] The relationship that intermediaries have with victims and victims/witnesses is one that has made victim participation before the ICC possible. But it is also a relationship which has and continues to be a source of conflict between two ideals. On the one hand the ICC provides for victims participation, a framework which has up until now been causing more problems than it is solving.[48] On the other hand, victims have

[47] The guidelines on intermediaries, (supra n. 4), p 6.

[48] Participation of victims at the ICC takes place through the procedure of rule 89 (1) of the Rules. By way of written applications, applicants are required to demonstrate that a) they are victims within the meaning of rule 85 of the Rules and 2) pursuant to article 68 (3) of the Statute, victims will first have to demonstrate that their personal interests are affected by the trial in order to be permitted to present their views and concerns at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused a fair and impartial trial).

However, these provisions fail to specify the role of victims during investigations and throughout case related proceedings. As a result different chambers of the Court have interpreted and applied these provisions different. Furthermore there are unresolved tensions between the individual and collective victims concerns, between the rights of victims and the rights of the accused and thus questions as to whether victims are meant to participate in criminal proceedings at all have been raised by academics.

For more academic discussion on this issue see SaCouto S. and Cleary., 'Victims' Participation in the Investigations of the International Criminal Court' (2008) Vol. 17:73, *Transnational Law and Contemporary Problems*.; War Crimes Research Office, Victim Participation Before the International Criminal Court (Washington: War Crimes Research Office, 2007); Friman H., 'The International Criminal Court and Participation of Victims: A Third Party to the Proceedings?' (2009) Vol. 22:3 *Leiden Journal of International Law,* 485-500.; Haslam E., 'Victim Participation at the International Criminal Court: A Triumph of Hope over Experience?' in D McGoldrick, P Rowe, and E Donnelly (eds), The Permanent International Criminal Court: Legal

been given rights by Article 68 (3) of the Rome Statute to participate in criminal proceedings.[49] In order to exercise these rights victims often rely on intermediaries to assist them with language, writing and other related formalities needed for victims to apply for participation in proceedings. Hence depending on the situations and conflicts, intermediaries can become crucial to the functioning of the entire system because without them it would practically be impossible for the Court to communicate with victims and vice versa. Where there are a handful of individuals capable of fulfilling this role, it becomes even harder for Units of the Court to separate themselves from those intermediaries.

The Office of Public Counsel for the Defence (OPCD) raised some of these important questions in 2008 in the DRC situation. It challenged the role played by intermediaries and argued that they were a threat to the integrity of proceedings as a whole. In its submission it raised the following issues: (i) whether intermediaries of the applicants should be permitted to provide additional information on behalf of the applicants, (ii) whether applicants who cannot read and write should be assisted in filling out the applications, and (iii) whether other persons should be permitted to be present when the applications are filled out.[50] These are legitimate questions given that at that time some intermediaries were already being accused of influencing witnesses to give false testimonies. Hence there were grounds for

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and Policy Issues (Oxford: Hart Publishing, 2004), at 315; Jorda C. and De Hemptinne J, 'The Status and Role of the Victim' in A Cassese, Gaeta P, and Jones J (eds), The Rome Statute of the International Criminal Court: A Commentary (Oxford University Press: 2002), 1387; Ntanda Nsereko DD, 'The Role of Victims in Criminal Proceedings – Lessons National Jurisdictions can Learn from the ICC' (2010) Vo. 21:3-4, *Criminal Law Forum,* 399-415; Wemmers J-A, 'Where Do They Belong? Giving Victims a Place in the Criminal Justice Process', (2009) Vol. 20:4, *Criminal Law Forum,* 395.; Wemmers J-A, 'Victims' Rights and the International Criminal Court: Perceptions within the Court Regarding the Victims' Right to Participate' (2010) Vol. 23: 3 *Leiden Journal of International Law,* 629-643.; Zappala` S., 'The Rights of Victims v. the Rights of the Accused', (2010) Vol. 8:1 *Journal of International Criminal Justice,* at 137.

[49] Rome Statute, 2002

[50] *Situation in Democratic Republic of Congo,* Decision on the Applications for Participation Filed in Connection with the Investigation in the Democratic Republic of Congo by Applicants a/0189/06 to a/0198/06, a/0200/06 to a/0202/06, a/0204/06 to a/0208/06, a/0210/06 to a/0213/06, a/0215/06 to a/0218/06, a/0219/06, a/0223/06, a/0332/07, a/0334/07 to a/0337/07, a/0001/08, a/0030/08 and a/0031/08, PTC I Case No:ICC-01/04-545 (4 November 2008), [8].

concern regarding the integrity of other processes which involve intermediaries such facilitating contact between potential witnesses and relevant units. However, as the Single Judge noted it was necessary "to balance the competing concerns of preserving an applicant's access to the Court against any adverse impact on the proceedings if an applicant is permitted to be assisted during the application process".[51] The Single Judge found that it would be denying victims to access the Court if they weren't permitted to rely on intermediaries to participate in proceedings which are in languages they do not necessarily speak or understand. Indeed without intermediaries some of the victims would not be able to complete the then 17-page form (now reduced to 7[52]) in English or French. The Single Judge recognised that the Court's inability to interact directly with victims and/or witnesses gives enormous power to intermediaries.[53] Similar to the Prosecution's response to some intermediaries' misconduct (or possible misconduct) the opportunities found in intermediaries services were prioritised over the possibility that they might use their positions for unsavoury purposes. As I will show in chapter four, this position of power is a product of in-between spaces which also produces vulnerability in-between actors. For example, pro-government intermediaries may be in positions of power where other intermediaries are exposed to serious security threats. Therefore, it would be incorrect to deduce from the Single Judge's ruling that intermediaries are necessarily or automatically in a position of power as a result of their newly-obtained status.

How intermediaries perceive themselves and how (or whether) local communities understand their function is also important. The defence for Jean-Pierre Bemba

[51] Ibid,[24].

[52] See ICC Application form for Individuals, available at < http://www.icc-cpi.int/NR/rdonlyres/48A75CF0-E38E-48A7-A9E0-026ADD32553D/0/SAFIndividualEng.pdf>, accessed, 26 August, 2013.

[53] *Situation in Democratic Republic of Congo,* Decision on the Applications for Participation Filed in Connection with the Investigation in the Democratic Republic of Congo by Applicants a/0189/06 to a/0198/06, a/0200/06 to a/0202/06, a/0204/06 to a/0208/06, a/0210/06 to a/0213/06, a/0215/06 to a/0218/06, a/0219/06, a/0223/06, a/0332/07, a/0334/07 to a/0337/07, a/0001/08, a/0030/08 and a/0031/08, (supra n. 50), [25].

raised this issue in 2010. It was concerned with an intermediary who presented himself to victims as "*intermédiaire de la CPI*" (meaning ICC intermediary). It argued that there was "no official status of such designation" and that a description would have "influenced applicants" to submit applications.[54] In response the Chamber recalled that it had recognised the role of intermediaries because of the role that intermediaries play during the application process. Pre-Trial Chamber III in this case said that it had recognised the role that intermediaries play during victims' application processes. It noted that intermediaries play a role in assisting in the filling in of the forms, even writing down the answers given by applicants –some of them being either illiterate or not speaking the language in which the form was filled in.[55] In addition, it said that it would only reject applications if there was a "doubt" as regards the intermediary's involvement in the filling of the applications.[56]

Overall it can be said that intermediaries are key players in processes of victim participation at the ICC. Leila Ullrich whose work focuses on this particular relationship shows that intermediaries' contribution is not limited to translation and the filling in of forms. She convincingly argues that intermediaries play an even greater role in the selection of victims and victims' stories. They are also the face of the Court on the ground throughout trial proceedings. I will discuss in subsequent chapters how intermediaries contribute to other processes of international criminal justice as well.

2.4 Intermediaries assist the Trust Funds for Victims (TFV)

The Trust Funds for Victims Regulations are part of the rare ICC legal documents which mention Intermediaries. In its Regulation 67 it says that "the Trust Fund may decide to use intermediaries to facilitate the disbursement of reparations awards, as

[54]*Prosecutor v. Jean-Pierre Bemba Gombo,* Public Document With confidential ex parte annexes only available to the Registry and the respective common legal representative Decision on 653 applications by victims to participate in the proceedings, PTC III (01/05-01/08-1091) 23 December 2010, [23].
[55]Ibid, [34] and [51-52].
[56]Ibid, [34].

necessary, where to do so would provide greater access to the beneficiary group and would not create any conflict of interest."[57] The second part of the regulation evidences, quite importantly, that the Trust Funds for Victims meaning of intermediaries is fundamentally different from the one proposed by the guidelines and the Defence team in the Kenyan situations mentioned earlier. It says that "Intermediaries may include interested States, intergovernmental organizations, as well as national or international nongovernmental organizations working in close proximity with the beneficiary groups".[58] It can, therefore, be said that the TFV understanding of intermediaries is broader than most definitions so far because it includes States and narrower because it excludes individuals.

Evidence that intermediaries assist the TFV can also be seen in OPCD submissions before the Court. Four years before Mr Lubanga was convicted, the OPCD had already requested the TFV to provide them with information concerning relevant intermediaries in order to submit observations. Essentially, the OPCD raised concerns about the possibility that the TFV may rely on intermediaries without verifying if persons involved in assistance programs could also be involved in proceedings before the Court. According to the OPCD, such partnerships might negatively impact the credibility of the court and the perception of impartiality of the proceedings.[59]
Intermediaries are also found in TFV Regulation 71 which provides that the TFV may identify "intermediaries or partners, or invite proposals for the implementation of the award".[60] However it is not clear what the difference is between intermediaries and partners or why and how this difference was drawn. The TFV website seems to recognise that it works with different types of intermediaries although it refers to them as 'implementing partners'.[61] In the DRC situation, the TFV recently reiterated

[57] Resolution ICC-ASP/4/Res.3, p 15 [67].
[58] Ibid.
[59] *Situation in Uganda*, OPCD observations on the Notification under Regulation 50 of the Regulation 50 of the Regulations of the Trust Fund for Victims, PTC II ICC-02/04, (12 March 2008), [7], [69] and [74].
[60] Resolution ICC-ASP/4/Res.3, p 15 [71].
[61] See TFV http://www.trustfundforvictims.org/partners

the role played by intermediaries for the purposes of victim outreach and identification. The TFV explained that in order to do their work in the field, they intended to rely on pre-existing networks of 'well-trained and efficient intermediaries'.[62] In addition, the TFV said that it intended to rely on the same intermediaries that the VPRS and the Legal Representatives have been working with through the long years of proceedings against Mr Lubanga. According to the TFV, these intermediaries have proven to be ethical, effective and reliable in such a way that the TFV expressed its intention to establish contractual relationships with them.[63]

The guidelines on intermediaries do not add any further clarifications as to how intermediaries ought to work with the TFV other than restating that the Rome Statute and Court orders regulate this relationship. The ways in which the guidelines on intermediaries describe the tasks and functions of intermediaries in relation to the TFV encourages or invites intermediaries to use 'voluntary contributions from donors to provide victims and their families with physical rehabilitation material support and or physiological rehabilitation'.[64]

Such tasks go beyond what a criminal court is capable of offering but fits into broader policy goals found in political transition. It can also be found in other types of community restoration efforts that take place after mass violence. Here I want to highlight that intermediaries' ability to perform all these tasks also exhibits the different registers through which they negotiate and mediate the Court's engagement with affected communities. It shows that intermediaries are not only

[62] *Prosecution v. Thomas Lubanga Dyilo,* Observation in relation to the victim identification and screening process pursuant to the Trial Chamber's order of 25 January 2018, TC II (ICC-01/04-01/06) 21 March 2018, [10].

[63] *Prosecution v. Thomas Lubanga Dyilo,* Observation in relation to the victim identification and screening process pursuant to the Trial Chamber's order of 25 January 2018, TC II (ICC-01/04-01/06) 21 March 2018, [15].

[64] The guidelines on intermediaries, (supra n. 4), Annex 1, p2.

partners with the Court for the purposes of international criminal proceedings but they also partner with donors. Consequently, intermediaries are accountable to the Court as well as other actors but thinking through global vs. local framings has prevented us from conceptualising how else intermediaries might navigate all of these different registers. I discuss the issue of accountability more extensively in chapter 6.

2.5 Intermediaries assist the ICC Outreach Program

Intermediaries assist the ICC Outreach Unit in the field.[65] The role of intermediaries was further reiterated in the Strategic Plan for Outreach of The International Criminal Court in which it is stated that "the development of partnerships is important for reaching the broader local population through culturally appropriate intermediaries, particularly where ICC staff is unable to contact the general public due to lack of resources, logistical or other constraints or security concerns."[66] In addition, the Unit said it was working towards avoiding situations where partners or intermediaries would be perceived as "speaking or acting on behalf of the Court [emphasis added]".[67]

Because intermediaries work in dangerous zones, their identities are usually redacted from public documents. Hence it is not only difficult to know who intermediaries are but their gender is also hidden. Thus far, the latest Outreach Unit report is the only one which refers to female intermediaries. It noted that "for various reasons, including cultural and livelihood reasons, women have showed little interest in participating in outreach activities in the past."[68] In reference to the Unit's progress the 2010 Outreach report gives an example of some Sudanese

[65] The guidelines on intermediaries, (supra n.4), p6.

[66] Assembly of States Parties, The Strategic Plan for Outreach was published by the Court in September 2006, on the occasion of the fifth session of the Assembly of States Parties, 5th Session ICC-ASP/5/12 (29 September 2006) available at<http://www.icc-cpi.int/NR/rdonlyres/FB4C75CF-FD15-4B06-B1E3-E22618FB404C/185051/ICCASP512_English1.pdf > [66].

[67] Ibid.

[68] See Outreach Report 2010 Public Information and Documentation Section-Outreach Unit (2010) available at http://www.icc-cpi.int/iccdocs/PIDS/publications/OUR2010Eng.pdf> [43-44].

women in Europe who had accepted to assist female groups to apply to participate in proceedings before the Court.[69] Without these intermediaries it would otherwise be difficult for victims to exercise their rights before the Court for the following reasons; i) victims don't necessarily know what the Court is and what it does, ii) they don't necessarily know that they can participate and how to do so, iii) in cases of sexual violence crimes, women are usually more comfortable talking to women than expose their suffering to men. In order to meet the above mentioned needs, the ICC could benefit from enhanced cooperation with intermediaries –such as International or Regional NGOs— who have the capacity and the ability to play a function here.[70]

One of the ways in which the ICC seeks to increase its impact on the ground is working with intermediaries (individuals or NGOs) capable of addressing gender orientated problems. The guidelines' recognize such possibilities where it states that the Unit that needs gender orientated assistance might provide 'training' for those intermediaries. These possibilities, however, are not without challenges. Emily Haslam and Rod Edmunds warn against the effects of 'professionalization tendencies' in international criminal law that take place through these types of trainings in general.[71] On a more practical level, the guidelines suffer from poor implementation and enforcement which makes one question how exactly the guidelines would apply here. Overall, Gender issues in relation to intermediaries are yet to be addressed at the ICC as well as in literature.[72]

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[69] Ibid.

[70] Those who support this view include Baylis E.A., 'Outsourcing Investigations', (2009) 14 University of California, *Los Angeles Journal of International Law and Foreign Affairs* 121; De Vos M.C., 'Investigating from Afar: The ICC's Evidence Problem', (2013) Vol 26:4 *Leiden Journal of International Law*, and Clancy D., ''They told us we would be part of history' Reflections on the civil society intermediary experience in the Great Lakes region', in De Vos C., Kendall S., Stahn S. (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions,* (Cambridge University Press: 2015).

[71] It is unlikely both authors would object to gender sensitive training but these types of trainings come with certain political and ideological implications that should not be ignored. See Haslam E. and Edmunds R, 'Managing A New 'Partnership': 'Professionalization', Intermediaries and the International Criminal Court (2012) Vol. 24:1 *Criminal Law Forum*, 49-85.

[72] More research is needed to address gender issues in relation to intermediaries but these questions are beyond the scope of this thesis.

3. Intermediaries as new subjects of international criminal law

Generally, the term intermediary is used in many different contexts to mean different things. In the context of international criminal law, however, I consider all who perform intermediary work –as described in the previous section— to be intermediaries. Nevertheless, unlike De Silva Nicole, I do not consider states to be intermediaries in the same sense as individuals or entities analysed in this thesis.[73] I exclude states from the definition of intermediaries because their relationship with the ICC is regulated by the Rome statute differently. First of all member states had the opportunity to negotiate their relationship with the Court at Rome conference and discussions between them and the Court continue through the Assembly of States meetings. Member states partner with the ICC in many different ways some of which include the execution of arrest warrants (Article 59 of the Rome Statute) or the enforcement of sentences and imprisonment (Article 103 of the Rome). In addition, member states' interests are represented at the ICC especially during admissibility proceedings as provided in the Rome Statue articles 17 and 18. Secondly, the ICC, its members and non-members are all regulated by public international law given their international legal personality. Thirdly, Court documents such as transcripts, decisions and parties submissions refer to intermediaries as individuals or entities which are different from states. Lastly, it is the dominant approach in NGO reports as well as in the little literature there is on ICC intermediaries.

Even with the exclusion of States, intermediaries are very diverse and operate at different levels. Differences between types of intermediaries are significant in that they come with different opportunities and challenges for intermediaries and those who rely on their services. The following are some of the ways in which

[73] De Silva N., 'Intermediary Complexity in Regulatory Governance : The International Criminal Court's Use of NGO's in Regulating International Crimes', (2017), Vol. 670:1, *The ANNLS of the American Academy of Political and Social Science,* p 172.

intermediaries can be categorised from a textual reading of the Court's documents, NGOs reports and statements as well as academic literature. Accordingly, ICC intermediaries can be categorised in three main groups: a) according to their status in international law, b) according to the units that intermediaries assist and c) according to their level of operation. Each one of these categories comes with significant implications. In the following paragraphs, I will explain what these categories are, why they are important and indicate how I use them in this thesis.

3.1 Status in international criminal law

The term intermediary refers to a specific function in international criminal law. It is the act of mediating between two or more people or entities for the purposes of international criminal proceedings at the ICC. For example, the Court mediates its presence in communities affected by its proceedings through intermediaries. Though the status of intermediaries is not expressly referred to in the Rome Statute or the Rules of evidence and procedures, intermediaries have evolved into becoming actors in international criminal law in the sense that they are capable of influencing outcomes in international criminal proceedings. Intermediaries are able to shape encounters between the Court and the communities affected by its proceedings through their assistance to different units of the Court on the ground. In many ways and for different reasons, the Court has even become dependent on intermediaries' services for its engagement with witnesses, victims and communities affected by its proceedings more broadly. Of course such dependence places in intermediaries in a powerful position. In Chapter 4 I show how, for example, intermediaries have interfered with the Court's engagement with affected communities, blocking victims from exercising their rights at the ICC.

Intermediaries are subjects of international criminal law in the sense that they are subjected to rules and regulations produced by the operation of the international criminal court. It is possible that intermediaries may be bound by contractual

agreements with the ICC or its units but it is also possible that intermediaries may not have such agreements. In both cases, the and most importantly intermediaries complement states' cooperation by facilitating access to information that would otherwise be inaccessible to the Court.[74]

Categorising intermediaries in this way allows us to conceptualise their place in international criminal law. According to Emily Haslam and Rod Edmunds the adoption of the guidelines on intermediaries gave them a 'semi-institutionalised status'.[75] As both authors convincingly argue, qualifying intermediaries in this way brings to light court practices that contribute to 'professionalization' tendencies in international criminal law. In addition as I mentioned earlier, these individuals and entities seem to be conscious of their status of intermediary whether they are linked to the Court through contractual agreements as provided in the guidelines or even

[74] The use of intermediaries in international criminal law is very different from how intermediaries are used in domestic legal systems. In cases of child abuse or rape it is possible that the witness-victim will experience secondary trauma due to cross examination. As a result of this, some witnesses might either say things that did not happen because of the pressure in Court or be reluctant to come forward and give their testimonies to avoid that pressure. It is in this sense that intermediaries were introduced in most countries. See Westcott H.L., 'Cross examination, sexual abuse and child witness identity', (2002), Vol. 11:3, *Child Abuse Review,* 137-152. One example of this is the case of South Africa.
In South Africa the rationale behind the intermediary process came from two fundamental principles, the preservation of justice and the best interest of the child. Relying on intermediaries for the preservation of justice means that better and precise evidence can be collected from the witness while reducing trauma and secondary abuse experienced by child witnesses in cases involving sexual abuse for example. The idea is that by separating the child from formal courtroom questioning and allowing an intermediary to relay questions and answers to the child, via closed circuit television or one-way mirror, helps reduce stress of the experience for child witnesses. At the same time, the accused will still be able to exercise their right of cross examination of witnesses. For more on Function, Duties and Powers of intermediary Van der Merwe A., 'Oral Evidence', in Schwikkard P.J. & Van der Merwe S.E., *Principles of* Evidence, (Juta Cape Town: 2009). For more on the role of intermediary in South Africa see Schoeman, U.C.W., *A Timing Program for Intermediaries for the Child Witness in South African Courts,* (2006), Doctoral Thesis, University of Pretoria, available at < http://upetd.up.ac.za/thesis/available/etd-11032006-175438/> Chapter 5. Practically, the intermediary translates questions posed by parties during legal processes into the appropriate language for the child witness to understand and therefore respond. See n *K v The Regional Court Magistrate NO, and Others* (1996 (1) SACR 434 (E) at 445E it was said that "[intermediaries] must convey the content and meaning of what was asked in a language and form understandable to the witness." ; For England and Wales see Registered Intermediary Procedural Guidance Manual (2012) [Hereinafter Intermediary Procedural Guidance] available at < http://www.cps.gov.uk/publications/docs/RI_ProceduralGuidanceManual_2012.pdf>

[75] Haslam E. and Edmunds R, 'Managing A New 'Partnership': 'Professionalization', Intermediaries and the International Criminal Court (2012) Vol. 24:1 *Criminal Law Forum*, 49-85.

without such contracts. Categorising intermediaries in this way is helpful to make distinctions between ICC intermediaries and ordinary citizens who might provide the Units of the Court with useful information without necessarily being committed to act as an in-between agent.

The other context in which the term intermediary is used at the ICC concerns the Trust Fund for Victims. In discussing the role of the TFV the Appeals Chamber found that Article 75 (2) of the Rome Statute, which explains the role of the TFV in comparison to the accused person, is to be understood as '*par l'intermédiare*' meaning through the intermediary of the TFV.[76] The Appeals Chamber clarified that the TFV does not replace or take the place of the accused person in reparation processes.[77] In my view, this is the sense in which states might also be regarded as intermediaries.

3.2 Intermediaries attached to the units they assist

Returning (briefly) to the sources used in this research, much of what we know about intermediaries comes from the units that employ them. Through transcripts, submissions, decisions and orders, intermediaries are presented and represented differently by different parties. In order to see these differences, it is also helpful to categorise intermediaries based on the units they assist. This category is fluid as intermediaries may move from assisting one unit to another or assist different units at the same time. However, it is an important category because where the prosecution makes reference to intermediaries in its submissions, it is often referring to the intermediaries it works with in specific cases and in specific countries. In other words, parties' use of the term intermediary must be carefully interpreted and not

[76] Article 75 (2) of the Rome Statute States that "The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79."

[77] *Prosecution v. Thomas Lubanga Dyilo,* Judgment on the appeals against the « Decision establishing the principles and procedures to be applied to reparations » of 7 August 2012 with Amended order for reparations (Annex A) and public annexes 1 and 2, AC (ICC-01/04-01/06 A A 2 A 3), 3 March 2015, [63] [74], [174].

applied to all intermediaries as they (parties) refer to different intermediaries in different contexts. Failure to make distinctions between different types of intermediaries might have greater and unintended consequences as can be seen in Deirdre Clancy's work. Though her research also fails to make distinctions between types of intermediaries, Clancy shows how accusations of misconduct against certain prosecution intermediaries had an impact on other intermediaries on the ground.[78] These other intermediaries may have been prosecution intermediaries in other cases or they may have been linked with the Court's work on the ground through other units.

Even though Defence intermediaries are at times referred to by their own names or by the term resource person,[79] this thesis rejects this terminology with a view to emphasise instances where the Defence renders its own intermediaries invisible and where Defence intermediaries are simply overlooked. It is not entirely clear why the defence uses a different terminology but one of the reasons may be that defence teams at the ICC are generally opposed to the role played by intermediaries in proceedings. The meaning of the term intermediary is therefore a very important issue that needs attention from academics as well as policy makers.

Categorising intermediaries based on the Units they assist is useful to understand the kind of knowledge the Court produces about them. This categorisation is dominant in ICC transcripts, decisions, submissions and it has been adopted in the guidelines on Intermediaries. For example, the guidelines describe intermediaries' functions in relation to the units they assist. In this thesis I use this categorisation to highlight some of the ways intermediaries are mediated at the ICC. This way, it becomes

[78] Clancy D., 'They told us we would be part of history' Reflections on the civil society intermediary experience in the Great Lakes region', (supra n. 70), p222.

[79] See *Prosecutor v. Thomas Lubanga* Dyilo, Transcript of Hearing, TC I (ICC-01/04-01/06-T-3 10-RED), 6 July 2010.

possible to see what kind of data is produced about intermediaries, who produces it and for what purposes

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3.3 Intermediaries' level of operation

Intermediaries are individuals and entities who mediate the Court's engagement with communities affected by its proceedings at different levels of social, economic and political power. One of the ways different levels of power become apparent is when we distinguish individual intermediaries from grassroots associations, local NGOs and international NGOs. Doing so helps us understand power dynamics in intermediaries' world better and, identify the kinds of opportunities and challenges intermediaries and those who rely on their services face.

Some authors in international criminal law literature on intermediaries have used this categorisation to begin a discussion about how the Court might partner with intermediaries and mitigate staffing and funding challenges. This is visible in the work of Elena Baylis though she uses different terminology. In reference to NGOs and UN entities, she talks about 'capable' third parties as opportunities for OTP investigators.[80] These types of intermediaries include for example Amnesty International, Redress and Human Rights Watch. They are known for bringing awareness of mass atrocities and pressing for political responses but also for their investigations into mass violence. By the time the ICC gets involved in a country, these NGOs will have developed reliable on ground intelligence which can be very useful for the Court. However, these NGOs are also known to share the Court's vision of justice which may not necessarily promote justice negotiations and debates in communities affected by ICC proceedings.

Secondly, intermediaries' proximity with communities affected by ICC proceedings influences the ways in which they mediate the Court's work on the ground. This is

[80] Baylis E.A., 'Outsourcing Investigations', (2009) Vol. 14 University of California, (supra n. 70), at 144.

visible in Clancy's work where she makes distinctions between local NGOs and International NGOs. For example, she shows how, local NGOs face far more security challenges than their colleagues in International NGOs. However, even this distinction can be further broken down as is seen in the work of Leila Ullrich. She draws differences Kampala (Uganda's capital city) based intermediaries and Giru (rural Uganda) based intermediaries.[81] Since intermediaries are sometimes referred to as 'local' agents, her work really highlights fragmentation within the local and especially how much gets lost in global vs. local analyses. It can therefore be said that there are significant difference between types of intermediaries which must be reflected in how we conceptualise intermediaries' relationship with the Court.

With this in mind, distinctions made in the following list of intermediaries emerged in from my reading of the Court's documents; and even though I consider all of them to be intermediaries, their contribution to international criminal law and assistance to the ICC is different.

- Individual intermediaries: This category includes all intermediaries in terms of the human actors; they may be contacted by units of the court or come forward voluntarily
- Local intermediaries: this category includes intermediaries who come from communities affected by the Court's proceedings. These intermediaries may also form associations or small NGOs or work as grassroots intermediaries.
- Country level intermediaries: These intermediaries live or work in states affected by ICC proceedings; they may be human rights activists, experts or other.
- Regional and international organisations intermediaries: While these intermediaries may have offices in the countries affected by ICC proceedings,

[81] Ullrich L., 'Local Intermediaries, Victims and the Justice Contestations of the International Criminal Court', (supra n. n13), at 547.

their headquarters are located outside the communities they serve; they may rely on other intermediaries in order to fulfil their mandates. This category also includes organisations which have special relationships with the ICC such as the UN.

In subsequent chapters, I use this categorisation to discuss how intermediaries relate to each other and how they negotiate their relationship with the Court. Using in-between analysis, I will show, for example, how the Court mitigates geographical distances through intermediaries but also how international NGOs represent other intermediaries in spaces they would otherwise not have access to. Additionally, different proximity determines the kinds of security risks intermediaries are exposed to. I discuss the issue of security in more detail in chapter 5 but, what is important now is to understand that different types of intermediaries necessitate different responses from the Court and from those who rely on their services more broadly.

Overall, these three categories are necessary in order to understand arguments that will follow about knowledge production, representation, power, security and accountability. This categorisation also serves methodological purposes in terms of my interpretation of court documents, NGOs' reports and academic literature on intermediaries. Classifying intermediaries based on their status in international criminal law sets them apart as in-between agents through which the Court extends its work on the ground. This distinction is made to emphasise the difference between intermediaries and ordinary citizens who might assist the Court in any given context and from NGOs whose work in situation countries is not necessarily linked to international criminal proceedings. Next, classifying intermediaries based on the units they assist is useful to analyse how the units of the court relate with their intermediaries, the kind of knowledge they produce about them and how these units represent intermediaries' views at the ICC. Lastly, categorising intermediaries based on their level of operation sets the stage for raising questions about intermediaries'

social, economic and political power. Such questions can help us understand how intermediaries negotiate their place in international criminal justice in relation to the Court and to other actors such as states, donors and other intermediaries.

4. Concluding remarks

An initial objective in this project was to identify who intermediaries are and how they participate in the practice of international criminal law which takes place in in-between spaces. This chapter has shown that defining the term intermediary is essential to have a common understanding of what it means to be or act as an intermediary for the ICC. Different judges presented with intermediaries' issues only expressed the lack of a clear definition setting a precedent whereby, parties in proceedings continually argue about how they ought to interact with them. This is evidenced by the different chambers' definitions, in particular Trial Chamber I statement that the concept is "too vague".[82] In addition, the guidelines on intermediaries emphasise the literal sense which is termed as 'coming between one person and another'.[83] The Registry's attempt to provide a definition through its guidelines on intermediaries also fell short as it excluded important actors such as international and regional NGOs. Yet these types of intermediaries are the cornerstone of the work assigned to TFV and ICC Outreach units. For most academics defining intermediaries in this way is simply too vague and therefore unhelpful. Though existing definitions influenced my conceptualisation of who intermediaries are and what they do, I have also shown that previous approaches in defining the term intermediary are limited and limiting. The lack of a Court-wide definition also reflects other problems such as the lack of clarity in terms of what the law on intermediaries is.

[82] *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Prosecution requests for redactions pursuant to rule 81(2) and 81(4) of the Rules and for an Extension of Time pursuant to regulation 35 of the Regulations of the Court, (supra n. 5), p 6.
[83] The guidelines on intermediaries, (supra n. 4), p 6.

For the purposes of this thesis, I have taken a rather over-inclusive approach in my understanding of who intermediaries are because I am interested into how different types of intermediaries interact with the court, communities affected by ICC proceedings and with each other. What is more, I expand existing definitions with a complex understanding of 'in-between' and how it affects intermediaries and those who rely on their services.

This chapter has demonstrated, for the first time, that a more complex understanding of in-between or betweeness uncovers aspects of intermediaries' relationship with the Court that were otherwise overlooked. As mentioned in the introduction of this thesis, thinking through in-between spaces led me to conclude that intermediaries are in-between actors in international criminal law. In that capacity, intermediaries give rise to a new way of doing international criminal by mediating interactions between the Court and communities affected by its proceedings in different in-between spaces. As primary mediators, intermediaries negotiate interactions between different legal authorities (e.g. international criminal law and domestic law), ideas or objectives (e.g. political transition and transitional justice) and institutions. Other times, intermediaries are also subjected to mediation in the in-between space between parties at the ICC. For example, where the prosecution views the disclosure of intermediaries' identities to the Defence as potentially compromising their (intermediaries) security on the ground, Defence teams have on several occasions argued that disclosure in certain relevant contexts is a defence right (and rightly so). However, intermediaries do not take part in these discussions and judges' decisions on these matters have significant implications on the ground.

In addition, as seen in the final section of this chapter, intermediaries operate at different levels of social, economic and political power. Distinctions between different types of intermediaries are important to examine the way in which they practice international criminal justice in in-between spaces. That is what kind of contribution they bring to the development of international criminal law, how they are affected by ICC decisions or how they relate with other intermediaries. Consequently, I categorised intermediaries based on their status in international law, the units they assist and their level of operation. This categorisation reflects my interpretation of data produced on intermediaries but it is also helpful to understand the arguments put forward in subsequent chapters.

Chapter 2: ACTING AS BRIDGES BETWEEN COMMUNITIES AND OUTSIDERS

–Selected Aspects of African Colonial Intermediaries

Literature on intermediaries in contemporary international criminal law focuses on a narrow group of individuals and entities that assist the international criminal court. This chapter shows that there is a broader context in which intermediaries may be understood. African intermediaries have a long history of mediating between their communities and outsiders. Going back to relevant historical literature in the early stages of British and French colonies, it appears that African colonial intermediaries were skilled individuals whose abilities to move from African to European worlds (and vice versa) was essential to the functioning of the entire colonial system. Similar to contemporary intermediaries, African colonial intermediaries have also been overlooked as accounts of colonialism tend to focus on colonial authorities and local chiefs.[1] Yet African intermediaries have played an important role in the communication of knowledge and power during their time.[2] My focus on the intermediaries who were directly or indirectly connected to the colonial legal system inspired the questions I raise in relation to contemporary intermediaries. This selection of intermediaries includes for example interpreters, letter writers, native courts judges among others. In colonialism, law was a tool through which Africans and Europeans negotiated, collaborated or contested issues such as access to resources, employment, relationships of power and authority, as well as interpretations of morality and culture.

[1] Austen A. R., 'Colonialism From the Middle: African Clerks as Historical Actors and Discursive Subjects', (2011) 38 *History in Africa,* at 24-25.

[2] Throughout this chapter I refer to the rare collection of essays (edited by Lawrance N. B., Osborn L. E. and Roberts L. R.) which focuses on the role played by intermediaries show similarities, in terms of how in-between spaces are productive of particular practices, between African Colonial intermediaries and contemporary intermediaries.

The summaries of some these negotiations provided in this chapter are far from being a comprehensive representation of African colonial intermediaries in all their spheres of work. However, the rather brief references I make in this chapter serve as an illustration of how African colonial intermediaries mediated encounters between their people and outsiders and some of the ways in which these encounters produced particular ways of practicing law. Consequently, these examples serve as a starting point to conceive the role of contemporary intermediaries beyond data collection. Rather, show that contemporary intermediaries might also be seen as contributors to the development of international criminal law by introducing counter hegemonic conceptions of justice.

Interactions between African colonial intermediaries and Europeans or African colonial intermediaries and their communities created a new category in the social order, a sort of hybrid or in-between subject. Intermediaries remained Africans to their employers but gained a different social status in their communities. This chapter analyses relevant aspects of intermediaries' practices in former British and French colonies, in Africa. This historical background sheds vital context to current discussions on the place of intermediaries in contemporary international criminal law or at least what it means to act in-between different legal systems, ideologies or peoples. It is not clear when the early intermediaries were employed, but this chapter traces the use of intermediaries from the early stages of colonialism (1800-1920) to the mature phase of colonialism (1920-1960). My intention is not to compare African colonial intermediaries to contemporary intermediaries *per se.* It is clear that African colonial intermediaries were not limited to criminal legal matters. In a way, it can be said that contemporary intermediaries are an extremely limited group of actors but they are also different in that they range from individuals to international NGOs. Still, this historical contextualisation is useful to understand mediation practices when justice views, legal systems and cultures encounter. In addition, this background sheds light on how intermediaries understood themselves,

how colonial masters conceived the position of intermediary as well as how the people perceived them.

The interest I found in African colonial intermediaries has not been that of tracing possible continuities or of feeding into the argument that the ICC targets Africa.[3] Rather, I found great inspiration from African colonial intermediaries as in-between subjects. The role played by African colonial intermediaries in power negotiation, knowledge production and how they related to their communities inspired the kinds of questions I raise in subsequent chapters about how questions of power and knowledge, security and accountability operate in in between spaces. This chapter shows how African intermediaries' role was useful and essential but also controversial and complex. It makes three key observations: a) The relationship between colonists, intermediaries and their people was complex; b) local politics influenced who became an intermediary and 3) partnerships with intermediaries come with opportunities and challenges for those who relied on their services, for intermediaries and for the development of law in general.

In the following section I will proceed with a brief description of the gap it seeks to fill in international criminal law literature on intermediaries.

[3] See Bosco D., 'Why is the International Criminal Court picking only on Africa?, *The Washington Post, 29* March 2013, available at < https://www.washingtonpost.com/opinions/why-is-the-international-criminal-court-picking-only-on-africa/2013/03/29/cb9bf5da-96f7-11e2-97cd-3d8c1afe4f0f_story.html?noredirect=on&utm_term=.c1417a41c9ef>.
Prominent scholars and international lawyers have also been invited to discuss the question of whether the ICC targets Africa inappropriately. The issues at heart of this debate can be found in their respective contributions available on the Court's public interface here < https://iccforum.com/africa>. Also see for example Clarke M.K, Knottnerus A.S. and De Volder (eds), *Africa and the ICC, Perceptions of Justice,* (Cambridge University Press: 2016); Cashman R., 'The Geopolitics of International Criminal Justice', *9BRi Lobbying Forum*, 4 March 2014; Cannon J. B., 'The International Criminal Court and Africa: Contextualizing the Anti-ICC Narrative', (2017) (2) 1-2, *African Journal of International Criminal Justice,* 6-28 and Chimni, 'International Institutions Today: An Imperial Global State in the Making', *European Journal of International Law*, Vol. 15, No. 1, 2004, pp. 1-37, at 3; Yigzaw D. A., 'The international Criminal Court: Biased Against Africa or Weak Towards the Powerful?', (2018) 43:3 *North Carolina Journal of International law*, 204-239.

1. The missing intermediaries in ICL literature

The relationship between Africa and the ICC has received a lot of attention in international criminal law literature.[4] But there is more that the scholarship on intermediaries in international criminal law can benefit from Africa's history. This historical consideration is relevant because most intermediaries are either working in or based in Africa but also because African intermediaries in particular, have a long history of acting as bridges between their people and outsiders.

Scholarship on colonial administration and governance is helpful for understanding the role played by intermediaries in contemporary international criminal justice in possibly different ways. In this chapter, I focus on the essence of intermediary work which consists of mediating between different actors or ideas and negotiating the terms of such interactions. My intention here is to begin a conversation about how Africa' colonial history might help us better understand the role played by intermediaries in contemporary contexts. So far, links between the ICC and Africa's colonial past tend to focus on why the ICC has only pursued cases in Africa. This on-going debate opposes those who argue that the ICC is a tool through which Western countries target Africans and those who argue that African leaders invited the ICC to their territories or that the Court acted within its rights. However, there is more that Africa's colonial past can offer to international criminal law literature. At least for the purposes of this thesis, Africa's history has greatly contributed to my thinking process and inspired the questions I raise in subsequent chapters. What is particular about African colonial intermediaries is their ability to navigate both European and African worlds, serving both the colonizer and the colonised; and in that process also manage to serve their own interests. The ways in which African colonial intermediaries navigated different spaces, different levels of power and relationships is what led to thinking about intermediaries as in-between agents.

[4] See for example Clarke M.K, Knottnerus S.A. and De Volder E., 'African and the ICC: An introduction', in Clarke M.K, Knottnerus and De Volder (eds), Africa and the ICC, Perceptions of Justice, (supra n.2), pp 1-36.

2. African colonial intermediaries as a source of inspiration

As a 16 year old Court, the ICC may be considered to be relatively new. But as it is shown in this chapter intermediary work such as data collection destined to be analysed or utilised by foreign institutions is nothing new for Africans. This chapter discusses a small selection of African intermediaries who worked in early French and British colonies and how learning about them inspired my understanding of contemporary intermediaries as in-between actors.[5] What transpires from this historical material is that there is more about African intermediaries in literature outside of traditional international criminal law. Many of the tasks performed by African intermediaries today such as partnership negotiations, interpretation or translation and sharing of intelligence in general have long histories that can serve as a starting point to raise questions about how intermediaries relate to the ICC, to their people and with each other. This chapter contributes to the literature with an historical perspective on African intermediaries. By observing how African colonial intermediaries mediated encounters between colonists and their communities, there are undoubtedly similarities with the ways in which contemporary intermediaries operate. Africa's colonial history places intermediaries in a broader context than that of international criminal law which in turn enriches the ways in which we view and think about intermediaries in contemporary contexts.

2.1 The essence of intermediary work

African colonial intermediaries and contemporary intermediaries have similar characteristics in terms of the essence of positions as in-between actors. The most articulated rationale behind the office of the prosecutor's decision for relying on intermediaries is that they access information that would otherwise be inaccessible to their office. Intermediaries are able to move and even live in communities affected by ICC proceedings without raising suspicion.[6] I think that other

[5] African colonial intermediaries are as diverse as contemporary intermediaries. They also perform many different tasks. It is beyond the scope of this research to cover all of those aspects here.

[6] *Prosecutor v. Thomas Lubanga Dyilo*, Redacted Decision on Intermediaries, TC I (ICC-01/04-01/06-2434-Red2), 31May 2010, [88].

intermediaries, who exhibit similar capabilities in Africa, at least in terms of practices, are African colonial intermediaries who have proven to be very diverse and complex characters.

While some collaborated and facilitated colonial administration, others found an opportunity for resisting pre-colonial structures or colonial administration or both. Without African colonial intermediaries it would have been difficult for colonial administrators to govern in territories that were unknown to them and to navigate pre-existing power structures and cultures of the people they found in those territories.[7]

To establish itself and to extend its power, a colonial authority often required native allies.[8] These allies would negotiate power and knowledge between colonial authorities and their communities. Colonial authorities worked in collaboration with Africans in various ways from region to region. Generally, Africans were employed in a wide range of services and had different names including informants, bureaucrats, African colonial employees, friendlies, auxiliaries or collaborators.[9] The diversity of personnel and their respective tasks inspired my conceptualisation of in-between-spaces as multiple sites of mediation. In the following sections, I will focus on African colonial intermediaries whose services facilitated the administration of justice such as interpreters, clerks, secretaries, letter writers and lawyers. They were particularly capable of serving both their people and Europeans in such a way that they became indispensable in governance, communication of power and knowledge production.

[7] Akurang-Parry, Kwabena O., ''A Smattering of Education' and Petitions as Sources: A Study of African Slave Holders' Response to Abolition in the Gold Coast.' (2000) *History in Africa 27,* at 56.

[8] Roberts R. and Mann K, *Law in Colonial Africa,* (Heinemann Educational Books: 1991), p4.

[9] Ranger O. T., 'African Reactions To The Imposition of Colonial Rule In East And Central Africa', in Gann L. H. and Duigman P., *Colonialism in Africa 1870-1960,* Volume 1 The History And Politics Of Colonialism 1870-1914, (Cambridge University Press:1969).

2.2 New sites of mediation

Emphasizing pre-colonial conditions and how they influenced who was or could become an intermediary inspired the questions I ask about political influences in relation to contemporary intermediaries. Pre-colonial structures influenced who would be an intermediary and provided a motive to become one. For example, British colonial administrators depended on their alliance with the Ganda aristocracy in Uganda.[10] While the Ganda aristocracy found an opportunity to stay in power, other Africans who were not part of the Ganda aristocracy had a chance to participate in what seemed to be promising political opportunities. In other words acting as a bridge between colonists and local communities presented political opportunities or at least the possibility to participate in new forms of governance. For the aristocracy to share this new role with others must have been in itself revolutionary. But what is key here is that these new sites of mediation were accessible to whoever could navigate European and African languages. Consequently, it can be said that encounters between colonists and local communities created new spaces in which social, economic and even political powers could be re-negotiated.

Similarly, encounters between the ICC and communities affected by its proceedings create new sites in which important issues such as power, knowledge, security or accountability are mediated. Given the contexts in which the ICC intervenes, it is difficult to dissociate intermediaries from the political context in which they operate. Working as an intermediary for the ICC in post-war societies is also taking part in political transition and community reconstruction. This is a particularly vibrant environment in which power and justice are negotiated between international institutions and actors of international criminal justice. In other words, contemporary intermediaries are positioned in-between justice and power struggles and the

[10] Ibid, p 300.

different sites of mediation in which they operate present them with opportunities and challenges.

For instance, it is possible that contemporary intermediaries might use their position to increase their social, economic and political status in the same way as African colonial intermediaries did. According to Caroline Buisman, there are at least two prosecution intermediaries who –wrongfully- might have used their intermediary status to access financial and other forms of support from the Court. She explains how in cases of relocation, the support given by the Court includes "free housing, health care, living expenses, security monitoring and education for the intermediary and sometimes for their entire family".[11] Of course, this example is far from being representative of intermediaries' experiences. In fact, according to Sara Kendall the majority of contemporary intermediaries work for the Court without financial compensation.[12] These examples illuminate some of the opportunities and challenges that are presented to intermediaries and those who rely on their services. While intermediaries can use their positions to change their social status or increase their political influence there are also opportunities and challenges for those who rely on their services. According to Roberts and Mann, without the manpower and machinery of the native administration or local government like bodies colonial administrators could never have functioned or even survived in their project.[13] Relying on African colonial intermediaries was cheaper than employing Europeans even in small numbers and,[14] it reinforced colonists' presence on the ground. In other words, working with intermediaries was both a staffing and an economic opportunity for colonists.

[11] Buisman C., 'Delegating Investigations: Lessons to be Learned from the Lubanga Judgment', (2013) Vol 11:3/3, *Northwestern Journal of International Human Rights*, at 61.

[12] Kendall S., 'Commodifying Global Justice - Economies of Accountability at the International Criminal Court', (2015) Vol. 13:1 *Journal of International Criminal Justice*, at 128.

[13] Roberts R. and Mann K, *Law in Colonial Africa,* (supra n. 8), p4.

[14] Ranger O. T., 'African Reactions To The Imposition of Colonial Rule In East And Central Africa', (supra n. 9), p 294-5.

Overall, international criminal law literature could benefit more from the idea that encounters between different governance or legal systems create zones of mediation. African intermediaries have long histories of negotiating and sometimes resisting meeting points. This is the reason why dichotomies such as global vs. local framings become unhelpful to examine what takes place in those sites. Similarly, contemporary intermediaries engage in many forms of mediation between different actors and for different reasons in international criminal justice. As in-between agents, it is not sufficient to conceive the role played by contemporary intermediaries without interrogating what gaps they bridge –or what in-betweens.

3. Acting as bridges between African communities and Europeans:

3.1 The Case of Interpreters

Interpretation is one of the key tasks that African colonial intermediaries did. I think of interpretation as a one of the mediation tools in-between space between different languages, cultures and ideas. It is a vibrant site where decisions about collaboration or contestation are formed but also a site where intermediaries are very powerful. From the early phase of colonial rule through the first generation of occupation interpreters exercised enormous power. Up until today, interpretation is a site of great power for intermediaries. In the late nineteenth century the power of African intermediaries often rested on their ability to cultivate or exploit a particular relationship with a European. In the flux of conquest and its aftermath, African intermediaries working closely with Europeans (or appearing to) could develop or shape positions of considerable authority. Generally, the initial decision to rely on intermediaries seems to have been driven by circumstances rather than the desire to build partnerships with local agents.[15] In other words it seems that relying on

[15] This is also visible in Lavigne's testimony see chapter 4. Lavigne is a French Magistrate who was a lead prosecution investigator in the case against Lubanga. His testimony explains how and why his team relied on

intermediaries is the result of calculated objectives. In this instance Europeans met language and cultural barriers which they could not overcome without intermediaries. In other cases relying on intermediaries was politically or financially motivated. All this to say that the relationship between Europeans and intermediaries was not necessarily motivated by a desire to build partnerships. For colonial administrators, relying on intermediaries was the best solution to develop and implement colonial policies and procedures on the ground.[16] As a result a trusted African intermediary could rise to positions of considerable authority whether or not these positions carried with them official titles.

Conversely, as the bureaucracy of the colonial state solidified, the possibilities for Africans to rise to positions of authority declined. The positions held by Africans became more strictly codified: their duties, ranks, and salaries were regulated by the state. In this context intermediaries came to rely on their understanding and manipulation of the bureaucracy, rather than on their relationship to a particular European patron.[17] African men who were literate in the language of the colonizer could use their skills to make a case or further a cause within the colonial hierarchy. When the colonial state drafted its laws and policies, African intermediaries adjusted their roles and cultural strategies.[18] Intermediaries' roles and functions further changed because of increased primary schooling in European languages.[19] More Africans started to learn the languages of the colonial rulers and in some colonies

intermediaries. *Prosecution v. Thomas Lubanga Dyilo,* Judgment pursuant to Article 74 of the Statute, TC I (ICC-01/04-01/06-2842), 14 March 2012, [125] and [130].

[16] Osborn Emily's discussion of the literature surrounding "middle figures" in Osborn E. L., ''Circle of Iron': African Colonial Employees and the Interpretation of Colonial Rule in French West Africa' (2003), Vol. 44:1, *The Journal of African History,* at 29-50.

[17] Jones G. I., 'The Warrant Chiefs: Indirect Rule in South eastern Nigeria, 1891-1929 by A. E. Afigbo', (1973) Vol. 6: 4, *The International Journal of African Historical Studies,* at 716-718.

[18] Osborn E. L., 'Interpreting Colonial Power in French Guinea: The Boubou Penda-Ernest Noirot Affair of 1905', in Lawrence B. Lawrance B. N., Osborn E. L. and Roberts R., *Intermediaries, Interpreters, and Clerks: African Employees in the Making of Colonial Africa,* (University of Wisconsin Press: 2006), p 37-56.

[19] Ibid.

European officials learned a local lingua franca (especially Hausa, Swahili, and Lingala).

The emergence of more widely spoken administrative languages changed but did not eliminate the influence of interpreters.[20] Intermediaries acting as interpreters could still exercise considerable influence over who could access the colonial apparatus and interpret its rules and policies. Differences of class, religion, status, and background also continued to play an important part in determining who gained entry to and could negotiate in colonial corridors of power. Through the performance of their different tasks, intermediaries had an impact on proceedings and their outcome. Richard Roberts and Kristin Mann examined the colonial court system as an important area where power, dominance, and hegemony played out and interacted with other sectors, observing that "because of its centrality to colonialism, law provides an excellent window through which to view the colonial period".[21] Law not only affected nor was it only affected by engagements between Africans and Europeans. Rather, struggles between Africans were central as well.

This is illustrated in Nyamanga Amutabi's work which historicizes the power and influence of African court officials in colonial Kenya. He comes to the conclusion that, "courts were susceptible to manipulation by African elites".[22] In this work, Nyamanga Amutabi challenges the narrative which often portrays Africans as victims of European dominance and the ways in which these narratives mask the violence of African perpetrators. He shows how sites of privilege and domination among and between Africans in Court were overlooked by officials. [23] Through a case study of

[20] Mcclendon T., 'Interpretation and Interpolation: Shepstone as Native Interpreter', in Lawrance B. N., Osborn E. L. and Roberts R., *Intermediaries, Interpreters, and Clerks: African Employees in the Making of Colonial Africa,* (University of Wisconsin Press: 2006), pp 77-93.

[21] Roberts R. and Mann K, *Law in Colonial Africa, (*supra n. 8), p 4.

[22] Amutabi M. N., 'Power and Influence of African Court Clerks and Translators in Colonial Kenya' The case of Khwisero Native (African Court) 1946-1956, in Lawrance B. N., Osborn E. L. and Roberts R., *Intermediaries, Interpreters, and Clerks: African Employees in the Making of Colonial Africa,* (University of Wisconsin Press: 2006), p 202.

[23] Ibid.

Khwisero native court, he demonstrates ways in which African intermediaries use their education to influence the outcome of cases. According to him hierarchies and layers of difference among Africans remained intact.[24]

In his study Amutabi shows how records of transcripts at the Khwisero (later African) court in late 1940s are not really useful to understand the nature and events surrounding the cases they covered. They are at times confusing, a result not of legal jargon but of the inadequate translation and the ways in which situations were portrayed. One example of this is an account of rape which was recorded as "loving by force" or "sharing blankets by force".[25] These Intermediaries could put forward the versions that suited their courses and served their interests. Amutabi strongly argued that an examination of the operations and functions of African court officials reveals issues of class differences, the role of education, social network, cultural identity, cultural differences, and cultural community in colonial Kenya.[26] Another important element to note about language is that although the colonial courts may have used local languages, the court recorders usually recorded in a European language. This means that testimonies were for the benefit of the plaintiffs, respondents, and native judges but the texts were produced for the benefit of Europeans.[27]

[24] Ibid.

[25] See Resident magistrates Court, Kakamega. KNA, NNM/104/146/1948, Case no. 104. Shivachi v. Ambudo, August 5, 1948;
on the charge of assault and causing actual bodily harm see Resident Magistrates Court, Kakamega, KNA, NNM/KSO/75/1949, Case no. 75. In the Native Tribunal Khwisero, July 12, 1949, Crown (CrC) v. Amuhinda Amukhobo; KNA, ADM 71/5/1, Kakamega District Record Books. Silas Amuka v. Ngamia Omusula, March 27, 1950. 172.12/1796.

[26] See Amutabi M. N., 'Power and Influence of African Court Clerks and Translators in Colonial Kenya' The case of Khwisero Native (African Court) 1946-1956, Lawrance B. N., Osborn E. L. and Roberts R., *Intermediaries, Interpreters, and Clerks: African Employees in the Making of Colonial Africa,* (University of Wisconsin Press: 2006)., p 202-19.

[27] Ibid.

3.2 Turning to intermediaries for justice: The Case of Letter Writers

Letter writers were a type of African colonial intermediaries. They acted between litigating parties; their task was to convey legal matters to colonial authorities. A letter writer operated in a more or less legal space and his tasks were very much linked to legal processes.[28] Other tasks performed by letter writers include the writing of complaints, defence statements, petitions, affidavit, summons, and statutory declarations, all with legal standing and on behalf of those who could not write or understand official languages. Yet the status of letter writers was more informal than that of interpreters and clerks in courtrooms. As writers they represented different constituencies at different times and it was difficult to monitor them. Letter writers are characterised as partisan individuals, who charge a fee for services, and whose legal authority as a middle figure rests completely in the hands of the colonial state. The state could revoke their profession and render inadmissible any letter or petition from them.[29] However, there were instances where some of the more sophisticated letter writers managed to challenge judgments on procedural grounds and cite numerous common law precedents.[30]

Thinking about how letter writers assisted parties in legal proceedings shows how much they were involved in the formulation of complaints and defences. The practice of writing on behalf of others for legal purposes is also found in contemporary international criminal procedure where intermediaries fill out forms on behalf of victims. The practice of writing on behalf of others gives an opportunity to those who would otherwise not access the ICC justice system to express themselves. However, it is also a site for intermediaries to filter what is relevant to be written and what is not.

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[28] Petitioners, 'Bush Lawyers," and Letter Writers Court Access in British-Occupied Lomé, 1914-1920', in Lawrance B. N., Osborn E. L. and Roberts R., *Intermediaries, Interpreters, and Clerks: African Employees in the Making of Colonial Africa,* (University of Wisconsin Press: 2006), p94-114.

[29] For *la loi bureaucratique* see Roberts R., 'Case against Faama Mademba Sy and the Ambiguities of Legal Jurisdiction in Early Colonial French Soudan', in *Law in Colonial Africa,* (supra n. 8), p 185-204.

[30] Ibid.

These concerns are documented in relation to African colonial intermediaries as well as contemporary intermediaries. In both cases, Intermediaries are active participants in the production of knowledge. Contemporary intermediaries played a greater role than simply supporting investigative teams in the cases against Lubanga, Katanga and Ngudjolo. According to Buisman, intermediaries may not have taken part in official decision-making processes however they "made all of the relevant decisions on the ground. It was the intermediaries who travelled to locations, collected information, identified witnesses and established what they had to say".[31] Similarly, Ullrich argued that intermediaries shape victims engagement with the ICC.[32] In terms of mediating interactions between victims and the ICC, intermediaries decide who gets to be a victim before the ICC based and which stories to tell. As the primary mediators, it is clear that their intermediary position gives them tremendous power in the production of knowledge.

Yet despite these concerns, to come back to African colonial intermediaries, they facilitated access to the contents of claims, complaints or defences for outsiders while at the same time creating opportunities for those who could not access the justice system. As a result, another layer of power and control between communities and colonial administrators was created. The position of letter writing meant that every complaint or defence had to go through the hands of a letter writer before it could reach the authorities. Did letter writers abuse their power? The answer is yes and the evidence of abuse can be deduced from the measures that authorities put in place for monitoring them.

[31] Buisman C., 'Delegating Investigations: Lessons to be Learned from the Lubanga Judgment', (supra n. 11), at 57.

[32] Ullrich L., 'Local Intermediaries, Victims and the Justice Contestations of the International Criminal Court', (2016), Vol. 14: 3, *Journal of International Criminal Justice*, at 552.

It came to a point where the authorities found it necessary to monitor intermediaries through licensing. Monitoring intermediaries in this way raises a number of questions: Who did the licensing, how did it work and who did licensing benefit or disadvantage? In West Africa for example, the British began to regulate letter writing through the Illiterates Protection Ordinance.[33] Ordinance 166 of July 1st, 1912, provided for annual licences at a certain fee and simultaneously banned a) letter writing for profit or; b) the representation of illiterates unless the writer or representative was licensed.[34] Other clauses specified the responsibilities of the writer, including that he must clearly read over and explain what he had written, ask the illiterate person/individual to write his signature or mark, to write his own full name and address; and to state the amount charged for the service.[35] Similarly, contemporary policy makers are making efforts to regulate intermediaries and the first manifestation of this move can be seen in the guidelines on intermediaries and the model contract for intermediaries.[36]

The history of letter writers and the regulation of the profession provide vital insight into the lives of colonial intermediaries and the Africans who turned to them for assistance. Although not employed by the state, letter writers operated in a complex legal environment as they navigated different customs and a complex colonial justice system. Because letter writers functioned as intermediaries and worked with less powerful constituencies, they documented a lot of what was happening in the 'social

[33] See Kingdon D. 'The Laws of the Gold Coast Colony: Containing the Ordinances of the Gold Coast Colony and the orders, proclamations, rules, regulations and bye-laws made thereunder in force on the 31st day of December, 1919, and the principal imperial statutes, orders in Council, letters patent and royal instructions relating to the Gold Coast colony prepared under the authority of the Revised edition of the laws ordinance, 1920, (Stevens & sons, ltd: 1920) Vol 2, 1408-10.

[34] Ibid.

[35] Ibid.

[36] See International Criminal Court, 'Guidelines Governing the Relations between the Court and Intermediaries' for the Organs and Units of the Court and Counsel working with intermediaries (2014); ICC Model Contract for Intermediaries, (2014), available at < https://www.icc-cpi.int/iccdocs/lt/MCI-Eng.pdf>.

history of access to colonial court systems'.[37] However, these narratives of letter writing provide little insight into what were the concerns of letter writers themselves or how they were selected. They negotiated access to the judicial tribunal; they framed and reframed the language of the plaintiff's case; they conveyed information between the chief, colonial officers, and a rural community; and they collected a fee for their services. What emerges from these accounts is that letter writers were sought by members of their communities for help and that colonial authorities had the power to revoke their position. Were letter writers accountable to the people who sought their services and paid them? Or were they accountable to the state? These questions are yet to be addressed in literature on contemporary intermediaries and although I do not answer them here, they inspired the questions I raise about accountability in relation to contemporary intermediaries in chapter 6.

4. Partnerships with intermediaries were characterised by opportunities and challenges

This section will address some of the opportunities and challenges found in having intermediaries or middleman. Differences between types of intermediaries serve as a starting point to think about some aspects of intermediaries' mediations and negotiations practices. What emerges from the material discussed in the following sections is that working with intermediaries created opportunities and challenges for colonists, intermediaries themselves and their people. I focus on two examples: the case of African assessors in British colonies and the case of African Magistrates in French colonies. These examples show the complex legal environment in which intermediaries operated. This can serve as a starting point to raise questions about how contemporary intermediaries also mediate the court's work on the ground and hopefully also show that intermediaries have the potential to enrich justice debates.

[37] Lawrance N.B., 'Petitioners, "Bush Lawyers", and Letter Writers –Court Access in British-Occupied Lomé, 1914-1920, in Lawrance B. N., Osborn E. L. and Roberts R., *Intermediaries, Interpreters, and Clerks: African Employees in the Making of Colonial Africa,* (University of Wisconsin Press: 2006), p 105.

4.1 The Example of African Assessors in British Colonies

African colonial intermediaries in former British colonies acted as bridges between their people and colonial legal authorities in many different ways. In this section, I will give a brief summary of how they operate and, particularly, how they acted as mediators in what seems like a chaotic legal environment. However those kinds of environments where different legal justice systems or justice ideologies meet are necessary for the development of law in general. The role played by intermediaries in these pivotal moments adds and enriches justice debates.

The common law tradition provided a venue for citizens, the Supreme Court, which was also available to African subjects who lived in West African and South African crown colonies. The Supreme Court served as the highest appeals court in the colony and heard appeals from native courts, but the boundaries between metropolitan law and African customs were not straightforward.[38] British colonies created some version of native courts, designed for Africans living within defined tribal units common to British colonial practice.[39] The jurisdictions of the native courts and the powers reserved for African judges were usually defined by 'warrants'.[40] Native courts would be hierarchically organised with jurisdiction over simple family law disputes at the lowest level leading towards higher ranked courts with greater jurisdiction over crimes and appeals from lower courts.[41] Where native authority was well-established, as in Northern Nigeria and Zanzibar, the British recognized the courts of chiefs, emirs, and qadis. Over time, British governors modified the native courts through the establishment of divisional and district courts.[42]

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[38] See Mann K., *Slavery and the Birth of an African City: Lagos, 1760–1900* (Bloomington, Ind.: Indiana University Press, 2007), chapters 7 and 8.

[39] Roberts S., 'Tswana Government and Law in the Time of Seepapitso, 1910-1916', Roberts R. and Mann K., *Law in Colonial Africa,* (supra n. 8), p 167-184.

[40] Ibid.

[41] For the operation of these lower level courts in Nigeria, see Bohannan P., *Justice and Judgment among the Tiv,* (Oxford University Press: 1957).

[42] See for example Christelow A., *Thus Ruled Emir Abbas: Selected Cases from the Records of the Emir of Kano's Judicial Council* (East Lansing, Mich.: Michigan State University Press, 1994); Stockreiter E., 'Child Marriage and Domestic Violence: Islamic and Colonial Discourses on Gender and the Female Status in Zanzibar', in Burrill

Technically, native courts had jurisdiction over both the territory defined by the district and all natives 'belonging' to that district regardless of their location, unless they permanently resided in another district.[43] However, in doing so the British assumed that organising territory would match customs. They overlooked the reality of African social and geographical mobility before their arrival and during the colonial period. This meant that African colonial intermediaries were not only essential in assisting their people access justice through interpretation and letter writing but they also had the potential to participate in policy making. Intermediaries understood their customs and traditions, they also understood agreements between different ethnic groups and what enabled their cohabitation. To simply impose or implement British law on these territories was likely going to fail and where they tried, these efforts failed. African colonial Intermediaries' knowledge of the many justice systems on the ground earned them the opportunity to partner with colonial authorities and negotiate a legal system that would meet the reality on the ground. However, despite these efforts reconciling different views of justice in real life is more challenging than well-established theoretical strategies.

How African colonial intermediaries participated in the construction a working legal system, despite its flaws, is what I want to emphasise here. According to the draft guidelines on intermediaries, the project of regulating intermediaries' relationship with the Court arose from 'a realization of the existence of a vacuum and the lack of a framework to govern the Court's relationship with intermediaries.'[44] Even though this initiative emerged from the Court, some NGOs were invited to provide comments and some of their remarks have been taken on board in the final adopted

S.E., Roberts R.L. and Thornberry E., '*Domestic Violence and the Law in Colonial and Postcolonial Africa,* (Ohio University Press: 2010).

[43] Roberts S., 'Tswana Government and Law in the Time of Seepapitso, 1910-1916', (supra n. 8), p 167-184.

[44] International Criminal Court, 'Draft Guidelines Governing the Relations between the Court and Intermediaries' for the Organs and Units of the Court and Counsel working with intermediaries', (2012) International Criminal Court, accessed on file, p 3.

guidelines on intermediaries.[45] In a way, it can be said that contemporary intermediaries also played a similar role in the processes that led to the adoption of the guidelines on intermediaries. However, the role played by African colonial intermediaries in policy making is different from what we see with respect to contemporary intermediaries. Contemporary intermediaries are different in that they are not just individuals who are located in the communities they serve. Contemporary intermediaries vary from such individuals to grassroots associations, country level NGOs or international NGOs. Consequently, they are involved in different law making processes depending on their level of operation. At times intermediaries are negotiating with the ICC, other times with donors and other times with other intermediaries. For example, some intermediaries participated in processes that led to the adoption of the guidelines on intermediaries and used that opportunity to represent other, perhaps less powerful, intermediaries.

African colonial intermediaries operated in a fragmented and complex legal environment. Where it was possible to set up a native court, it (the native court) would have jurisdiction over ordinary crimes or other offences committed by natives. However, native courts did not have jurisdiction over all offenses. Offenses against specific laws of the Protectorate including for example crimes of slavery, liquor, firearms, and personation proclamations fell under the jurisdiction of provisional courts because these crimes were foreign to native law and custom.[46] For instance, Muslim courts fell under the umbrella of native courts and their jurisdiction was

[45] For example, Redress recommended the Court should recognise intermediaries' role in relation to victims' rights. REDRESS, 'The Practice of Victims in International Criminal Court Proceedings –A Review of the Practice and Consideration of the Options for the Future', (2012), p61., Also see earlier comment on draft guidelines REDRESS, 'Comments on the Draft Guidelines Governing Relations between the Court and Intermediaries', (15 October 2010), available at < http://www.redress.org/downloads/publications/Comment_on_draft_guidelines_on_intermediaries_15_Oct_2010.pdf>.
For the adopted guidelines see International Criminal Court, 'Guidelines Governing the Relations between the Court and Intermediaries' for the Organs and Units of the Court and Counsel working with intermediaries, (2014) International Criminal Court.

[46] Quoted in Margery Perham, *Native Administration in Nigeria,* (Oxford University Press: 1937), p55.

limited to Muslims.[47] Native courts, provincial courts and the Supreme Court had jurisdiction over different types of offenses and because of this it was difficult to monitor what was really happening in native courts.[48]

Intermediaries such as elders, clerks, and local officials who served as assessors were often tempted by bribes, especially where customs or traditions were not clear or fixed.[49] Their power was also strengthened by the fact that they combined their activities as assessors with additional legislative work. For example, assessors played a crucial role in processes of customs codification. It is not clear how and whether assessors were accountable to their people and colonial administrators. However, at the same time, they assisted the Supreme Court which also heard appeals from native courts. In doing so, assessors were essential to the functioning of the entire system as they contributed to Supreme Court judgments with great knowledge about their (African assessors) customs and traditions. It was in this sense that selected Africans (men) were sent to England for legal training from the 1880s.[50] These African lawyers played crucial roles in transforming grievances into complaints that could be heard by British judges serving on the colonial high courts; many also played key roles in the development of early 'constitutionalism'.[51]

Coming back to international criminal justice, African assessors help bring to light the opportunities and challenges that those who navigate in-between spaces faces. African colonial intermediaries and contemporary intermediaries both have a certain

[47] Mann K., 'The Rise of Taiwo Olowo: Law, Accumulation and Mobility in Early Colonial Lagos' in Roberts S., 'Tswana Government and Law in the Time of Seepapitso, 1910-1916', (supra n. 6) p 167-184.

[48] Kirk-Greene A., 'The Thin White Line: The Size of the British Colonial Service in Africa', (1980) Vol 79: 314, *African Affairs*, 25-44.

[49] Omoniyi A., *The Judicial System in Southern Nigeria, 1854–1954* (Atlantic Highlands, NJ: Humanities Press, 1977), p77; see also Maurice Nyamanga Amutabi, 'Power and Influence of African Court Clerks and Translators in Colonial Kenya: The Case of Khwisero Native (African) Court, 1946–1956', in Lawrance et al., *Intermediaries*.

[50] The legal training received by those selected to study abroad is also linked to political activism that followed this period. For an example of this see Kenneth S. Broun, *Black Lawyers, White Courts: The Soul of South African Law* (Ohio University Press, 2000).

[51] See Elias T.O., *Groundwork of Nigerian Law* (Routledge & Kegan: 1954), pp 351–9; Edsman B. M., *Lawyers in Gold Coast Politics, c.1900–1945: From Mensah Sarbah to J. B. Danquah* (Almqvist & Wiksell: 1979).

knowledge of their communities, culture, language, customs and traditions. That kind of knowledge combined with their ability to mediate between different actors is valuable for the proper conduct of legal proceedings at the ICC and also for the development of justice systems. Without them, it would be difficult to penetrate the histories of relevant communities and to understand what their needs are. Different communities experience mass violence differently and they also have different mechanisms for dealing with the consequences afterwards. Of course working with intermediaries comes with challenges as well. There are questions about how much they really represent the interests of their people or whether they are accountable to their people, how best can intermediaries be monitored in order to avoid abuse of power? I do not attempt to find answers for all these questions but I think that current literature on contemporary intermediaries can benefit from the experiences of African colonial intermediaries.

4.2 The Example of Magistrates in French Colonies

French colonies were managed in a slightly different manner than British colonies. However, the role that African colonial intermediaries played in the territories managed by the French are similar. As I show in subsequent paragraphs, African colonial intermediaries mediated interactions between the French and their people similarly. For example, in all of their negotiations for power or knowledge they had great respect for culture, traditions or customs which really mirrored the values of their communities. In a sense, despite their flaws, African colonial intermediaries contributed to the preservation of their communities' visions of justice.

In 1903, the French imposed a three-tiered system of courts for African subjects: at the base was the village tribunal, led by the village chief (*le chef du village*) and the court was designed to emphasize reconciliation. The village chief had some powers of correction and could charge small fines. The second level was the provincial tribunal, led by a provincial chief and two other African magistrates who also heard

most of the family law disputes and ruled on criminal offenses.[52] The provincial tribunal had to be approved by district officers and during the time of his service was required to keep a written register of cases. There was also monitoring system in place as the provincial tribunal was periodically inspected by the attorney-general. One of the objectives of this organisation was to promote consistent punishments and judgments.

The third level was the district tribunal, presided over by the French district officer and two African assessors. This tribunal heard felony cases and the appeals of judgments from the provincial level. Appeals from the district tribunal and all prison terms exceeding five years (this rule changed periodically) were sent to the *cour d'homologation*, which was part of the colonial appeals court at the government-general, where the procedures were assessed and punishments certified. Lawyers were formally barred from the African courts, although they were permitted in the courts for citizens.[53] If not satisfied or if the cases involved misdemeanours, the case went to the tribunal of the first instance; felonies and appeals went to the tribunal of the second instance. All these tribunals were presided over by French magistrates or the district officer in cases where there was no formally trained magistrate.[54]

At first sight this structure seems clear but the reality on the ground was complex and some would say complicated. African intermediaries assisted French magistrates with the necessary knowledge in order to apply and enforce local customs. At the same time, African courts often turned into a battleground between colonial and African perceptions of the essence of the legal process. According to Ginio's work on the formative period of colonial rule, it appears that French laws (legal principles)

[52] Ginio R., 'Negotiating Legal Authority in French West Africa: The Colonial Administration and African Assessors', in Lawrance B. N., Osborn E. L. and Roberts R., *Intermediaries, Interpreters, and Clerks: African Employees in the Making of Colonial Africa,* (University of Wisconsin Press: 2006).

[53] Ibid.

[54] Ibid.

mostly prevailed over African customs and traditions. In these situations different types of intermediaries, whatever their functions, took an active role of rewriting and reinterpreting expectations on both sides. Such practices and opportunities are produced by in-between spaces. Encounters between individuals and ideas create new possibilities. As can be seen in Terretta's work, in the later stages of colonialism law became a tool to challenge imperial structures. She argues that 'alliances Africans formed with activist lawyers forged both the practice of claiming for themselves individual rights and the collective right of the imperially governed to determine their political future, and thereby the nature of their future citizenships'.[55] This was a result of encounters between African subjects and European lawyers who worked together to challenge power structures of their time.

Overall, it can be said that the level of power at which African colonial intermediaries operated influenced the kind of knowledge they produced and the purposes for which that knowledge was produced. Generally, intermediaries seem to have been in a position of control as they shaped information and intelligence but essentially they negotiated meeting grounds through their role as cross-cultural brokers. For example, the African colonial intermediaries who had access to training in foreign languages had to not only translate and codify laws, they also had to master European cultural and legal categories in order to translate African experiences into terms that made sense to Europeans and vice versa. African colonial intermediaries navigated different sites of mediation in such a way that they were able of living in social worlds that connected African and European universes. Of course, that ability was reserved to a limited number of people which contributed to the power that an intermediary could accumulate. Yet, African colonial intermediaries represented access to justice, opportunities and development.

[55] Terretta M., 'Anti-Colonial Lawyering, Postwar Human Rights, and Decolonization across Imperial Boundaries in Africa', (2017) 52:3 *Canadian Journal of History,* at 450.

5. The opportunities and challenges of mediating practices

In order to exercise control over native courts colonial authorities created a mechanism of higher courts led by European magistrates.[56] These processes enabled collaboration between local elders -who were thought to be custodians of their customs- and Europeans –who produced written documents on customary law.[57] Indigenous law became customary law through this process and these documents served as guides for colonial magistrates in adjudicating cases and appeals brought before them.[58] The production of customary law gave significant power to African colonial intermediaries who willingly or unwillingly reshaped gender relations and forms of authority.

While African colonial intermediaries used these opportunities to consolidate their power, it appears that colonial magistrates also shaped customary law according to their perceptions of African communities.[59] However, customs and traditions helped limit what intermediaries could negotiate, transform or amend. These limits derived from the communities themselves. African colonial intermediaries worked to meet the assumptions that colonial authorities made about their communities but they

[56] Starr J. and Collier J., *History and Power in the Study of Law: New Directions in Legal Anthropology* (Cornell University Press, 1989), p 8-9.

[57] Ranger T., 'The Invention of Tradition in Colonial Africa', in Eric Hobsbawm and Terence Ranger (eds), *The Invention of Tradition* (Cambridge University Press: 1983); see also Chanock M., Law, *Custom and Social Order: The Colonial Experience in Malawi and Zambia* (Cambridge University Press: 1985); Moore S. F. , 'Treating Law as Knowledge: Telling Colonial Officers What to Say to Africans about Running "Their Own" Native Courts', (1992) Vol. 26:1 *Law and Society Review*, 11-46.; Jean-Hervé Jézéquel, '"Collecting Customary Law": Educated Africans, Ethnographic Writings, and Colonial Justice in French West Africa', in Lawrance B. N., Osborn E. L. and Roberts R., *Intermediaries, Interpreters, and Clerks: African Employees in the Making of Colonial Africa,* (University of Wisconsin Press: 2006).

[58] For an example of this see Schapera I., *A Handbook of Tswana Law and Custom* (Oxford University Press: 1938).

[59] Roberts R., 'Law; Crime and Punishment in Colonial Africa', in *The Oxford Handbook of Modern African History,* Parker J. and Reid R. (eds) (Oxford University Press: 2013). According to Meredith Terretta, the plural systems of law meaning customary, colonial, international, public, and metropolitan were modified to fit the 'strictures of colonial administration'. Terretta M., 'Anti-Colonial Lawyering, Postwar Human Rights, and Decolonization across Imperial Boundaries in Africa', (supra n. 55) at 450.

also worked to preserve the values of their communities too. An example of this can be seen in Spear's work where he demonstrates how intermediaries were made accountable to their communities. There were community meetings held to debate important issues of the village.[60] During these meetings, the members of a given community and their elders would debate questions of traditions and customs brought for discussion. The outcome of these meetings, to come back to African colonial intermediaries, could to some extent limit what they and colonial officials could promote as custom. Despite these limits, however, the invention of tradition gave rise to what Sara Berry refers to as 'an era of intensified contestations over custom, power, and property' within colonial courts;[61] which in my view is crucial to the growth of law in general.

This background of setting limits to what an intermediary can do, how far they can go in negotiating meeting points or mediating between customs and new legal philosophies inspired the questions I raise in relation to contemporary intermediaries' accountability. Are they also limited? What are they capable of negotiating and what is off the table? In addition, we can see how encounters between different legal systems create new dynamics and how intermediaries are positioned as the primary mediators. Even though the hierarchy created by colonial masters placed British law or French law at the top, customs and traditions remained important to local communities and they preserved their values while at the same time allowing change to occur.

[60]Spear T., 'Neo-Traditionalism and Limits of Invention of Tradition in British Colonial Africa', Journal of African History, 44/1 (2003); also see Hamilton C., *Terrific Majesty: The Powers of Shaka Zulu and the Limits of Historical Invention* (Harvard University Press: 1998); also see Hamilton C., *Terrific Majesty: The Powers of Shaka Zulu and the Limits of Historical Invention* (Harvard University Press: 1998).

[61] Berry S., *No Condition is Permanent: The Social Dynamics of Agrarian Change in Sub-Saharan Africa* (University of Wisconsin Press: 1993), p 8.

6. Concluding remarks

Literature on intermediaries in contemporary international criminal justice has, up until now, traced the practice of relying on in-between agents as something that started with the ICC in the Lubanga case, back in 2004. While this is true for the ICC, this chapter has shown that African intermediaries have a long history of acting as bridges between their people and outsiders. It has shown that an examination of the relationship between Africa's colonial past has more to offer than simply challenging the ICC's perceived focus on Africa. This chapter recalled intermediaries' usefulness to British and French colonial governments by commenting on aspects of key intermediaries and how they assisted both Europeans and their people. Through tasks and/or services such as interpretation, letter writing, forms of legal representation and through political activism, African colonial intermediaries were active participants in the transformation of their societies. Their role was useful and essential, but also controversial and complex. In this chapter, it was made evident how complex the relationship between intermediaries and those who seek their services is; how local politics influenced who became an intermediary and lastly how the position of intermediary almost always came with opportunities and challenges.

The structures in which African colonial intermediaries operated assembled pre-colonial, colonial and European characters. In this contact zone, African intermediaries actively participated in negotiations of power, governance and in knowledge production. Encounters between Africans and Europeans opened up new sites in which justice and power contestations took place. In later stages of colonialism, these encounters gave birth to a particular practice whereby, according to Meredith Terretta, the alliance Africans formed with anti-colonialist lawyers was productive of a practice of claiming individual rights and the collective rights through law.[62] These encounters were also productive of a new economy. To their employers,

[62] Terretta M., 'Anti-Colonial Lawyering, Postwar Human Rights, and Decolonization across Imperial Boundaries in Africa', (supra n. 55).

African intermediaries represented a financial opportunity and an instrument for control (at least theoretically, the reality is more complex). However, these changes also affected intermediaries themselves in terms of their place in society and how they related to their communities. The climax of African intermediaries' power can be situated in early stages of colonialism. The reason for it is that intermediaries were most needed in communities that had weak political structures or where cultural and language limitations were greater. Partnerships with intermediaries introduced new power dynamics as colonists could not simply impose their rule on the communities, there had to be negotiations between the multiple views of justice and intermediaries were the primary mediators.

At different points throughout this chapter I discussed some of the similarities between African colonial intermediaries and contemporary intermediaries. First, there are similarities in terms of the nature of their position as in-between agents. The status of intermediaries in both cases is productive. It produces effects on intermediaries, those who rely on their services and on what is being mediated (for example power and knowledge). Secondly, encounters between individuals, ideas and institutions create sites of mediation in which both African and contemporary intermediaries act (similarly) as the primary mediators. For example, the practice of mediating financial and staff problems through intermediaries can be observed in relation to both African colonial intermediaries and contemporary intermediaries. Of course there are limits as to how far these comparisons can since contemporary intermediaries include individuals and entities that come with different financial, cultural and political capital. Still, the ICC can benefit from these past experiences to develop its 'on ground' strategies.

This chapter touched on relevant aspects of intermediaries' functions in former British and French colonies, in Africa. Although there is more to study on intermediaries generally, aspects of African colonial intermediaries covered in this

chapter contributed greatly to my conceptualisation of who intermediaries are and provided the basis for my thinking about intermediaries through in-between spaces. Depending on who they were and what place they had in pre-colonial Africa, intermediaries participated in a variety of tasks at different power levels; and for different political, economic and social reasons. Intermediaries, therefore, played a greater role than that of simply being data collectors. The socio-political space in which African colonial intermediaries operated was neither entirely African nor was it European (even where intermediaries were granted citizenship). This background shaped the story of complexity that is told in subsequent chapters.

Chapter 3: Rethinking Interactions between Actors of International Criminal Justice –New Sites of Inquiry

This chapter explains the lens through which I studied and conceptualised the relationship between intermediaries and the international criminal Court. The analytical frame that I adopted to analyse the issues described in the introduction of this thesis called In-between spaces – a term borrowed from Homi Bhabha's work on identity and culture. However, as this chapter will show in-between spaces in this thesis operate differently. It is an artificial concept that serves a specific analytical purpose, one that should not be interpreted as an actual space. I also use in-between spaces as a reality description. The two concepts inform each other and as such they cannot be easily separated from one another. The idea of using in-between spaces as a reality description was inspired by my reading of African colonial intermediaries as well as my observations of how contemporary intermediaries mediate and negotiate interactions between the ICC and the communities affected by its proceedings and interactions between different categories of intermediaries. The idea of using in-between spaces as an analytical frame, on the other hand, was inspired by in-between as a reality description and the lack of an appropriate analytical frame in existing literature.

Building on the discussion in chapter 2, African colonial intermediaries evolved to become in-between subjects. Their ability to navigate between their African worlds and European worlds put them in a powerful position but their new social status also came with a lot of challenges. What we learn from that background is that essentially, acting between one person and another, positions the intermediary in-between different people, institutions and ideas but, until now, the idea of 'in-between' has not been developed in existing literature on intermediaries. As seen in the previous chapter, African colonial intermediaries navigated different spaces at

different times and in different capacities. Tracing how they connected key elements of different (legal concepts for example) spaces inspired what follows in this chapter.

The idea of in-between spaces in this thesis operates as an abstract concept which operates as an analytical frame and as a site of mediation for intermediaries and those who rely on their services. The concept of in-between spaces helps us see and understand differently the ways in which important issues such as knowledge, security and accountability operate in international criminal justice. For clarity purposes, I use the term in-between analysis to signify in-between spaces as an analytical tool. However, there are limits to what can be achieved when using this device. In-between spaces (as sites of mediation) are multiple, not easily identifiable and sometimes they overlap. Consequently, it may seem as though it lacks analytical rigor. Yet, as is shown in this chapter and the following three chapters thinking through in-between spaces both as an analytical frame and empirically helps uncover new sites of opportunity and challenge for the practice of international criminal justice in in-between spaces.

Part of the aim of my research project is to answer the question of how we might best conceptualise the relationship between intermediaries and the ICC. In order to do that, it is first necessary to understand how I intend to conduct my analysis in the following substantive chapters. This is the first objective of this third chapter – to explain the lenses through which I theorise the place of intermediaries in international criminal justice. Secondly, this chapter contributes to literature on intermediaries with a unique and new analytical tool which might be used to analyse aspects of the relationship between intermediaries and the ICC. As is shown throughout this thesis, thinking through in-between analysis also leads to a very particular reading of the court's documents. As such, this chapter contributes to existing conversations about how relationships between international criminal institutions relate to the communities they claim to represent.

As a whole this chapter explains why I turned away from existing frameworks such as global/local or interactional justice, why and how I developed the concept of in-between spaces both as an analytical frame and a means to articulate intermediaries' reality; and also why this new frame is most suited to understand intermediaries' relationship with the Court. This chapter begins by exposing the limits of global/local analytical framing. I argue that despite the potential of global/local approach, thinking through this frame is unhelpful because some intermediaries operate in the global, others work in the local and others work in both categories. I also discuss the limits of interactional justice –to date this is the only framing proposed to examine intermediaries' relationship with the Court. I argue that interactional justice is also unhelpful to address the issues this thesis is concerned with such as interrogating the 'in-between'. In doing so, I will also discuss why new conversations are needed in international criminal law literature on intermediaries. Secondly, I seek to explain, in greater detail, how I conceptualise in-between spaces. Thirdly, I intend to provide the reader with a description of which in-between spaces I will examine in subsequent chapters, how they have been selected and why they merit attention. Finally, I will come back to the questions posed in this chapter and discuss the opportunities and limitations of using in-between spaces as an analytical framing.

1. The need for new conversations in international criminal law

New conversations about how the ICC interacts with its constituents are needed in international criminal law. In this section, I will briefly explain why existing conversations are unhelpful to examine the place of intermediaries in international criminal justice. To do so, I will give four main reasons, though there are probably more, behind the necessity of thinking differently about the ways in which the Court interacts with intermediaries and the communities affected by its proceedings. First,

literature on intermediaries has tended to focus on legalistic questions which fail to capture other aspects of the relationship between intermediaries and the ICC. Secondly, though global/local analytical framing has played its part, this analytical tool is limited and limiting to study intermediaries' interactions with the ICC. Thirdly, thinking through interactional justice is inadequate to address the issues this thesis is concerned with and fourthly literature fails to capture aspects of intermediaries' social-political realities.

First, early writings on intermediaries tended to focus on legalistic questions such as disclosure, witness tampering, outsourcing investigations or even broader questions such as the fairness of proceedings. But we also need conversations about power, the production of knowledge or accountability in relation to all categories of intermediaries. For example, Caroline Buisman's work focuses, almost exclusively, on the question of whether the prosecution's reliance on intermediaries for evidence gathering is a 'justified' or 'effective' process for conducting international criminal investigations.[1] Essentially, she argues that the ways in which the prosecution relies on intermediaries undermines the 'quality' of justice because intermediaries can potentially mislead investigators.[2] In other instances, it has been pointed out that intermediaries make mistakes while filling out forms on behalf of victims or influencing victims to fill out forms and other times they have been accused of pursuing victim participation for political reasons.[3] Despite these challenges, intermediaries' work with victims facilitates victim participation in ICC processes.[4]

[1] Buisman C., 'Delegating Investigations: Lessons to be Learned from the Lubanga Judgment', (2013) Vol 11:3/3, *Northwestern Journal of International Human Rights*, at 32.

[2] Ibid, at 31, 39.

[3] On intermediaries making errors also see *Prosecution v. Callixte Mbarushimana,* Decision on the applications for participation of victim applicants a/2176/11 and a/2195/11, PTC I (ICC-01/04-01/10-441), 23 September 2011; On intermediaries influencing victims see *Prosecution v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus,* Defence Application to restrain legal representatives for the victims a/1646/10 & a/1647/10 from acting in proceedings and for an order excluding the involvement of specified intermediaries, PTC I (ICC-02/05-03/09-113), 6 December 2010, [39-40].

[4] *Situation in the Democratic Republic of Congo,* Decision on the Applications for Participation Filed in Connection with the Investigation in the Democratic Republic of Congo by Applicants a/0189/06 to a/0198/06,

What is more, these conversations do little to theorise the place of intermediaries at the ICC. As I show in subsequent chapters, my conception of intermediaries and their role in international criminal justice is different. Thinking through in-between spaces has led me to see and understand that intermediaries bring more opportunities for the development of the Court's work on the ground despite the challenges that those who rely on their services face. For example, Buisman argues that when the prosecution outsources investigations to other actors such as intermediaries, the UN and NGOs it also 'transfers the responsibility to solve security issues to third parties'.[5] But as I will show in chapter 5, the prosecution does not have the means to solve all security problems for all intermediaries at all times. Even if it did, thinking through in-between analysis uncovers other sites in which intermediaries are put a risk and sometimes these sites are beyond the Court's reach. We must therefore have new conversations about these challenges, and more, and begin to conceptualise the place of intermediaries in international criminal justice differently.

Secondly, new conversations about what analytical tool is best suited to examine intermediaries' relationship with the Court and the communities affected by its proceedings are needed because global/local analyses are limited. But before I delve into why this popular analytical tool is unhelpful in this project, I must first acknowledge its contribution to literature and even to my personal thinking process. The dominant analytical framing in to examine relationships between international institutions and local populations has been done through global/local or top-down/bottom-up lenses. According to Mark Goodale, this trend started in the 90s as a 'way of conceptualizing processes that were first included in the category globalisation'.[6] Though these frameworks have played their part, they are limited

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a/0200/06 to a/0202/06, a/0204/06 to a/0208/06, a/0210/06 to a/0213/06, a/0215/06 to a/0218/06, a/0219/06, a/0223/06, a/0332/07, a/0334/07 to a/0337/07, a/0001/08, a/0030/08 and a/0031/08, PTC I (ICC-01/04-545), 4 November 2008, [25].

[5] Buisman C., 'Delegating Investigations: Lessons to be Learned from the Lubanga Judgment', (supra n. 1) at 70.

[6] Goodale M., 'Locating Rights, Envisioning Law between the Global and the Local', in Goodale M. and Merry S.E., *The Practice of Human Rights: Tracking Law between the Global and the Local*, (Cambridge University Press: 2007), p14.

and limiting essentially because interactions with intermediaries and their role in international criminal justice unfold in such a way that they cannot be easily fitted in one side or another.

Literature on the relationship between the global and the local is large. It is enriched by numerous and important debates about how the global and its antithesis the local relate. In particular, there is a growing concern about the ability of nation states to exercise authority over their territories and the ways in which they exercise that authority.[7] In broader international law, some authors have even suggested that we are now in a post-inter/national time in which we now have global governance that has own global law.[8] In international criminal law, thinking through global/local dichotomies is exacerbated by the fact post-war societies are characterized by an element of state failure which forms the basis on which international actors (including the UN, international courts and tribunals or NGOs) intervene in what was formally in the internal affairs realm.[9]

With this in mind, global/local framing becomes the most obvious or logical to turn to when thinking about relationships between the international criminal court and intermediaries. After all, intermediaries are commonly referred to as local or on ground contacts for the Court, suggesting that they operate in the local as opposed to its antithesis the global. Certainly, global/local analyses can be instrumental in exposing power imbalances in international criminal law. This is, for example, visible in Emily Haslam's work on civil society but she uses different terms. She observed that discourses in international criminal law favour civil society as subject to the

[7] Eslava L., *Local Space, Global Life: The Everyday Operation of International Law and Development,* (Cambridge University Press: 2015), p 8.

[8] Koskenniemi M. and Leino P., 'Fragmentation of International law? Postmodern Anxieties', (2002) 15 (3) *Leiden Journal of International Law,* 553; Koskenniemi, 'The Politics of International Law –20 Years Later', (2009) 20(1) *European Journal of International Law,* at 7.

[9] On the challenges of nation-state see Eslava L., *Local Space, Global Life: The Everyday Operation of International Law and Development,* (Cambridge University Press: 2015), p 8-10.

detriment of civil society as object and by extension to justice. Her argument is built on the assumption that civil society as subject encompasses (global) actors such as expert international NGOs 'who choose to take part in international criminal law' whereas civil society as object encompasses (local) actors such as those communities at which 'international criminal law is directed and on whose behalf it is purportedly exercised.'[10] Some have even gone as far as to qualify the ICC as a global public good suggesting that all states, population groups and communities share a common goal which is the fight against impunity.[11] However, we must also be cautious not to favour (in terms of concern and analysis) one side from the other. Our challenge is to articulate how influences go both ways (global and local) and also in in-between spaces.

Coming back to intermediaries, the global/local framing as an analytical tool can only take us up to a certain extent. As seen in chapter one, intermediaries are extremely diverse. They cannot easily be fitted with the local or the global. Some intermediaries such as international NGOs operate in the global[12] while others such as individual intermediaries operate in the local. In addition, intermediaries move from one category to another or operate in both at the same time. Also, assuming that there are only two levels is likely to obscure other spaces in which intermediaries operate. We must also have conversations about how different types of intermediaries navigate spaces that are not captured in the global/local dichotomies. Consequently, thinking through global/local dichotomies is likely to be unhelpful or at best limit us to debating how these two levels relate. Overall, it can be said that a global/ local

[10] Haslam E., 'Subjects and Objects: International Criminal Law and the Institutionalization of Civil Society', (2011) Vol. 5:2 *International Journal of Transitional Justice,* at 223

[11] Galand S. A., 'A global public goods perspective on the legitimacy of the international criminal court', (2017) 41 *Loyola of Los Angeles International and Comparative Law Review*, at 162-3.

[12] It has been argued, for example, that some international NGOs already enjoy international legal personality, Maragia B., 'Almost there; Another Way of Conceptualizing and Explaining NGOs' Quest for Legitimacy in Global Politics', (2002) 2(3) *Non-State Actors and International Law,* 301-332.

conceptualisation of the relationship between intermediaries and the ICC is simply unsuitable.

Thirdly, interactional justice was recently introduced as a tool that can help us overcome the limits of global/local dichotomies but this framing is also has limitations to address the issues this thesis is concerned with. Interactional justice is a theory developed by Leila Ullrich in her study of the ways in which intermediaries interact with victims in international criminal law. Essentially, she argues that what constitutes the global or the local are not clear. Through examples of differences between rural areas and cities such as Gulu or Lira in Uganda, she observes that the local and also the global are not easily identifiable.[13] Therefore, she argues, thinking through global/local framings is unhelpful. Instead, she proposes an alternative framework called 'interactional justice' which is based on the premise that the meaning of justice at the ICC is in flux and so the Court's bureaucrats, lawyers and intermediaries are all at the centre of the justice analysis.[14] For her 'an interactional justice approach helps to challenge the premise that justice ideas and practices at the Court are uniform and neatly correspond to a 'global' or 'Western notion of justice.'[15] However, it is difficult to conceive of any space, whether global or local, as uniform or neat. In short, her work shows that the day to day interactions between intermediaries, victims and the court do not correspond to the dominant liberal western notions of justice. This is slightly different from what I intend to do in this project. I focus on a practice (or justice interactions) of international criminal justice that takes place in in-between spaces, that is not captured by literature on intermediaries and law. I argue that unless the Court engages better and differently with intermediaries, it will become an obstacle to the participation of the communities it claims to represent and consequently to the development of

[13] Ullrich L., 'Local Intermediaries, Victims and the Justice Contestations of the International Criminal Court', (2016), Vol. 14: 3, *Journal of International Criminal Justice*, at 550.
[14] Ibid, at 556.
[15] Ibid.

international criminal law. In other words, since contemporary international criminal law is rooted in liberal legal history and in western values and ideals we need new conversations about how other visions of justice might also find their place in this system. One way of achieving this, and as I show throughout this thesis, is by interrogating in-between spaces.

Fourthly, we need conversations that take into account practices of international criminal justice that are not performed by institutions such as states or international criminal courts and tribunals. In-between spaces are productive of a particular practice of international criminal justice and this takes place in many different ways. Sometimes intermediaries participate through their work with victims, and through consultation or collaboration with policy makers. This is a change from traditional conceptions of international criminal law which are based on the premise that states and international institutions negotiate, through treaties, the operating parameters that will allow all parties involved to achieve any given common goal. In these processes, it is common practice that states will surrender some of their power to the international institution so as to allow it to function.[16] However, such conferences are not the only sites where power and justice are negotiated or contested. Negotiations take place continuously at the ICC as well as in situation countries. As my discussion in the following chapters will show, some of these negotiations and contestations are made possible by and through intermediaries. Sadly, the Court continues to behave as though intermediaries are simply data collectors who sometimes assist its work on the ground. Yet intermediaries mediate the Court's day to day operation of international criminal justice in ways that are different (but necessary) compared to how institutions respond to community needs.

[16] See for example processes leading to and Rome Treaty negotiations in Cryer R, Frieman H., Robinson D., Wilmshurst E., *An Introduction to international criminal law and procedure,* (Cambridge University Press: 2010), pp 144-9.

Given the complexity of the task before me, I could only address a limited number of in-between spaces in this thesis. However, I hope to open a new conversation which in turn may help to open new theoretical and political spaces in international criminal law.

2. Conceptualising in-between spaces

Turning now to my conceptualisation of in-between spaces, it was inspired by my reading of African colonial intermediaries, Bhabha's work on hybridity, my observations of contemporary intermediaries and the lack of an adequate analytical frame in literature on intermediaries. Together, these sources of inspiration have shaped how I conceptualise in-between spaces and how I use the concept of in-between space both analytically and as a description of reality.

African colonial intermediaries had to have a certain understanding of their own communities as well as an understanding of their colonists' world in order to mediate between the two. Essentially, this is what gave African colonial intermediaries the ability to make their world and European worlds meet. African colonial intermediaries were not only able to facilitate the communication of knowledge and power between colonists and their people, they also became active participants in the production of knowledge, the administration of justice, as negotiators of power among other things. Because of the centrality of their role to the colonial administration and judicial systems, literature on African colonial intermediaries serves as an inspiration to ask a different set of questions about the practice of international criminal justice to the ones normally asked in literature on intermediaries.

Homi Bhabha's work on identity and culture shaped my understanding of processes through which African colonial intermediaries helped bridge the gap between colonists and their people. In fact, I borrow the term in-between space from his work

but I use it differently. In his interrogation of culture and identity, Homi Bhabha finds that hybridity is enabled by conditions of inequality through impositions of culturally hegemonic practices.[17] For Homi Bhabha, 'if the effect of colonial power is seen to be the production of hybridization rather than the noisy command of colonialist authority or the silent repression of native traditions, then an important change of perspective occurs'.[18] In other words, hybridity is an unstable space where subtle domination and ideological imposition take place while at the same time opening up a new space for collaboration and resistance which ultimately redefines the idea of society itself. Bhabha's concept of hybridity rests on the mixing or interweaving of two elements: the colonizer and the colonised. As a result, this encounter produces something new and fundamentally different from the previous two elements.[19] Even though he is concerned with questions of identity and culture, his work inspired the ways in which I interrogate relationships between different actors in international criminal law. More importantly, it provided me with a basis on which I built my own conceptualisation of 'in-between' and how we might track and trace hidden sites of power in international criminal justice.

Next, the Court's documents, NGO commentary and academic literature on intermediaries also shaped my conceptualisation of in-between spaces. Read together, these documents show that intermediaries do more than collect data or enable access to data for the units of the court. By interrogating these texts to understand how exactly intermediaries participate in ICC processes, it became evident that different types of intermediaries play different roles at different times. However, they [intermediaries] all have in common the ability to act as mediators between one person or entity and another, ideas and institutions.

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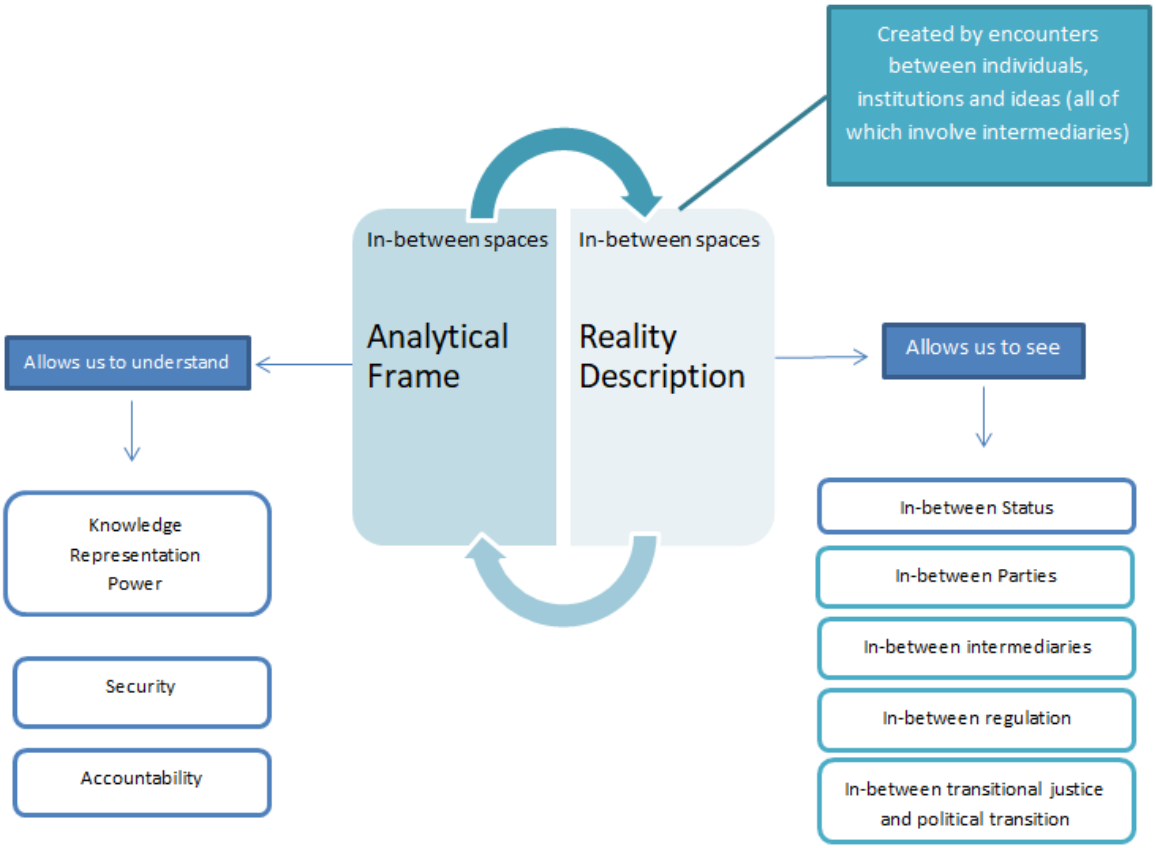
[17] Bhabha H., 'Culture's in between', in Bennet D. (ed.), '*Multicultural States: Rethinking Difference and Identity,* (Routledge:1998)

[18] Bhabha H.K., *the location of Culture,* (Routledge: 1994), p 112.

[19] Papastergiadis N., *Tracing Hybridity in Theory: Debating Cultural Hybridity; Multi-Cultural Identities and the Politics of Anti-Racism,* (Zed Books: 1997), p 258.

As regards the nature of in-between spaces, it is one concept with two interconnected but distinct meanings. 'In-between spaces' as an analytical frame serves a specific analytical purpose which is to examine the effects of in-between spaces on intermediaries and those who rely on their services. In the context of this thesis, in-between analysis allows us to interrogate and examine the practice of international criminal justice that takes place in in-between spaces. Specifically, I use it to examine the way in which knowledge is produced, subjects are represented and how power is exerted. Furthermore, I use in-between analysis to examine security and accountability issues in relation to intermediaries. 'In-between spaces' as a reality description is conceived as a dynamic site of mediation created by encounters between individuals, institutions and ideas, all of which involve intermediaries. Some of the effects of the fact that international criminal law takes place in in-between spaces (as sites of mediation) is that specific forms of knowledge, representation, power, security and accountability are produced. In order to better understand the relationship between in-between spaces (or in-between analysis) and in-between spaces (or sites of mediation) see the diagram below.



In-between spaces are complex sites of mediation which are characterised by opportunities and challenges for intermediaries and those who rely on their services. For example, while in-between spaces in general allow us to see the ways in which intermediaries participate in the day to day operation of the Court on the ground, they also allow us to see the limits of the Court in these sites of mediation. That is, whenever the Court relied on intermediaries, it relinquishes some of its control over justice processes into their hands. As result, intermediaries are put in a position of power which they can use to support, resist or even sabotage the Court's engagement with communities affected by its proceedings. Such practices of international criminal justice are not represented in dominant international criminal law literature and they are not always capable of regulation. I view these contradictions as vibrant, rich dynamic and necessary for the development of the Court's work on the ground. In-between spaces as sites of mediation provide, therefore, opportunities and challenges.

If we now turn to the usefulness of In-between analysis it allows us to think about well-known issues in international criminal law such as representation or security differently and new issues such as accountability. For instance, the spatial relationship between The Hague-based Court and communities affected by its proceedings has, as pointed out in the previous section, been extensively studied through global to local framings. However, these frames hide some of the other sites in which international criminal law takes place. By way of illustration, the following paragraph will focus on one of the sites of mediation that traditional approaches overlook and how specific forms of representation operate in it.

Throughout this thesis I refer to multiple in-between spaces which are relevant to the operation of international criminal justice. Take for instance the in-between space between parties at the ICC; it is not to be interpreted as an actual physical space. From a global/local perspective, it could be said that this site is located in the

global. Even in terms of language, French and English are the official languages in which those who navigate this space communicate. The particularity of this site of mediation is that relationships between actors (judges, lawyers, administrators) are regulated by specific rules and regulations. Exchanges between actors in this site are formal and are mostly in line with French and British legal traditions. However, thinking through in-between analysis allows us to see that lawyers do more than prosecute or defend their clients. In-between spaces are productive of a particular way of doing international criminal justice and one of the consequences of these in-between spaces is that lawyers at the ICC also indirectly represent intermediaries. In-between parties is, therefore, a site in which different types of intermediaries rely on representation for their views and concerns to be heard. For example, individual intermediaries such as P-316 and UN agencies relied on the OTP to represent their concerns about confidentiality in the Lubanga case.[20] This is the site in which intermediaries are mediated by those who rely on their services and where important decisions are made about them.

As a new analytical device, any number of issues could be discussed to test it. In this thesis, I will focus on power, knowledge and representation, security and accountability and use in-between analysis to understand how they operate in in-between spaces. In addition, I will analyse interactions between different actors of international criminal justice including: the ICC, states, NGOs and different types of intermediaries to analyse how in-between spaces impact them. Together, this analysis will show how thinking about intermediaries through the concept of in-between uncovers new sites for opportunity and challenge for those who rely on intermediaries' services and for intermediaries themselves.

In terms of how the interactions examined in this thesis have been selected, my choices were influenced by a number of different factors. First, my main research

[20] De Vos C., ''Someone who comes between one person and another': Lubanga, local cooperation and the Right to a fair trial', (2011) 12, *Melbourne Journal of international law,* at 220.

question which is about the place of intermediaries at the ICC shaped and directed my reflective process. Second, by focusing on knowledge production, representation and power; b) security and c) accountability, certain interactions stood out more than others.

In this section, I have defined what in-between spaces are and explained their usefulness both as an analytical frame and as a description of reality. The following section will focus on explaining the sites of mediation analysed in subsequent chapters.

3. Deploying in-between space as an analytical tool

The concept of in-between spaces helps uncover new sites in which international criminal law takes place. These sites are sites for opportunity and challenge for intermediaries and those who rely on their services. In this section, I will first explain how thinking through intermediaries' in-betweeness engenders new possibility. I argue that intermediaries' in-between status is not just descriptive, it is also productive. This meaning of in-between runs through the whole thesis and overlaps with the four in-between spaces I identified. Then, I will briefly discuss which in-between spaces are examined in subsequent chapters and why they have been selected. Some in-between spaces run through the entire thesis while others are emphasised in specific chapters. I will discuss the following main in-between spaces: a) in-between parties, b) in-between intermediaries, c) in-between regulation and d) in-between transitional justice and political transition. Together, these in-between spaces help articulate the ways in which intermediaries mediate interactions between individuals, ideas and institutions.

3.1 Intermediaries' in-between status

The essence of inter-mediary work is the ability of an agent to act between one person and another or, as seen in chapter two, between one idea or concept and another. As new actors in international criminal law, intermediaries enjoy an in-between status which is produced by encounters between individuals, institutions and ideas in international criminal law. Describing intermediaries in this way was inspired by my reading of African colonial intermediaries in terms of how they somewhat evolved as in-between subjects. Intermediaries' in-between status generates a number of consequences which I will describe below and demonstrate in subsequent chapters. The idea that intermediaries have an in-between status runs through the thesis.

The complexity of this in-between space lies in that intermediaries occupy different roles at different times and for different purposes. Some intermediaries are recognised by the guidelines on intermediaries while others are not, some intermediaries move from acting as intermediaries to acting as staff members and NGO intermediaries act sometimes as intermediaries and other times as members of the civil society (or in their own capacity). Hence the different names used to describe intermediaries such as third party sources, partners, informants or resource persons reflect in-between status as a characteristic that all intermediaries share. Such in-between middlemen and women provide an opportunity for the operation of ICC processes on the ground because they are able to move and share information that has proved to be useful for international criminal investigations and proceedings.

Intermediaries have an in-between status in the sense that some of them (for example individual intermediaries) are able to assist the work of the Court on the ground without being noticed by their own communities or sign confidential agreements that also make them unnoticeable in court records. For example, an intermediary may assist a particular unit of the Court by sharing data on the security

situation on the ground or by sharing intelligence on security precautions on the ground in a way that protects both ICC staff and the intermediary themself. With this it can be said that one of the effects produced by intermediaries' in-between status is invisibility. I will discuss this in more detail in chapter four where I investigate the place of intermediaries on the Court's public interface –the official website, Court documents such as the Rome Statute and intermediaries' textual visibility in Court records.

This in-between status also comes with great challenges for intermediaries and for those who rely on their services more broadly. Intermediaries' in-between status is what enabled (and continues to enable) prosecution teams in several cases before the ICC as they play an important role in gathering information about international crimes sometimes even before ICC investigative teams conduct their own investigations. According to Kambale, several DRC based intermediaries were instrumental in collecting raw intelligence on crimes committed in the Ituri region.[21] Such practices are not without implications and defence teams at the ICC have, on several occasions, criticised the prosecution for over-relying on intermediaries.[22] That said, this in-between status empowers intermediaries to participate in international criminal process through collaboration, negotiation, mediation and sometimes resistance. In the following paragraph, intermediaries' in-between status is at once an opportunity and a challenge for the Court's work on the ground; then in subsequent chapters I will give an in-depth analysis of how this takes place.

First, intermediaries' in-between status is an opportunity for international criminal law in the sense that it is at heart of the Court's engagement with beneficiary groups. Though understudied, the relationship between intermediaries and communities affected by ICC proceedings is one that has enabled many victims and survivors to

[21] Kambale P.K., 'A story of missed opportunities: The role of the International Criminal Court in the Democratic Republic of Congo, in in De Vos C., Kendall S., Stahn S. (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions,* (Cambridge University Press: 2015), p191.
[22] See Chapter 1.

have access to international criminal justice.[23] Sadly, it has also been a source of many conflicts.[24] Still, without intermediaries' outreach work it would be difficult for some victims to even realize that they have rights to reparations in international criminal proceedings. Secondly, intermediaries' in-between status opens up new possibilities for justice contestations and new voices to be heard and as such contribute to the development of international criminal law.

Intermediaries' in-between status is also a challenge for intermediaries themselves and those who rely on their services. In almost all countries where the ICC is involved some intermediaries assist the units of the Court openly while others are more discrete. Often times, these intermediaries would be known by their people, they are sometimes community leaders and so when they act as intermediaries they are the face of the Court on the ground. As I will discuss in subsequent chapters, this in-between status places intermediaries in a powerful position which may be exploited by other actors for reasons other than international criminal proceedings. Some intermediaries have also exploited their positions for personal gain as can be seen in the Lubanga case where intermediaries were found guilty of tampering with witness testimony[25] and the Bemba case where intermediaries were found guilty of bribing witnesses.[26] This is unfortunate and it is a challenge the ICC will have to deal with. Additionally, it can be said that intermediaries' in-between status may enable subtle influences on witness testimonies or victims' accounts which are difficult to monitor. The person on the ground could mean one and many things; he or she may be an educated and experienced person, a pastor or a farmer. These differences are

[23] On the role of intermediaries in victim participation at the ICC see, *Situation in Democratic Republic of Congo,* Decision on the Applications for Participation Filed in Connection with the Investigation in the Democratic Republic of Congo by Applicants a/0189/06 to a/0198/06, a/0200/06 to a/0202/06, a/0204/06 to a/0208/06, a/0210/06 to a/0213/06, a/0215/06 to a/0218/06, a/0219/06, a/0223/06, a/0332/07, a/0334/07 to a/0337/07, a/0001/08, a/0030/08 and a/0031/08, PTC I Case No:ICC-01/04-545 (4 November 2008) [25].

[24] Especially between the OTP and Trial Chamber I but also between the OTP and Defence teams.

[25] See *Prosecution v. Thomas Lubanga Dyilo,* Judgment pursuant to Article 74 of the Statute, TC I (ICC-01/04-01/06-2842), 14 March 2012, [291-298].

[26] See Bemba bribery case *Prosecutor v. Jean-Pierre Bemba Gombo,* Public Document With confidential ex parte annexes only available to the Registry and the respective common legal representative Decision on 653 applications by victims to participate in the proceedings, PTC III (01/05-01/08-1091) 23 December 2010.

important to consider when thinking about how intermediaries connect the Court with affected communities. It helps uncover which voices are being heard and which voices are silenced.

This in-between space also highlights differences in the ways that intermediaries perceive their role and their place in international criminal justice. For some victims-intermediaries, the status comes with some level of prestige. This is visible in the interviews that Leila Ullrich conducted in Kenya where intermediaries were encouraged to organise themselves into associations for victims which gives them access to funding.[27] For others such as NGOs and international NGOs, it is less clear when they act as intermediaries and when they act in their own capacity. What this means is that acting as an 'ICC intermediary' either has a different meaning for these organisations or it is an optional status which applies only in certain cases. Examples of how NGO intermediaries and international NGOs speak of intermediaries can be found in reports about the processes that led to the adoption of the guidelines on intermediaries. More on the guidelines on intermediaries can be found in the following chapter.

Existing literature on intermediaries touches on aspects of intermediaries' in-between status. For example, every discussion about the definition of the term intermediary (ies) deals with intermediaries as middlemen and women in one way or another. And so much of what is written about intermediaries in this study examines aspects of this relationship. While some authors focus on the law on intermediaries and case law, others focus on responses or lack of responses by the Court to intermediaries. However, what was missing up until now is the conceptualisation of intermediaries as in-between agents whose in-between status produces effects.

[27] Ullrich L., 'Local Intermediaries, Victims and the Justice Contestations of the International Criminal Court', (supra n. 13), at 566.

Overall, intermediaries' in-between status can be viewed both as an opportunity and a challenge for the ICC, intermediaries and international criminal law more broadly. In-between status enables intermediaries to access information and share data that are essential for the work of the Court on the ground. However, this new status also comes with challenges for intermediaries and those who rely on their services. Intermediaries' in-between status places them in other in-between spaces, some of which are explored in this thesis and explained in the following sub-sections.

3.2 Other Sites of mediation

3.2.1 In-between parties

In-between parties has been selected because it is the site of interactions for parties in ICC proceedings. It is an important in-between space which runs through all three subsequent chapters. As mentioned above, the prosecution, defence and legal representatives for victims operate in this narrow site and they are governed by rules of legal tradition. In this space parties interact through submissions, requests and oral arguments in court about issues that concern intermediaries. In many different ways, intermediaries find themselves in-between parties because each party makes submissions about intermediaries in ways that benefit their interests.[28] Throughout the thesis I will highlight instances where intermediaries are caught in-between disputes between parties and how judges, who usually have limited to no encounter with intermediaries, decide on these matters.

[28] For example Court processes expose intermediaries to security risks. Looking at the ways in which intermediaries' security is presented and contested by the parties within the Court, we see that intermediaries can be exposed due to legal processes. The most notable example of the ways in which intermediaries find themselves between parties can be seen in the Lubanga case where intermediaries' security problems came to the surface in heated disputes between the defence, the prosecution and Trial Chamber I. At the time, the prosecution presented intermediaries' security problems and defended intermediaries against Trial Chamber I orders to disclose their [intermediaries] identities to the Defence. But the Defence made the question of intermediaries (including their security) a matter of contestation and made it a central part of Defence strategy in the case against Lubanga and other cases before the Court. Intermediaries soon found themselves in-between parties' arguments during the proceedings and this had an impact on their security in the field and on their willingness to assist the Court.

Interactions in this in-between space are the sum of interactions performed through formal exchanges (submissions, responses, transcripts, motions, orders and judgment) between the office of the prosecutor, defence, legal representatives for victims and judges at the ICC. In these interactions, intermediaries are for the most part absent and therefore what we learn about them comes from different parties in pre-trial and trial processes. Exceptions include instances where intermediaries are called to answer for their actions or appear as victims or witnesses in certain procedures.[29] It is also through these interactions that intermediaries and their work are challenged. And so this is an important set of interactions which runs through all three subsequent chapters.

Much of what we know about specific individual intermediaries is generated in this in-between space through the ways in which different parties present intermediaries' issues in court and how they indirectly represent intermediaries' views. A large or substantial amount of data analysed in this thesis comes from submissions made by parties before different chambers and in different cases at the ICC. Even though intermediaries largely evolved without academic oversight, defence lawyers at the ICC have developed elaborate arguments about the prosecution's reliance on intermediaries. These arguments and prosecution responses have been a rich source of knowledge for this research. For instance, Defence lawyers in the case against Thomas Lubanga were the first to raise questions about the prosecution's use of intermediaries, the practice of relying on intermediaries for evidence collection and the effect that this new partnership may have on criminal proceedings. The ways in which the prosecution, legal representatives for victims and sometimes the

[29] See for example the Bemba case in which intermediaries have been prosecuted for interfering with justice processes. *Prosecutor v Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu, Narcisse Arido,* Judgement pursuant to Article 74 of the Statute, TC VII (ICC-01/05-01/13) 19 October 2016.

Registry respond to these kinds of issues show how Court processes obscure sites of power and other forms of representation at the ICC.[30]

This in-between space is also important for a number of other additional reasons. It allows us to see how parties manage and present the data they have on intermediaries. In a way it makes sense that they would have this amount of data on intermediaries because parties hire intermediaries, they have direct relationships with intermediaries; and they have access to intermediaries throughout the duration of trials. They have first-hand data about who intermediaries are and what they do. For example, Lavigne a lead prosecution investigator extensively explained in the case against Mr Thomas Lubanga how intermediaries were selected, which intermediaries were selected why they were selected and what opportunities his (Mr Lavigne) team found in working with them.[31] Overall, in this in-between space, I will show how intermediaries find themselves in-between parties' interests. What is more, this in-between space helps us see how court decisions and orders –though they seem remote from where intermediaries are - have a real impact on intermediaries' lives.

3.2.2 In-between intermediaries and other intermediaries

Having explained the in-between space between intermediaries and the ICC, this section will explain the in-between space between intermediaries and other intermediaries which in one sense is linked to the many layers of interactions between different types of intermediaries. Intermediaries come with different backgrounds, knowledge, political and economic power, all of which influence the ways in which they engage in mediation and negotiation. What is more, different intermediaries are affected differently depending on who they are and what their

[30] More discussion on the issue of representation is further discussed in chapter 4.

[31] On how intermediaries are selected see *Prosecution v. Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute, TC I (ICC-01/04-01/06-2842), 14 March 2012, [190-197].

level of operation is. The usefulness of this site of mediation is that it allows us to see how certain international NGOs and NGOs move between acting as intermediaries to acting as members of broader civil society.

The ways in which knowledge, power and representation operate as a means or result of negotiation are most visible in this in-between space. Particularly, the following chapter will discuss how individual intermediaries, grassroots intermediaries, regional and international intermediaries offer new sites for opportunity and challenge for the ICC. There are significant differences between different types of intermediaries and these differences are important to understand the effects of in-between spaces on intermediaries.

Distinctions between different types of intermediaries are important when considering the effect of a court decision in the field. When Chambers at the ICC lift disclosure agreements between intermediaries and the office of the prosecutor, it is likely to have a greater impact on community level intermediaries (that is community leaders and pastors) than on international intermediaries (Redress and IRRI). This type of in-between space (in-between status, for example NGO and intermediary) also runs through the thesis as different types of intermediaries lead to different sources of knowledge, different security problems and lastly they are accountable to different actors.

3.2.3 In-between regulation

In-between regulation is linked to intermediaries' in-between status. In-between regulation is a site where different laws, rules and regulations cross or intersect without the possibility of clearly dissociating what falls under which regulatory authority. The idea that intermediaries find themselves in-between regulation came from the observation that intermediaries operate in globalized processes which are not entirely governed by domestic laws or international criminal law. These

globalized processes enable different actors to create rules and regulations to which intermediaries are submitted to. These processes include for example: international criminal justice, transitional justice, peace building mechanisms, conflict resolution initiatives, domestic or 'traditional' justice mechanisms or international human rights law. Intermediaries seem to be involved in all of these different processes which run in parallel and which are sometimes in competition with one another.[32] Global legal pluralism, fragmentation and the diversification of laws as they are framed in different disciplines as such are nothing new.[33] What thinking about intermediaries through the prism of in-between regulation allows us to see is how intermediaries navigate these different registers and how they are affected by them. I use this in between space in all three subsequent chapters to examine the way in which intermediaries navigate between different regulatory authorities.

Intermediaries navigate between different institutions at different times and in different capacities. Different kinds of intermediaries assist international institutions such as the ICC, the UN or other development institutions on the ground. This partnership is sometimes referred to as part of 'inclusion policies', local empowerment or local ownership in legal scholarship, transitional justice, development studies and peace building studies. Local ownership in particular seems to be an important theme in the literature on intermediaries.[34] Take for instance interactions between states, the ICC and the UN; formally, the relationship between states and the ICC is regulated by the Rome Statute and the relationship between the

[32] See for example Clarke K.M., 'Multiple Spaces of justice: Uganda, the International Criminal Court', in Clarke K.M., *Fictions of Justice –The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa,* (Cambridge University Press: 2009), p 117-48.

[33] Different perspectives on legal pluralism see Van Sliedregt E. & Vasiliev S., *Pluralism in international criminal law,* (Oxford University Press: 2014); Corradi G., Brems E., & Goodale M. (eds), *Human Rights Encounter Legal Pluralism: Normative and Empirical Approaches,* (Oxford Hart: 2017), and in Clarke K.M., *Fictions of Justice – The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa,* (supra n. 32) p 117-48.

[34] See for example De Vos M.C., 'Investigating from Afar: The ICC's Evidence Problem', (2013) Vol 26:4 *Leiden Journal of International Law*, 1009-1012.

ICC and the UN is governed by the Negotiated Relationship Agreement between the International Criminal Court and the United Nations.[35]

In-between regulation allows us to see how these powerful institutions dominate the site for justice contestations by less powerful constituencies. The tight cooperation between powerful institutions such as the UN and the ICC and their shared goals potentially produce a certain monopoly of justice. The UN acts both as a separate institution and as an intermediary at different times in the Court's work on the ground. For instance, the UN acts as an intermediary based on the Regulations of the Trust Fund for Victims Rule 67. This ability to shift from separate entity to intermediary has implications on less powerful intermediaries, especially those who do not share the Court's vision of justice because the Court is likely to work with like-minded entities rather than engaging with the intermediaries who come with different views. For instance, the UN plays an important role in knowledge production because it investigates and produces reports about mass violence, potential perpetrators and victims. Additionally, the organs of the UN that investigate and write these reports are usually involved in situation countries long before the ICC. As a result, they are viewed, by many, as reliable intermediaries who produce useful data for international criminal prosecutions. And so thinking through in-between regulation allows us to have deeper conversations about how international institutions dominate justice debates.

As seen in chapter 2, African colonial intermediaries' ability to navigate different spaces came with opportunities and challenges. This inspired the kinds of questions I raise about how contemporary intermediaries navigate in-between regulations as well as how they are affected by the intersections and crossings of different legal orders in chapters 5 and 6. In-between regulation is visible in chapter 5 where I

[35] Negotiated Relationship Agreement between the International Criminal Court and the United Nations, available at < https://www.icc-cpi.int/NR/rdonlyres/916FC6A2-7846-4177-A5EA-5AA9B6D1E96C/0/ICCASP3Res1_English.pdf>.

discuss how different actors play a role in the security of intermediaries. What in-between regulation allows us to see differently is how different legal frameworks come into play or fail in terms of intermediaries' security. Through a discussion of the Court's legal framework and practice I will show that the Court bears an enormous responsibility to protect intermediaries. However, the Court's ability to protect intermediaries is limited for different reasons some of which are linked to intermediaries' in-between status. For instance, intermediaries' free labour is a result of the Court's small budget.[36] But as I show in chapter 5, even if the Court was financially capable of protecting intermediaries it would still be limited because intermediaries' in-between status exposes them to security problems that the Court may not be able to address. In fact, even court processes may expose intermediaries to security risks.

The case of intermediaries in North Sudan is another example of how intermediaries are affected by the space in between regulation. When states resist international criminal prosecutions they often make it difficult for people on their territories to interact with the ICC. Because of this, intermediaries venture in a very dangerous space by offering their services to the Court. There is evidence suggesting that doing this work for the court has had serious repercussions on intermediaries' lives and the lives of their families, particularly in North Sudan.[37] What this example shows is that North Sudan as a country that has the responsibility to protect all who live on its territory may in reality be a threat to its own people. Because the ICC system is built

[36] Baylis E.A., 'Outsourcing Investigations', (2009) 14 University of California, *Los Angeles Journal of International Law and Foreign Affairs* 121; and Buisman C., 'Delegating Investigations: Lessons to be Learned from the Lubanga Judgment', (2013) Vol 11:3/3, *Northwestern Journal of International Human Rights*.

[37] For example in late 2011 early 2012, the security situation in Darfur had deteriorated to the point that investigations became impossible. Specifically, the government of Sudan (now North Sudan) 'barred ICC personnel from speaking to Sudanese officials, expelled NGOs accused of collaborating with the ICC and criminalised cooperation with the Court'. See *Prosecution v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus,* With Public Annexures A, B, B, E, I, M and O, Confidential Anexures C, J, L and N, and Confidential and *ex parte* Annexures F, G, H, and K available only to the Defence –Defence Request for a Temporary Stay of Proceedings, TC IV (ICC-02/05-03/09-274), 6 January 2012, [4-5].

on State cooperation, even a well-thought legal framework for the protection of intermediaries is likely to be limited in these kinds of cases.

In-between regulation is also visible in chapter 6 where I discuss intermediaries' accountability. In-between regulation is a site where intermediaries and those who rely on their services navigate different accountability rules and mechanisms. These come into play in a way that impacts intermediaries because of the nature of their work. All who rely on intermediaries have some sort of accountability mechanism in place holding intermediaries accountable to them.[38] As I will explain in chapter 6, intermediaries are accountable to the Court, states, NGOs, donors and the communities they serve in different ways and through different frameworks. The complexity of in-between spaces in general is exacerbated by the fact that different actors come with different political agendas and priorities which may compete with the objectives of international criminal prosecutions. Firstly, it allows us to see that intermediaries are accountable to many different actors under different rules and laws. Secondly, thinking about intermediaries as occupying a space in-between regulation allows us to see spaces in which intermediaries are neither covered by domestic law or international criminal law. Thirdly, this in-between space allows us to see how intermediaries mediate their employers' accountability toward the communities they claim to serve. I will focus on the ICC to interrogate the ways in which communities affected by ICC proceedings hold intermediaries accountable for the work of the Court on the ground.

3.2.4 In-between transitional justice and political transition

So far, I talked about in-between spaces produced by encounters between individuals or entities and between institutions. In-between transitional justice and political transition is an articulation of how intermediaries find themselves in-

[38] The question of whether those who rely on intermediaries are also accountable to them is subject to further research. However, as I will show in chapter 6 the Court's practice is set up in a way that only holds intermediaries accountable.

between ideas. Generally, intermediaries are said to work in post-conflict situations, they are either witnesses of mass violence themselves or in possession of intelligence on international crimes. As on ground based agents, it is difficult to dissociate their contribution to transitional justice from political transition. As I will show in chapter four, post-conflict environments are very dynamic sites in which concepts of justice; truth and reconciliation are in constant negotiation. Essentially, this in-between space allows us to see how intermediaries' views on conflicts and local politics might influence the ways in which they mediate interactions between the Court and the communities affected by its proceedings.

Overlooking the ways in which intermediaries navigate this site can cause some serious repercussions for the Court's engagement with intermediaries and on its processes. In the Lubanga case, for example, OTP investigators' ignorance of local politics caused them to blindly work with intermediaries who were also supporters of the accused (Mr Lubanga).[39] IRRI further observed that the Court's failure to engage 'the real community leaders' considerably weakened its position on the ground.[40] Similarly, Ullrich observed that both international and local NGOs in Uganda had 'fallen prey to ethnic politics'.[41] Other times, local governments' competing interests with ICC processes can cause intermediaries to be in delicate and often times high security risk positions. This can be seen in situations such as North Sudan and Kenya where the accused persons are sitting heads of states.

Overall, throughout this research, I focus on intersections between individuals, entities and legal traditions; and I interrogate the in-between spaces that emerge from those intersections. In my analysis, I take into account the fact that the concept

[39] IRRI, 'Steps Towards Justice, Frustrated Hopes: Some Reflections on the Experience of the International Criminal Court in Ituri', Just Justice? (2012) Civil Society, international Justice and the Search for Accountability in Africa, Discussion paper no 2, p 20.

[40] Ibid.

[41] Ullrich L., 'Local Intermediaries, Victims and the Justice Contestations of the International Criminal Court', (supra n. 13), at 550.

of the intermediary encompasses diverse individuals and entities that perform many different tasks, at different levels and times in international criminal justice processes. Ultimately, international criminal prosecutions take place in transitional justice processes as well as in processes of political transition. It can be said that intermediaries connect with different aspects of the Court (for example, one intermediary can work for more than one unit or move from one unit to another), they are themselves interconnected and their relationships with communities affected by ICC proceedings varies from intermediary to intermediary. Intermediaries, thus, mediate power and knowledge in their daily dealings with the units of the Court, with other intermediaries and with communities affected by ICC proceedings. What is needed then is a framework that allows us to see and question the different levels at which intermediaries operate while at the same time interrogating the ways in which these intermediaries mediate between actors, ideas and institutions.

4. Studying intermediaries through in-between analysis: Opportunities and Limitations

In previous sections, I have tried to answer the questions of how the relationship between intermediaries and the ICC might be conceptualised. In particular, how the concept of in-between spaces might help us understand some of the ways in which intermediaries mediate the spaces in which they operate. This section brings together further elements of answers to these questions with the view of clarifying the analysis that follows in this chapter as well as in chapters 4, 5 and 6. Deploying in-between spaces as an analytical frame is the most suited tool to answer the questions that this research is concerned with but it also has limitations.

4.1 Opportunities

'In-between spaces', as a reality description, helps see new sites in which international law criminal law takes place. 'In-between spaces', as an analytical tool, helps us understand the effects of those sites on intermediaries and those who rely on their services. The usefulness of in-between spaces (both as an analytical tool and as reality description) can be summarised in three main points which I will develop in subsequent paragraphs. First, it helps conceptualise the place of intermediaries in international criminal justice. Secondly, thinking through in-between spaces allows us to see and understand old issues differently and helps us identify issues that were previously unseen. Third, thinking through in-between spaces allows us to pay attention to the day to day operation of the Court on the ground and how increased partnerships with intermediaries could benefit the Court, intermediaries and the development of international criminal law.

As seen at the beginning of this chapter, existing literature on intermediaries does not conceptualise the place of intermediaries in international criminal justice. Generally, interactions between international institutions and African communities have been done through global/local lenses. Though such analyses have played their part, I argued that they are unhelpful because intermediaries navigate more spaces than global/local. Thus in-between spaces as an analytical framework allowed me to explore sites of interactions between individuals, institutions and ideas. Thinking through in-between spaces allowed me to examine intersections between different actors including the ICC, other international institutions, states, international NGOS, NGOs and other types of intermediaries. This means that while States, the ICC (institution) or the UN are powerful players in international criminal justice, there are other actors whose work and role in international criminal justice are important. These other actors include lawyers, administrators and different types of intermediaries. Of course, actors in international criminal justice work at different levels of power and this is what is interesting about in-between spaces because they

help uncover hidden sites of power in international criminal law. Essentially, a more complex understanding of in-between as site of mediation and negotiation helps us see interactions between intermediaries and those who rely on their services differently. Rather than conceiving an intermediary as a person who comes between one and another, this thesis views that 'in-between' as a dynamic site in which different in-between spaces run in parallel involving different actors who interact for different purposes.

Secondly, thinking through in-between spaces allows for deeper analyses of the interactions between intermediaries and those who rely on their services. Other times, it allows us to see how intermediaries are mediated by those who rely on their services. For example, thinking through in-between spaces between parties allows us to see a site of mediation in which intermediaries rely on representation to make their voices heard. In addition, this site helps us see for example how ICC judges decide on issues concerning intermediaries, such as security, without being on the ground and in the absence of intermediaries. Existing literature has tended to put all the responsibility for intermediaries' security on the Court. However, as I will show in chapter 5, in-between analysis shows that the Court is sometimes unable to implement protective measures because of intermediaries' in-between status. This example illustrates some of the ways in-between analysis allows us to think differently about well-known issues.

Rather than positioning the ICC as a central focal point from which the law on intermediaries is created and enforced, thinking through in-between spaces reveals other sources of law and enforcement in the broader context of international criminal justice. The ICC can only capture, and thus regulate, a fraction of who intermediaries are and what they do. It would be challenging for any court to monitor and have an oversight on all the in-between spaces analysed in this thesis at all levels and at all times. This is evident in the ways that intermediaries navigate between institutions such as the Court and donors or between the ICC and the UN. In

my view international NGOs are accountable to their donors rather than to the ICC.[42] With this, individual intermediaries and other types of intermediaries operating at different levels are accountable to many actors in international criminal justice.

Third, thinking through in-between spaces allows us to see important aspects of intermediaries' participation in international criminal justice processes. Particularly, the Court and early writings on intermediaries tended to present intermediaries as data collectors alone. However, they are also very much at the centre of knowledge production about conflicts, victims, witnesses and communities affected by ICC proceedings. Even though the Court, through units such as the registry, continues to deny or resist it[43]; intermediaries produce knowledge about the Court and its activities in ways that cannot be controlled through regulations. What this example illustrates is that we begin to see power dynamics differently. Intermediaries are not just middlemen who facilitate communication they are also mediators and negotiators of knowledge, power and more. For example, thinking through in-between spaces allows us to trace the ways in which intermediaries might resist international criminal processes by denying the Court access to local communities or by deciding which victims can have access to the Court and which victims are left out.

4.2 Limitations

While thinking through in-between spaces opens up new sites for opportunity and challenge for intermediaries and those who rely on their services, there are limitations to what can be achieved with this concept. In the following paragraphs, I will discuss three main limitations of using in-between spaces as an analytical tool.

[42] See Muvingi I., 'Donor-Driven Transitional Justice and Peacebuilding', (2016) Vol. 11:1 *Journal of Peace building and Development*, 10-24.

[43] On how intermediaries produce knowledge about the Court see Ullrich L., 'Local Intermediaries, Victims and the Justice Contestations of the International Criminal Court', (supra n. 13), at 551-2.

First of all, in-between spaces as an analytical tool and in-between spaces as an empirical reality inform each other and their interconnectedness cannot be easily dissociated. As such, the analysis conducted through these lenses suffers from a lack of clarity which could be seen as poor analytical rigor. Even so, the findings of this research as a whole form a distinct and unique contribution to the existing literature on intermediaries.

Secondly, using in-between spaces as a conceptual frame meets several challenges which are very similar to those made against every deployment of hybridity. Bhabha's concept of hybridity is a mature concept which has had to face several criticisms that can help us foresee potential problems.[44] For example, hybridity necessitates elements of 'old' cultural heritage and 'new' to form a new hybrid whole.[45] However, this in itself raises further problems. Hybridity is located between two paradoxes. The first paradox is that it is dependent on the assumption of categories and difference.[46]If there are no categories, hybridity is impossible. What this means in this thesis is that without categories such as international court (global) and (local) communities affected by mass violence there would be no in-between spaces. The second paradox is that if all cultures are hybrid, then there is no need for the concept.[47] In this project, the same critique would be applicable: if the local is intertwined with the global, then there is no need for the concept of in-between space.

Similar criticisms could be made against the ways in which I use in-between space in this thesis. For instance, Leila Ullrich's interactional justice lens suggests that 'the

[44] This literature includes for example Solomos J & Les Back, 'Identity, Hybridity and New Ethnicities', (1996), *Racism and Society,* 121-155; Young R., *Colonial Desire: Hybridity in Theory, Culture and Race,* (Routledge: 1996), Ahmad A., 'The Politics of literary postcoloniality', (1995) Vol. 36:3, *Race &* Class, 1-20; Webner P and Modood T., Debating Cultural Hybridity –Multicultural identities and the politics of anti-racism, (ZED: 1997).

[45] Anthias F., 'New Hybridities, Old Concepts: The Limits of "Culture", (2001) Vol. 24:4 *European Law Review*, 619-41.

[46] Pieterse J. N., 'Hybridity, So What? The Anti-hybridity Backlash and the Riddles of Recognition', (2001) Vol. 18:2-3, *Theory, Culture & Society*, at 226.

[47] Ibid.

boundaries of who can and who cannot influence the ICC's justice concepts and practices are porous and do not neatly fall along inside or outside lines. For Leila Ullrich looking at intermediaries through interactional justice lens places them as 'another category of actors within the Rome Statute system.'[48] In other words there is a broad Rome statute system in which different actors including states, the ICC, NGOs and intermediaries participate in international criminal justice processes in their different capacities. However, the global/local boundaries do exist and as Jan Nederveen Pieterse has argued before, that is why they should be questioned.[49] The two criticisms made against hybridity also apply here. What constitutes 'in-between' envelopes countless in-between spaces which cannot be clearly separated from one another and so questions about the usefulness of such a theoretical frame may be raised.

Thirdly, using in-between spaces as a theoretical framing is based on in-between spaces as sites of mediations which are themselves fluid. Take for example the in-between space between transitional justice and political transition where issues of power, justice or truth are constantly shifting. Consequently, local politics in those different categories changes with time and that can make analyses seem unreliable due to their potential transformation. Yet, boundaries and classifications do exist and that is why they need to be challenged. When in-between spaces become visible and vocal, the effects and limits of the law become apparent. In the particular case of this thesis, deploying in-between spaces as an analytical tool does more than challenging existing boundaries in that it allows for deeper analysis of interactions between individuals, institutions and ideas in international criminal justice.

[48] Ullrich L., 'Local Intermediaries, Victims and the Justice Contestations of the International Criminal Court', (supra n. 13) at 556.

[49] Pieterse J. N., 'Hybridity, So What? The Anti-hybridity Backlash and the Riddles of Recognition', (supra n. 46), at 226.

5. Concluding remarks

This chapter has shown how global/local and interactional justice approaches are unhelpful to answer the questions that this thesis is concerned with. Specifically, these approaches are inadequate to conceptualise the place of intermediaries in international criminal justice. I also discussed the limits of interactional justice and argued that we need more conversations that go beyond legalistic questions and interrogate the Court's engagement with the communities affected by its proceedings. Next, I discussed my conceptualisation of in-between spaces and explained how thinking through in-between spaces both analytically and empirically helps us uncover new sites for opportunity and challenge for intermediaries and those who rely on their services.

As I have shown how in-between spaces, as reality description, come in different forms and affect intermediaries and those who rely on their services in different ways. It also shows some of the other ways in which law operates through in-between agents in international criminal justice. Thinking about intermediaries through the lenses of in-between spaces analysis does more than exposing the limits of international criminal law, it also helps us understand how knowledge production, representation, power, security and accountability operate in in-between spaces.

In-between spaces (as sites of mediation) are dynamic and productive of a particular way of practicing international criminal law, they include voices that would otherwise be overlooked by traditional conceptualisations of the relationship between the ICC and its constituents. Understanding the ways in which intermediaries use their in-between status and how they navigate in-between parties, in-between intermediaries, in-between regulation and in-between transitional justice and political transition sheds vital light on what their place is at the ICC.

The following chapters show how approaching intermediaries through the framing of in-between spaces, both analytically and empirically, helps us see and understand how knowledge production, representation and power operate, as well as how security and accountability are negotiated in in-between spaces.

CHAPTER 4: Knowledge, Representation and Power–Intermediaries and the ICC

In this chapter I explore the dynamics of knowledge production, representation and power in the relationship between intermediaries and the international criminal court. I argue that conceiving intermediaries as in-between agents through whom the Court extends its work is unhelpful and sometimes frustrating (for the Court and intermediaries). Rather, conceptualising intermediaries as mediators or primary negotiators of the Court's work operating in in-between spaces opens up new discussions about what knowledge is produced, who is producing it and for what purposes. In a time where the ICC's dominant on ground labour comes from intermediaries, raising questions about what is actually known (or knowable) about them and their role in international justice is important.

I will examine the knowledge produced about intermediaries and the knowledge produced by intermediaries as they mediate spaces in-between parties, in-between intermediaries, in-between regulation and in-between transitional justice and political transition. Intermediaries do more than simply translating or writing down answers on behalf of victims. In addition I will discuss some of the effects produced by intermediaries' in-between status. As primary mediators, they are placed in the privileged position of being among the first receptors and vehicles of knowledge about who victims are or the security situation on the ground. Without intermediaries to explain what the Court does or how to apply for victim participation, it would be impossible for victim applicants to access the Court. Thus intermediaries produce knowledge about the Court, its mandate, and its presence on the ground.

Continuing with a more complex understanding of in-between as a site of mediation, I will discuss new forms of representation in international criminal law. I argue that

more dialogues need to be had between the ICC and intermediaries on institutional matters as well on the ways in which parties represent intermediaries' views in Court. While intermediaries rely on representation to make their plights known to the Court, the Court also relies on intermediaries to reach out to their communities, assist victims and more. In terms of legal process, we now have a situation where lawyers represent intermediaries as if they were clients but only to the extent that such representation benefits their primary duties. For instance, victims' representatives are willing to act as intermediaries' representatives, presenting their views in court, challenging legal decisions against them as long as it serves their position as victims' representatives. As a result, intermediaries' interests suffer from this type of representation and they are never represented on institutional matters. Similarly, intermediaries represent aspects of the Court on the ground. It has even been suggested that intermediaries are the face of the Court on the ground.[1] However, our knowledge of how exactly intermediaries do it is limited because of the many layers of representation produced by different types of in-between spaces.

With respect to power, I argue that local politics' influence on intermediaries affects the ways in which they mediate interactions between the Court and affected communities. Thinking about intermediaries through the prism of an in-between analysis helps us understand which intermediaries are likely to be heard and which intermediaries' voices are likely to be overlooked. In addition, I hope that these analyses will assist the Court to develop different strategies for its work on the ground.

The first section of this chapter will examine intermediaries' visibility based on texts produced by the Court and its public interface. I will demonstrate how intermediaries' in-between status makes them partially invisible. Though such

[1] Clancy D., 'They told us we would be part of history' Reflections on the civil society intermediary experience in the Great Lakes region', in De Vos C., Kendall S., Stahn S. (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions,* (Cambridge University Press: 2015), p 221.

invisibility may be necessary, it also affects the ways in which the Court relates to them. Then I will discuss some of the ways in which intermediaries rely on representation. In doing so, I will show how representation operates in in-between spaces between parties and between different types of intermediaries. Lastly, I will discuss some aspects of power dynamics in the in-between space between transitional justice and political transition.

1. Tracing Knowledge in In-Between Spaces

Intermediaries produce valuable knowledge for the Court by mediating interactions between its units and victims or witnesses in the communities affected by ICC proceedings. Whether it is through translation, interpretation or by arranging meetings and collecting data, intermediaries produce valuable intelligence for the Court. However, how much do we know about intermediaries? Who produces knowledge about them and how can we access it? What knowledge do intermediaries produce about the Court? These are the questions I seek to answer in this section.

1.1 Intermediaries' invisibility on ICC official website

Intermediaries are hardly visible on the ICC website even though almost all research published on intermediaries in international criminal law recognises the tremendous role played by intermediaries in the operations of the Court on the ground.[2] I began my investigation by looking at the way the Court presents itself to the public via its official website. My first observation was that intermediaries are not visible in the 'About' section and the section that is dedicated to 'interacting with communities affected by crimes' is empty.[3] Next, I continued my search through the search box of

[2] See literature review in the introduction.

[3] When one havers on the 'About' section of the courts official website, three subsections appear a) how the court works (with 3 subsections including legal process, how we are organized, where we operate); b) in the courtroom (with 7 subsections including Presidency, Judicial Divisions, Office of the Prosecutor, Defence, Victims, Witnesses, Registry) and finally c) interacting with communities affected by crimes. See International Criminal Court Official Website < https://www.icc-cpi.int/> accessed (05 February 2018).

the homepage which led me to a number of documents including the Strategies and guidelines, Submissions made in the case against Lubanga and in a few Assembly of States Parties (ASP) documents.[4] This search also leads to four documents which are specifically about intermediaries and which I will analyse in the following paragraphs. These documents include the 2014 guidelines governing the relations between the court and intermediaries (hereinafter the guidelines on intermediaries) questions and answers, the guidelines on intermediaries, the code of conduct for intermediaries and lastly the model contract for intermediaries.

The first document which is titled 'questions and answers on the Court's engagement with intermediaries', is roughly three pages long and mostly a concise version of the guidelines on intermediaries. Some of the points that it summarises include the definition of intermediary, the tasks of an intermediary, and how one can become an intermediary. However, the title of this document is somewhat misleading as it creates the expectation that one would read questions asked by or about intermediaries and the Court's response to them. Even if this document's purpose was to explain how the Court interacts with intermediaries, it gives the impression that there is a clear and court-wide policy on how to interact with intermediaries despite the fact that other documents of the Court show that different units continue to follow their own policies in their dealings with intermediaries.[5]

As regards the guidelines on intermediaries, they were officially adopted in 2014 and they are non-binding. During the processes that led to the adoption of the guidelines, some parts of the guidelines were welcomed by members of the civil society but others met several criticisms from international non-governmental organizations (INGOs) and academics.[6] The most significant shortcoming of the guidelines

[4] The same search for prosecutor gives totally different results, the prosecutor is clearly visible.

[5] Further discussion of this problem can be found in 1.

[6] See For example REDRESS, 'Comments on the Draft Guidelines Governing Relations between the Court and Intermediaries', (15 October 2010) at 1 [emphasis added], available at <

highlighted by most observers was that its definition of the term intermediary was so vague that it would likely cause enforcement and implementation problems.[7] In addition, to return to my interrogation of in-between, the guidelines overlook important aspects of intermediaries' mediation and the importance of their contributions to the development of such rules. In a way the guidelines read like a set of fixed rules to which intermediaries must be submitted and as such these guidelines interrupt negotiations between the Court and intermediaries. Despite the input of some international NGOs, less powerful intermediaries viewed these guidelines as purely emerging and produced by the Court., if these rules fail to capture intermediaries' experiences, they are bound to fail. In an interview conducted by Leila Ullrich during the course of her work in Kenya, one intermediary said, in reference to the guidelines "with the Court, we have had discussions since 2011 and what do they come up with? Some bloody guidelines which intermediaries are supposed to sign… what for?"[8] This comment resonates with some of the issues discussed earlier in relation to differences between types of intermediaries. different intermediaries are faced with different problems but it is not reflected in the guidelines on intermediaries. Because of this regulatory efforts fail to capture important dynamics in the relationship that intermediaries have with each other and capture limited aspects of intermediaries' work on the ground. In some instances, powerful intermediaries have advanced investigative capabilities which the Court might benefit from if it enhances its relationship with them as Baylis previously

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http://www.redress.org/downloads/publications/Comment_on_draft_guidelines_on_intermediaries_15_Oct_2010.pdf> , Haslam E. and Edmunds R, 'Managing A New 'Partnership': 'Professionalization', Intermediaries and the International Criminal Court (2012) Vol. 24:1 *Criminal Law Forum*, 49-85 and Clancy D., 'They told us we would be part of history' Reflections on the civil society intermediary experience in the Great Lakes region', (supra n. 1).

[7] The Guidelines on Intermediaries define an intermediary as "someone who comes between one person and another; 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". See International Criminal Court, 'Guidelines Governing the Relations between the Court and Intermediaries' for the Organs and Units of the Court and Counsel working with intermediaries (2014) at 6.

[8] Ullrich L., 'Local Intermediaries, Victims and the Justice Contestations of the International Criminal Court', (2016), Vol. 14: 3, *Journal of International Criminal Justice*, at 552.

argued.[9] In other instances, however, less powerful intermediaries have the advantage of proximity in terms of geographical location, culture or language. According to Kambale, for example, in Ituri –DRC local NGOs and activists had 'more raw intelligence on the crimes committed there than any other entity.'[10]

Distinctions between types of intermediaries are important for yet another reason. They allow us to see power relations between intermediaries, which intermediaries' voices are heard and which intermediaries are not. To illustrate the relevance of such distinctions I propose a brief look at Emily Haslam's work in which she argues that there is a distinction to be made between 'civil society as subjects' and 'civil society as object'. For her, the distinction between the two is that "activists in civil society as subjects are treated as participants in international criminal policy and law making while 'civil society as object' is often determined by it being a target for external intervention and transformation".[11] Here it important to note that because some intermediaries fall in the category of civil society as 'objects' and others in civil society as 'subjects' they navigate different spaces and this is also very significant. For example the intermediaries who fall in the category of civil society as 'subjects' are likely to rely on intermediaries who fall in the category of civil society as 'objects' for the production of knowledge about affected communities, armed conflicts, victims, witness and evidence in general. Through these non-binding guidelines on intermediaries, it is clear that the Court is making efforts to contain and codify intermediaries' interactions with its units. However, it is also clear that some intermediaries are prevented contributing to these processes since the Court only captures a small fraction of the relationship between intermediaries and the ICC.

[9] Baylis E.A., 'Outsourcing Investigations', (2009) Vol. 14 University of California, *Los Angeles Journal of International Law and Foreign Affairs* 121.

[10] Kambale P.K., 'A story of missed opportunities: The role of the International Criminal Court in the Democratic Republic of Congo, in in De Vos C., Kendall S., Stahn S. (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions,* (Cambridge University Press: 2015), p191.

[11] Haslam E., 'Subjects and Objects: International Criminal Law and the Institutionalization of Civil Society', (2011) Vol. 5:2 *International Journal of Transitional Justice,* at 223

The code of conduct for intermediaries is a five-page long document with eight sections enumerating the Court's expectations about intermediaries. Though an in depth analysis of each article in the code of conduct for intermediaries is beyond the scope of this chapter, it must be noted that that the Court omitted a section on its responsibilities towards intermediaries.[12] This is important because such omissions further make certain intermediaries' plights invisible. Yet dealing with such plights is precisely what helps justice systems grow. An illustration of how intermediaries' concerns might be obscured by Court process can be seen in the Lubanga case. At a time where the Court was grappling with who intermediaries are and what role they played for the prosecution, it was found necessary to examine how the practice of relying on intermediaries was developed. This is the context in which Bernard Lavigne gave his testimony and answered some of these questions. Bernard Lavigne is a French Magistrate who led the investigation team in the Democratic Republic of Congo (DRC) situation. He was called by the Prosecutor to testify about how his team interacted with intermediaries, how they were selected and what tasks they performed.[13] An account of this appears in the public judgment against Mr Thomas Lubanga.

On one occasion, Bernard Lavigne made reference to tensions between members of staff and certain intermediaries but it is not clear how that matter was resolved and who took which responsibility. In his interview Lavigne spoke about intermediary 0136 who worked as an intermediary for the investigative team and for the DRC government at the same time. According to Lavigne, intermediary 0136 was 'turned down' for staff position. The account does not reveal anything more on the matter but it left me with some questions. Was there a promise of contract for intermediary 0136? Was it turned down as a means of punishment? Was intermediary 0136 no

[12] The issue of accountability is further discussed in chapter 6.

[13] *Prosecutor v. Thomas Lubanga Dyilo*, Redacted Decision on Intermediaries, TC I (ICC-01/04-01/06-2434-Red2), 31May 2010, [146].

longer needed for the work he had initially been hired for? If intermediary 0136 was treated unfairly, is there a mechanism for an intermediary to make their concerns heard? Though other submissions of the prosecution praise intermediary 0136 for bringing his expertise from the *Agence Nationale de Renseignement* (national intelligence agency) to the service of the Court, intermediary 0136 was found guilty of tempering with witness testimonies. In a way, intermediary 0136's misconduct made him visible as he became the focus of arguments between parties in the courtroom.

To sum up, the code of conduct for intermediaries fails to capture not only the complexity of relationships between intermediaries and the Court, intermediaries and other intermediaries but also intermediaries and affected communities. In addition, it crystallises aspects of intermediaries' relationship with the court in a way that renders certain plights invisible. In a way, the code of conduct contributes to the interruption of mediation processes between the court and intermediaries. Yet it is through such interactions that law is negotiated, challenged or even contested. In brief, the issue here is not that the Court could and should have written a longer and detailed document covering all intermediaries at all times. Rather, it is the failure to consider that different intermediaries navigate different spaces at different times which significantly weakens these regulations.[14]

I will now move to discuss the fourth and last document which is the model contract. This is a seven-page long document with nineteen articles. Similar to the code of conduct, the analysis of each article of the model contract is beyond the scope of this chapter however, I will analyse article 3.1 of the model contract for intermediaries to show how thinking through in-between analysis might open up new conversations.

> "The intermediary shall be considered as having an independent legal status *vis-à-vis* the Court (*or* the Counsel) and nothing contained in or relating to the Contract shall be construed as establishing or

[14] See for example *Prosecution v. Thomas Lubanga Dyilo,* Judgment pursuant to Article 74 of the Statute, TC I (ICC-01/04-01/06-2842), 14 March 2012, [203-205] on contracts between OTP and intermediaries.

creating between the Parties a partnership, a relationship of employer and employee, a relationship of principal and agent nor any sort of representation."[15]

This framing of the model contract presents intermediaries as third party entities that are totally separate from the Court. However, as it is shown in the following sections, intermediaries play different roles at the same time and/or at different times depending on what type of intermediary is in question. For example, individual intermediaries who are also located in affected communities can at the same time be intermediaries, victims and/or witnesses in particular cases. What rules such as article 3.1 above overlook is that each one of these titles comes with different implications for intermediaries and for those who rely on their services. This is visible in the case against the former president of Ivory Coast, Mr Laurent Gbagbo and Mr Charles Blé Goudé where some intermediaries had dual status, acting as intermediaries and as prosecution witnesses. In dealing with this issue, Trial Chamber I said that when intermediaries assist victims in completing forms, they have "engaged in Court process" and they no longer qualify as "innocent third parties".[16] Here it can be seen that it is difficult to trace intermediaries' visibility (and by extension their contribution) due to their ability to move from one category to another and sometimes hold dual status or because they may play different roles at different times. It is also possible that the Court may not be able to keep track of all these changes because of the number of intermediaries involved and the length of international criminal processes that is, investigations and later trials.

Next, thinking about intermediaries through in-between analysis helps us understand some of the ways in which intermediaries are mediated in the courtroom. I will provide more analysis on the issue of representation in the next section but here it I

[15] Article 3(1) of the model contract for intermediaries.

[16] *The Prosecutor v. Laurent* Gbagbo and Charles Blé Goudé, Defence response to the "Response to ICC-02/11-01/15 and request to maintain certain redactions in the victim applications of dual status individuals" (ICC-02/11-01/15-473), TC I (ICC-02/11-01/15), 07 April 2016, [27-33]; *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé,* Decision on Prosecutor's requests for lifting of certain redactions in victim application forms, TC I (ICC-02/11-01/15) 9 May 2015, [16].

want to highlight a discrepancy between article 3.1 and the practice at the ICC. In short, lawyers at the ICC are still debating the place of intermediaries and are starting to raise questions about whether they have the authority to speak on behalf of intermediaries. A brief example can be found in the interactions between the Defence for Mr Laurent Gbagbo and Mr Charles Blé Goudé and the legal representative for victims. On one occasion the Defence expressly said that the "legal representative for victims conducts herself as the spokesperson of intermediaries" and that "the LRV has no duty or authority to speak on behalf of intermediaries or represent their views". However, as it is shown in this chapter, because of the in-between spaces in which intermediaries operate, all parties in proceedings engage in some form of representation. The problem that remains is that there is no 'official' entity within the court that could ensure that the voice of intermediaries is heard on institutional matters. And so the knowledge produced by parties about intermediaries is likely to be filtered and therefore limited.

Overall, intermediaries' in-between status produces a number of different effects and one of them is that it makes them partially invisible. There are a number of ways to explain intermediaries' invisibility on the ICC public interface. When one searches for intermediaries on the ICC official website, the results that come up are predominantly linked to the Lubanga case and recently the Laurent Gbagbo and Charles Blé Goudé case/proceedings. However, a deeper search into the documents of the Court and parties' submissions show intermediaries' involvement with the prosecution, the defence, legal representatives for victims, the registry and the outreach program in the daily affairs of their respective duties. The first possible explanation of the discrepancy between intermediaries' partial invisibility on the ICC public interface despite their involvement with the units of the Court might be a reflection of the Court's internal fragmentation. The role played by intermediaries is not entirely clear for the Court (meaning the institution) itself and consequently Court's technicians such as programmers or administrators are unlikely to

understand and thereby include intermediaries in the description of the Court's work. There is no 'real' place for intermediaries at the ICC because they are not part of the traditional design of criminal institutions.[17] Secondly, the guidelines on intermediaries and the other documents linked to the guidelines that appear on the ICC website, capture a small fraction of intermediaries. Intermediaries are diverse groups of individuals and entities who act as bridges between affected communities and the Court. While some intermediaries are located the countries that have been affected by political violence, other intermediaries such as international NGOs have offices and staff in different parts of the world. Now, more than missing pages or tabs on the ICC public interface, intermediaries' invisibility reflects an institutional problem as well as the complexity of intermediaries' world. Acknowledging publically that intermediaries are part of the Court's structure would come with political and economic implications. Some of these implications include for instance taking responsibility for intermediaries' security on the ground or paying intermediaries for the work that they do for the Court. However, this would only add to the funding challenges and poor state cooperation in Africa that the ICC is currently facing. What is more, intermediaries continue to assist the Court's work on the ground without compensation as Sara Kendall argued.[18] In brief intermediaries are not only essential to the functioning of the Court but also to its survival.

The design of the Court's online platform is not the only place where intermediaries are made invisible. The following section will show some of the ways in which they can be invisible due to the nature of their work as 'in-between' agents.

[17] Note the exception of South Africa, England and Wales where intermediaries are included. However, the role played by intermediaries in domestic criminal systems is very different from intermediaries in international criminal justice. In cases of child abuse or rape it is possible that the witness-victim will experience secondary trauma due to cross examination. As a result of this, some witnesses might either say things that did not happen because of the pressure in Court or be reluctant to come forward and give their testimonies to in order to avoid that pressure. It is in this sense that intermediaries were introduced in most countries. One example of this is the case of South Africa. See for example Westcott H.L., 'Cross examination, sexual abuse and child witness identity', (2002), Vol. 11:3, *Child Abuse Review,* 137-152.

[18] Kendall S., 'Commodifying Global Justice - Economies of Accountability at the International Criminal Court', (2015) Vol. 13:1 *Journal of International Criminal Justice*, 113-134.

1.2 Intermediaries invisibility due to in-between spaces

In order to, further, understand how intermediaries' in-between status contributes to their partial invisibility, it is necessary to recall that the essence of their work is the ability to act as bridges between one person and another. It is also important to know that this kind of work does not begin from the moment an individual or an entity is given the title of intermediary by the Units of the Court or from the moment a contract is signed. Generally, entities such as the UN, international NGOs intermediaries and NGO intermediaries begin their work of collecting data about conflicts, human rights violations, international crimes and victims' experiences way before the office of the Prosecutor officially opens an investigation.

These intermediaries collect data for different purposes including the possibility that it may lead to criminal prosecutions. And so they navigate the in-between spaces between international judicial institutions, international political institutions, relevant countries and communities in those countries. What is more, International NGOs work in close collaboration with country level intermediaries and/or grassroots associations. In other words, they rely on their own local contacts to collect data from affected communities and often lobby on international platforms for international criminal prosecutions on behalf of the victims they have interacted with during the course of their investigations. NGO investigations and report can take several years before the UN Security Council or the ICC take any action. For example, several reports about the conflict in Libya were published by Human Rights Watch and Amnesty International before the events that led to a United Nation Security Council (UNSC) resolution referring the Libyan situation to the ICC.[19] This referral

[19] UNSC Res 1970 (26 February 2011) UN Doc S/Res/1970, available at < https://www.icc-cpi.int/NR/rdonlyres/081A9013-B03D-4859-9D61-5D0B0F2F5EFA/0/1970Eng.pdf>, accessed 11 November 2017; also see some of HRW and AI reports on Libya Human Rights Watch, 'World Report' events of 2009, (USA: 2010), < https://www.hrw.org/sites/default/files/reports/wr2010.pdf>, accessed 11 November 2017, pp 536-40; Human Rights Watch, 'World Report' events of 2010, (USA: 2011), < https://www.hrw.org/sites/default/files/world_report_download/wr2011_book_complete.pdf >, accessed 11

took place on February 15, 2011. Then on May 16, 2011 ICC prosecutor requested arrests warrants for former president of Libya Muammar Mohammed Abu Minyar Gaddafi, his son Saif Al-Islam Gaddafi and former Minister of Defence Abdullah Al-Senussi on counts of murder and persecution as crimes against humanity.[20] Yet no mention of intermediaries is made in this application. For Caroline Buisman, when the ICC prosecutor submitted his application for arrest warrants his team had not yet conducted their own investigations on the ground suggesting that the knowledge produced by intermediaries served as a basis for these arrest warrants.[21] Overall, it can be said that intermediaries work for the Court goes through a number of trajectories and sites of mediation before it reaches The Hague to serve in international criminal proceedings. In addition, it is difficult to dissociate what is produced by intermediaries and what is produced by Court officials. Together these factors contribute to intermediaries' partial invisibility.

1.3 Intermediaries' invisibility through redactions

Turning now to literal invisibility, this section shows how legal processes render intermediaries partially invisible through redactions. At the ICC, applications for non-disclosure have to be filed by the OTP to the Relevant ICC Chamber by issuing a formal request, explaining and justifying each redaction sought, accompanied by Annexes to the filing containing the (proposed) redacted as well as un-redacted or summarized version of information, in order to give the ICC Chamber the opportunity

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November 2017; pp562-7.; Amnesty International, 'The Battle for Libya' killings, disappearances and torture, (UK: 2011), available at< https://www.amnesty.org/en/documents/MDE19/025/2011/en/ >, accessed 11 November 2017 and Amnesty International, ''Libya of Tomorrow': What Hope For Human Rights', (UK: 2010), available at< https://www.amnesty.org/en/documents/MDE19/007/2010/en/> , accessed 11 November 2017.

[20] *Situation in the Libyan Arab Jamahiriya, '*Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi' TC I (ICC-01/11), 4 March 2011.

[21] Buisman C., 'Delegating Investigations: Lessons to be Learned from the Lubanga Judgment', (2013) Vol 11:3 *Northwestern Journal of International Human Rights* 3, at 24.

to make comprehensive evaluations. Possible applications for redactions can include the replacement of parts of documents by the word [REDACTED] or neutral words, distortions and/or omissions of audio or videotape evidence, or summaries of witness statements. As a result access to data produced on intermediaries is limited. Yet we know that intermediaries produce a lot of knowledge for the Court since they have the ability to collect information without raising suspicions in their countries or communities affected by ICC proceedings. Their knowledge of the terrain, language, culture and their people has and continues to be vital for the Units of the court.[22] However, the ways in which intermediaries mediate interactions between different units and their communities or how exactly they contribute to the Court's work on the ground remains for the most part inaccessible to the general public.

Evidence of the knowledge produced by intermediaries for the units of the Court is, as parties recognize themselves, what allows them to fulfil some of their duties and obligations on the ground. In situation countries where ICC intervention is openly rejected, intermediaries become even more essential for the units of the Court as investigations on the ground become very difficult. However, even for the limited amount of knowledge that is presented in Court, a great amount of this knowledge is made inaccessible by the Court processes.

Intermediaries often operate in dangerous zones, in on-going conflict and at times at the expense of their lives. In one report Human Rights wrote the following "We wish to thank our colleagues in eastern Congo, who risk their lives to defend the rights of others, for their commitment and assistance. We also wish to thank all those who took the time and courage to speak to the delegation, in particular the survivors themselves."[23] This account illustrates some of the difficulties related to

[22] See for example *Prosecutor v. Thomas Lubanga Dyilo*, Redacted Decision on Intermediaries, (supra n. 13), [183-185].

[23] Human Rights Watch, 'The War Within The War' Sexual Violence Against Women and Girls in Eastern Congo, (USA: 2002).

investigations on the ground and why any information that might expose intermediaries to security problems should be handled with utmost care. This is even more important in places like Darfur where any collaboration with the Court has been criminalised or more recently in Burundi where the current government has openly rejected all collaboration with the Court. Thus intermediaries' invisibility through redactions serves as a means of protection for them and a way to ensure that intermediaries will continue to assist the units of the Court. However, intermediaries' invisibility through redactions is also problematic because redactions limit the possibility to interrogate how exactly intermediaries relate with the units of the Court.

This section has reviewed three aspects of intermediaries' invisibility a) on the Court's official website, b) due to their in-between status and c) in texts produced by the Court. The following section will tackle the issue of representation treated under three subheadings: Parties representation of intermediaries; NGO (or NGO intermediaries) representation of intermediaries and intermediaries' representation of the Court.

2. Intermediaries' reliance on Representation

Intermediaries' reliance on representation is an effect of in-between spaces. Even though intermediaries are able to move from one category to another, certain spaces are not available to all intermediaries. In this section, I will examine the question of whether intermediaries are represented in Court. I argue that parties indirectly represent their own intermediaries but this representation is limited to a small group of intermediaries. In addition, this indirect representation is always tailored to parties' interests. However, the ways in which judges decide about these issues can potentially affect all other intermediaries. Next, I will discuss NGO representation of intermediaries. I argue that NGOs representation of less powerful intermediaries might potentially interfere with the contribution that those less powerful

intermediaries bring in international criminal justice. Lastly, I will discuss intermediaries' representation of the Court. Intermediaries mediate ideas, expectations and the Court's vision of justice.

2.1 Parties' representation of intermediaries

As was pointed out in the previous chapter, the courtroom and formal exchanges between parties is a site where intermediaries are mediated. Contrary to what the language of the model contract for intermediaries suggests, parties at the ICC produce a great amount of knowledge about intermediaries through their interactions with each other. In addition, parties engage in forms of representation because intermediaries are generally absent from these exchanges, except when intermediaries are called to testify on specific issues.

The OTP, partly due to its responsibilities, has had to indirectly represent intermediaries in the courtroom. An illustration of this can be seen in the Lubanga case where it said that "the environment in which intermediaries operate is dangerous and risk of harm is high both to them and to witnesses who may have interacted with them".[24] The prosecution added that it can only carry out its heavy mandate of prosecuting international crimes with the help of intermediaries and, that if intermediaries were put in a position where their identities were to be disclosed, it would weaken the prosecution's ability to build trust with other intermediaries for future cases.[25] The OTP has made similar submissions in many different cases, almost always explaining to the court the difficult environment in which intermediaries operate and why intermediaries' identities and information that might reveal who they are or where they are located might expose them to security risks.

[24] *Prosecutor v. Thomas Lubanga Dyilo*, Redacted Decision on Intermediaries, (supra n. 13), [30].
[25] Ibid.

On the other hand, Defence teams have been the most active in challenging the use of intermediaries in general and the OTP's reliance on intermediaries in particular. Although also driven by the interests of the accused –their primary role –Defence teams have succeeded to put on the map the negative impact that intermediaries might have on criminal proceedings. Through their submissions and exchanges with the OTP, Defence teams seem to be very much against the use of intermediaries at the ICC. Terminology such as 'liar', 'corrupt', 'tainting evidence' are very often used by the Defence to describe the persons, work and knowledge produced by intermediaries.[26] A precedent for these allegations was set in the Lubanga case whereby intermediaries were accused of tampering with evidence. Even though some of these allegations turned out to be substantiated in the Case against Lubanga and later in the Case against Bemba, there were also several occasions where these allegations were unsubstantiated. Here it is important to note that Defence allegations against intermediaries are usually made in relation to particular individuals in specific cases but they tend to have a negative impact on the role of intermediaries in general.

Though Defence teams are critical of the ways in which the OTP relies on intermediaries, their teams also rely on 'local' contacts to assist them with investigations. For instance Caroline Buisman –who has been a defence lawyer in several cases at the ICC –agrees that defence teams also need to rely on their own intermediaries.[27] However, Defence intermediaries are the least visible in the documents of the Court. One possible explanation might be that Defence teams at the ICC are actually independent and separate from the Court. They are only linked to the Court through the Registry for administration issues only. Because of this, it is even more difficult to raise questions about how the Defence interacts with its intermediaries.

[26] See *Prosecution v. Thomas Lubanga Dyilo,* Judgment pursuant to Article 74 of the Statute, (supra n. 14), [336], *Prosecutor v. Thomas Lubanga Dyilo*, Redacted Decision on Intermediaries, (supra n.13), [58].

[27] The term she uses is 'resource person', Buisman C., 'Delegating Investigations: Lessons to be Learned from the Lubanga Judgment', (supra n. 21) at 53.

The other party that has been very active in producing knowledge on intermediaries as well as representing intermediaries' views in court is the Legal representatives for victims. Similar to the OTP, the legal representative for victims (in different cases) seeks enhanced security measures to protect intermediaries. Without this, they say, it would be impossible for them to have a relationship with their clients. In an interview with the Institute for War and Peace Ms Carine Bapita –legal representative for victims in the Lubanga case –said that intermediaries are the "focal points but most of them are in danger today. I brought the issue before the court but was told there is no provision in any of the rules, so I had to manage by myself and find the money from elsewhere to relocate them."[28] More recently, the legal representative for victims in the case against Mr Laurent Ggagbo and Charles Blé Goudé zealously requested that information about intermediaries with dual status (meaning those who act as intermediaries and prosecution witnesses) be kept from the Defence as this would also reveal the identities of victims who have not agreed for their identities to be disclosed. Trial Chamber I was not satisfied with the legal representative for victims' arguments and found that if the prosecution was willing to disclose this information, it must be material for the defence to prepare for trial.[29]

Together these examples illustrate how knowledge about intermediaries, their needs and views is produced through parties' interactions. Intermediaries' needs and views are indirectly represented and challenged in Court by the prosecution, the defence and the legal representative for victims. Though lawyers, whose primary task is either to prosecute, represent the defendant or victim(s), intermediaries are also

[28] Interview in Glassborow K., 'Intermediaries in Peril' Those who provide vital link between victims and ICC under threat, *Institute for War & Peace Reporting,* (28 July 2008), < https://iwpr.net/global-voices/intermediaries-peril>.

[29] *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé,* Decision on Prosecutor's requests for lifting of certain redactions in victim application forms (ICC-02/11-01/15-465 and ICC-02/11-01/15-493), (supra n. 16), [19].

indirectly represented so long as it serves the interests of the relevant party. Similarly, the ways in which judges at the ICC rule on these matters show that they are also concerned about the Court's interests.

After all, the ICC is a criminal court which makes decisions on case related matters. However, the decisions made about disclosure or lifting confidentiality agreements have had serious impact on intermediaries and how they relate to the units of the Court on the ground.[30] What is more, intermediaries are generally absent from these discussions. Overall, for parties to represent intermediaries is problematic because there is little to no evidence suggesting that intermediaries give this authority to the different lawyers. Even if they did, there would be an issue because different intermediaries might assist several units at the same time. Lastly, prosecution, defence and legal representative for victims lawyers tend to align the account they give of intermediaries with their competing interests.

2.2 NGOs representation of intermediaries

It is believed that NGOs, in general, played an extraordinary role in the process of establishing the international criminal court. Their lobbying activities have and continue to be successful in influencing policy makers on key international criminal justice issues.[31] Over the last two decades, members of the civil society have grown to form a distinct and rich body of literature in which it is clear that NGOs in general have a place of their own which is different from that of intermediaries.[32] Even though, grassroots associations, country level NGOs, regional NGOs and International

[30] I come back to the impact of the space between parties on intermediaries in the following chapter.

[31] International NGOs such as Redress, Global Rights, Féderation 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 are as active on the ground as they are on international platforms.

[32] See Glasius, Marlies. *Expertise in the cause of justice: Global civil society influence on the statute for an international criminal court*, (Oxford University Press: 2010).

NGOs are also intermediaries, certain international NGOs have evolved to represent other intermediaries.[33] It is unlikely that they intended to do this from the start or that it is something that is part of their mandates. Rather, it seems that with the development of the Court, these INGOs have had to also develop and adapt themselves to face new challenges. It is also possible that INGOs might have had to reinvent themselves in order to stay relevant. Another explanation might be that INGOs tend to represent less powerful intermediaries because they operate in different spaces. Because of this the less powerful intermediaries rely (willingly or not) on NGO representation to make their voices heard.

In general, it seems that intermediaries who are also members of civil society as subjects such as INGOs relate to the Court through separate cooperation agreements and are excluded from the meaning of intermediaries in the guidelines on intermediaries. Secondly, members of civil society as subjects occupy a distinct place in the literature on intermediaries. Elena Baylis refers to them as 'capable' third parties,[34] Sara Kendall and Nowen refer to them as the Court's 'actual agents' in the context of international criminal justice,[35] and Deirdre Clancy qualifies them as 'managers' of what emerges from the ground or in her own words they are the 'senior or lead intermediary'.[36] Together these accounts position international NGOs in a slightly different place to other intermediaries.

The distinction made by Haslam is helpful to see power hierarchies that exist in international criminal justice and how this affects intermediaries. The process that led to the adoption of the guidelines on intermediaries exhibits some of the ways in

[33] Although international NGOs are not considered to be intermediaries under the Guidelines on intermediaries, they are referred to as intermediaries elsewhere.

[34] For an account of third parties engagement with the court see E. Baylis, 'Outsourcing Investigations', *UCLA Journal of International Law & Foreign Affairs* 14 (2009), 121, 126-130.

[35]Kendall S. and Nowen S., 'Representational Practices at the International court: The Gap between Juridified and Abstract Victimhood', (2014) Vol: 76, *Law and Contemporary Problems,* at 235.

[36] D. Clancy, 'They told us we would be part of history' Reflections on the civil society intermediary experience in the Great Lakes region', (supra n. 1).

which powerful NGOs represent less powerful NGOs on international platforms. Open Society Foundations together with International Refugee Initiative were among the first to comment on the Draft ICC Guidelines on Intermediaries. At the time they encouraged the ICC to engage in consultations with interested parties, meaning NGOs and persons experienced in working with, or as, intermediaries. Among the invitees was the International Refugee Initiative which presents itself as a bridge between local advocates and the international community.[37] Then there were other international NGOs such as REDRESS and the Victims Rights Working Group who also present themselves in similar terms to IRRI. For instance Redress pointed out that local actors in the Democratic Republic of Congo and Central African Republic had been given little opportunity to make their comments on the draft guidelines on intermediaries.[38]

Such representational practices are problematic for several reasons. In order to better understand my analysis, it is relevant to mention that I apply Kendall and Nowen's argument on representational practices. Firstly, according to Kendall and Nowen, "representational practices of speaking on behalf of others require an appropriation of the voices and authority of the represented".[39] In this case, Redress took upon itself to speak for the local actors who had not received an invitation. Sara Kendall and Nowen continue by pointing out that "In this sense the represented relies on the representative to make them present while the representative relies on the represented to confer their authority".[40] In other words, in-between spaces produce a practice whereby local actors rely on international NGOs 'to make them present' in relevant meetings on intermediaries while international NGOs rely on

[37] See About section on official website, available at < http://refugee-rights.org/about/who-we-are/>, accessed 28 October 2017.

[38] REDRESS, 'Comments on the Draft Guidelines Governing Relations between the Court and Intermediaries', (supra n. 6).

[39] S. Kendall and S. Nowen, 'Representational Practices at the International court: The Gap between Juridified and Abstract Victimhood', *Law and Contemporary Problems,* (supra n. 35), at 236.

[40] Ibid*,* at 237.

local actors for the authority. These practices are not without political implications. For one, encounters between different types of intermediaries operate alongside 'North-South axis'.[41] Put differently, the relationship between civil society as subjects and civil society is not always symbiotic; it is also marked with frictions. Yet accounts of the Court's work on the ground have tended to overlook these realities.

Secondly, the reality of local actors is more complex than what Redress' commentary may suggest. Intermediaries' level of operation (for example country level intermediaries, grassroots intermediaries, community level intermediaries and dual status intermediaries) comes with certain political and ideological implications. An illustration of this can be seen in the work of Leila Ullrich in which she challenges the global/local or top/bottom analytical framings in international criminal law. In one example, Leila Ullrich narrates her search for the 'local' in Uganda. She started her journey in Uganda's capital city Kampala, where country level intermediaries presented themselves as local actors as opposed to global/international, and then she travelled to Gulu and Lira which are the largest and second largest cities in Northern Uganda. There she met with NGO's who presented themselves as 'local' intermediaries as opposed to country level intermediaries because they were closer to the communities affected by ICC proceedings. In the end, Leila Ullrich found the communities affected by ICC proceedings were located in the 'villages' and they had their own intermediaries.[42] Reading Leila Ullrich's experience alongside Adam Branch's work in Uganda shows clearly that encounters between different types of intermediaries in Uganda are marked with political tensions linked to the country's long history of political struggles.[43] In a way it is not surprising that communities affected by ICC proceedings in Northern Uganda have little trust for Southern

[41] Haslam E., 'Subjects and Objects: International Criminal Law and the Institutionalization of Civil Society', (supra n. 11), at 223.

[42] Ullrich L., 'Local Intermediaries, Victims and the Justice Contestations of the International Criminal Court', (supra n. 8), at 549-51.

[43] Branch A., *Displacing Human Rights: War and Intervention in Northern Uganda,* (Oxford University Press: 2011), chapter 6.

intermediaries (located in Kampala). Yet at the international level these two types of intermediaries are regarded and treated the similarly.

On the whole international NGOs, country level intermediaries and grassroots intermediaries engage in different forms of representations at different levels. Thinking about intermediaries as mediators in different sites helps uncover some of the ways in which intermediaries who fall under civil society as object offer a much wider range of claims and options about justice that are different and sometimes compete with the views of civil society as subjects.[44] In addition, less powerful intermediaries' access to certain platforms is limited; consequently they rely on capable NGOs to present their claims before international institutions such as the ICC (and in other contexts to donors). This form of representation is useful because it gives insights into less powerful intermediaries' experiences. However, it also limits our knowledge of intermediaries by filtering what can be known about them. This is an effect of in-between spaces and it is inevitable. Finally, I have demonstrated how making distinctions between types of intermediaries might help us begin to understand how they relate to each other. Intermediaries' world is extremely complex because they move from one category to another and play different roles at different times. Their ability to move from representing others to representing themselves also adds to the difficulty of discerning their role and the consequences attached to it.

2.3 Intermediaries' representation of the Court on the ground

So far, this section has examined the ways in which parties represent intermediaries' views in the chambers of the ICC and also how NGO's represent intermediaries on international platforms. Though the following analysis is far from being a comprehensive account, I will briefly discuss aspects of intermediaries'

[44] Haslam E., 'Subjects and Objects: International Criminal Law and the Institutionalization of Civil Society', (supra n. 11) at 223.

representation of the Court on the ground. There is evidence, on one hand, that different types of intermediaries who assist the units of the Court produce knowledge about the court mainly for the communities affected by ICC proceedings.[45] Some of this knowledge is dictated by the Court through different channels but some of it is beyond the Court's control and is generated through encounters between intermediaries and the communities they serve. What I mean by 'dictated' is the information found on ICC flyers or ICC Outreach leaflets. This information is produced in The Hague, it is specifically designed to present the Court and its activities positively target affected communities. ICC flyers and outreach leaflets tend to cover generic questions such as what is the Court, what is its mandate or how can victims participate in proceedings? What is more, these leaflets present the court as a homogeneous institution.

On the other hand, evidence suggests that intermediaries can also be creative when asked questions for which these leaflets fail to provide answers.[46] According to Ullrich, intermediaries make promises of assistance to victims that the Court is not able to fulfil.[47] Consequently, unfulfilled promises impact negatively the Court's overall engagement with communities affected by its proceedings. However, it is also possible that ICC staff make promises when they travel to affected communities which put intermediaries in a difficult position when those promises are not carried through. One example of this can be read in the 2015 Berkeley Report:

> "She [speaking of an ICC visitor] was promising support, I mean economic kinds of support, such as school fees. Then she went away. But this boy was already so expectant, and his mother was desperate. So when the ICC left, this family kept on following-up with me… Remember, I am from the same locality where she had pledged to help this boy. Now anytime I go to my village, they ask me about this support. If I go there wearing a new shirt, they say 'Oh, it's our money you're spending, it's

[45] The guidelines on intermediaries, (supra n. 7), p 6.

[46] Ullrich L., 'Local Intermediaries, Victims and the Justice Contestations of the International Criminal Court', (supra n. 8), at 555.

[47] Ibid.

> my son's money that you diverted to buy your shirt'… it is so embarrassing. Remember, I'm working as an intermediary out of my desire to help. And I do this voluntarily, with no pay."[48]

These two examples of unrealistic promises made by intermediaries and Court officials show that there are dialogues and discussion yet to be had between intermediaries and the Court. In my view those are the kinds of consultations that would lead to a comprehensive partnership between intermediaries and the Court. As seen with respect to African colonial intermediaries, engaging with different views (sometimes even opposing ones) creates the necessary environment for justice contestations. This is desirable. However, as long as the Registry will come up with rules and expect intermediaries to simply follow them without possible negotiations, these rules are likely to be ineffective on the ground.

Secondly, intermediaries' representation of the Court to victims facilitates victims' participation at the ICC. Without intermediaries some victims would not even be aware that they can participate in proceedings. However, on one occasion the ICC Outreach Unit said that it was working towards avoiding situations where partners or intermediaries would be perceived as "speaking or acting on behalf of the Court.[49] In fact, this situation occurred in the Bemba case where the defence for Jean-Pierre Bemba was concerned with an intermediary who presented himself to victims as "*intermédiaire de la CPI*" (meaning ICC intermediary). It argued that there was "no official status of such designation" and that such a description would have "influenced applicants" to submit applications.[50]

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[48] Human Rights Center, 'The Victims' Court?' A study of 622 Victims Participants at the International Criminal Court, (UC Berkely School of Law: 2015), < https://www.law.berkeley.edu/wp-content/uploads/2015/04/VP_report_2015_final_full2.pdf> accessed, 10 November 2017.

[49] Assembly of States Parties, The Strategic Plan for Outreach was published by the Court in September 2006, on the occasion of the fifth session of the Assembly of States Parties, 5th Session ICC-ASP/5/12 (29 September 2006) available at<http://www.icc-cpi.int/NR/rdonlyres/FB4C75CF-FD15-4B06-B1E3-E22618FB404C/185051/ICCASP512_English1.pdf > [66].

[50] *Prosecutor v. Jean-Pierre Bemba Gombo,* Public Document With confidential ex parte annexes only available to the Registry and the respective common legal representative Decision on 653 applications by victims to participate in the proceedings, PTC III (01/05-01/08-1091) 23 December 2010, [23].

Yet community-based intermediaries are also the Court's presence on the ground. Thirdly, intermediaries represent the Court's "failures" on the ground. Deirdre Clancy's work documents several instances where intermediaries became the target of their own communities because their communities perceived them to be representatives of the Court.[51] Facing reprisals from communities is a direct consequence of the work that intermediaries perform for the Court and how they are perceived by their own communities.[52] Finally, intermediaries might use their position to influence their communities' engagement with the Court. An example of this can be found in Sara Kendall's recent work where she gives an account of one Kenyan intermediary who was 'tempted to influence victims to withdraw' their applications to participate in proceedings.[53]

In this section, it has been explained that different actors represent intermediaries in different spaces and for different reasons. For parties, this representation is tied with their primary responsibilities (to prosecute, defend or represent victims) and for NGOs I have shown how they operate at different levels of power and how they represent less powerful intermediaries. These less powerful intermediaries rely on representation to make their voice heard. The relationship between powerful and less powerful intermediaries is sometimes a relationship of collaboration and at other times it is characterised by friction and political tension. Lastly, this section discussed some of the ways in which intermediaries represent the Court on the ground.

In conclusion to this section I hope to have started a discussion about knowledge production in international criminal law in general and intermediaries in particular. It

[51] Clancy D., ''They told us we would be part of history' Reflections on the civil society intermediary experience in the Great Lakes region', (supra n. 1).

[52] This is further developed in the following chapter on security challenges that intermediaries are faced with.

[53] Kendall S., 'Archiving Victimhood: Practices of Inscription in International Criminal Law ', in Stewart Motha and Honni van Rijswijk (eds), *Law Memory Violence: Uncovering the counter-archive*, (Routledge: 2016) at 13.

is clear that many different entities are involved in producing knowledge for the Court but little is known about them. Parties' production of knowledge about intermediaries tends to be filtered through their (parties) primary duties in terms of legal process. As for international NGOs, they sometimes act as intermediaries and other times as separate entities. Though these organisations have demonstrated their ability to represent less powerful intermediaries, they also interrupt negotiations between these less powerful intermediaries and the Court. Yet such discussions are necessary if the Court desires to enhance its collaboration with on ground intermediaries. Following on this point, I also discussed the knowledge produced by intermediaries about the Court. Essentially, the Court's conception of intermediaries as in-between agents is what leads them to writing leaflets and expect intermediaries to stick to Court produced information about itself. Yet thinking through in-between analysis helps realise that intermediaries are likely to also mediate expectations, ideas and (in this case) views of justice. In other words intermediaries' knowledge production about the Court is likely to traverse different filters or serve different objectives the same way knowledge produced about them does. The following section will engage with the issue of local politics in the relationship between intermediaries and the ICC.

3. Knowledge production, transitional justice and political transition

The production of knowledge in post-conflict situations is very dynamic and highly contested. Knowledge production about armed conflicts attracts different communities, policy makers, lawyers, technologies and scholars from different fields. In addition, knowledge on armed conflicts where international crimes took place is collected and produced through different methods, for different entities and thus different purposes. It is the focal point of narratives and histories of conflicts, crimes and victims. The kind of knowledge that I am interested within this chapter is data collected through intermediaries for the purposes of international criminal

prosecutions before the ICC as well as the data collected on intermediaries. Now, the question that this section seeks to answer is whether local politics influences interactions between intermediaries and the Court.

3.1 Intermediaries and post-conflict dynamics

Post-conflict environments characterised by accentuated pain and hope at the same time. As communities affected by international crimes struggle to move on from war and conflict they also work very hard to rebuild their communities for a better future. It is not surprising that some would see such environments as an opportunity for communities that have been excluded from governance in previous regimes to make their voices heard. Intermediaries can provide that access through participation in transitional justice mechanisms, peace processes and the documentation of the root causes as well as the aftermath of political violence. One such example can be found in the assistance that intermediaries give to units of the ICC on the ground despite life threatening security challenges. Community based intermediaries are likely to be individuals from the communities affected by ICC proceedings such as community leaders, religious leaders such as pastors, or whoever can act as a bridge between their community and the ICC.

Some intermediaries can also have dual status when they act as intermediaries and victims and/or witnesses in particular cases. For many intermediaries and their communities, participating in international criminal justice represents an opportunity to be recognised as victims of political violence, an opportunity to document the injustice they suffered and most importantly give the international communities access to stories of victimhood and survival. And so, intermediaries' involvement in international justice processes is closely linked to local political struggles.[54] An examination of how local politics affects intermediaries helps shed light on which

[54] Here local is used to signify country level.

voices are heard and which voices are silenced. This is important because the stories that are retained by international institutions also serve in political races for legitimacy in post-conflict situations.

Political dynamics in situation countries influence the relationship that communities relevant to ICC proceedings will have with the ICC. In the case of intermediaries, it is possible that they get involved with many different actors which further complicate their role. For instance, some intermediaries may align themselves with local authorities while others perceive local authorities to be the reason for ICC presence in the first place. It is the lack of trust in local authorities that pushes some of those intermediaries to partner with or turn to 'international' actors despite security risks.[55] For example, some NGOs might be inclined to work more with certain ethnic groups more than others depending on the nature of conflict.[56] Of course these categories are not clearly defined and cannot be easily dissociated one from the other which, further testifies to the complexity of the roles played by intermediaries in 'acting as bridges' between their communities and the ICC. An illustration of how local politics influences the ways in which relevant communities interact with the Court can be found in the Kenyan situation. I will provide deeper analysis of this phenomenon in chapter 5. But what is important to understand here is that intermediaries play different roles in post-conflict countries. Put differently, intermediaries' relationship with local authorities shapes both their relationship with the Court and communities affected by ICC proceedings.

[55] On lack of trust in local authorities see for example the Kenyan situation (Figure 4), Gachigua S.G., 'Discursive Reconstruction of the ICC –Kenyan Engagement through Kenyan Newspapers' Editorial Cartoons', in Clarke M.K, Knottnerus and De Volder (eds), Africa and the ICC, Perceptions of Justice, (Cambridge University Press: 2016), p 201.

[56] This was the case in Kenya and Uganda where it was argued that civil society tends to mirror collapsed political systems. See Ullrich L., 'Local Intermediaries, Victims and the Justice Contestations of the International Criminal Court', (supra n. 8) at 550.

3.2 Resisting ICC involvement

The intermediaries who navigate the in-between space that is a site of interactions between affected communities, their countries and the ICC are sometimes put in a difficult position where they embody resistance against international criminal prosecutions. This resistance takes place in many different ways and produces different implications.

First of all, resisting international prosecutions in the 21st century is a difficult position for anyone to be in because powerful actors in international criminal justice almost universally view ICC interventions as a desired mechanism for transitional justice. What is overlooked in this analysis is that transitional justice takes place alongside political transition and intermediaries are often at the heart of those dynamics, mediating interactions between different actors and pursuing different objectives. Scholars and policy makers may have some level of freedom to express why ICC intervention may not be ideal but for intermediaries, resisting ICC intervention means resisting the 'global' narrative of a particular conflict and in some cases this also means resisting local power structures. Uganda is a great example of this since the (current) President of Uganda Joweri Museveni seized power in 1986, he faced fierce opposition including the Lord's Resistance Army (LRA). The ICC got involved in the situation of Uganda back in 2004 to prosecute alleged war crimes and crimes against humanity committed in the context of a conflict between the LRA and the national authorities in Uganda since 1 July 2002.

Already, before the ICC prosecutor decided to pursue any case against Ugandan authorities, LRA and communities affected by this conflict were involved in processes of peace and justice.[57] And so the Court's involvement in the situation met several

[57] Hendrickson D. and Tumutegyereize K., Dealing with complexity in peace negotiations: Reflections on the Lord's Resistance Army and the Juba talks, (2012) *Conciliation Resources*, available at <

criticisms[58], but the most remarkable was that it appeared as though the ICC had sided with Ugandan authorities and in doing so lost its legitimacy and impartiality hence disrupted peace processes.[59] For many of the Ugandan people affected by war in Northern Uganda, ICC intervention has been a painful experience because its arrest warrants served as basis for military interventions which caused more victims but also because some of them wanted justice solutions other than what the ICC offers.[60] In this context, it would likely be difficult for intermediaries who come from outside affected communities to gain the necessary trust because they are perceived as pro government.[61]

Secondly, resisting ICC involvement may be part of national policy. Here intermediaries act in harmony with their states to discourage interactions between communities affected by political violence and the ICC. This is illustrated in the Kenyan situation where the national rhetoric was in favour of resistance rather than support, all in the name of *umoja* (unity).[62] At state level, resistance was ideological through references to pan-Africanist or colonial concepts. It was also practical in the sense that the ICC struggled to obtain cooperation from the state. Lastly, resistance may come in unexpected ways as it was the case for some victims who wrote a letter to the ICC asking to be removed from the list of victim participants. In their

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http://www.operationspaix.net/DATA/DOCUMENT/6894~v~Dealing_with_Complexity_in_Peace_Negotiations__Reflections_on_the_Lord_s_Resistance_Army_and_the_Juba_Talks.pdf>.

[58] Branch A., 'Uganda's Civil War and the Politics of ICC Intervention', (2007) Vol 21:2 *Ethics & International Affairs,* at 179-198.

[59] Branch A., *Displacing Human Rights: War and Intervention in Northern Uganda,* (supra n. 43), p190.

[60] See for example Baines E.K., 'The Haunting of Alice: Local Approaches to Justice and Reconciliation in Northen Uganda 1', (2007) Vol. 1:1 *International Journal of Transitional Justice,* 91-114.; Apuuli K. P., 'Peace over Justice: The Acholi Religious Leaders Peace Initiative (ARLPI) vs the International Criminal Court (ICC in Northern Uganda', (2011) Vol 11: 1 *Studies in Ethnicity and Nationalism,*116-129.

[61] In a way it is not surprising that "most program managers in Uganda are Acholi" as can be seen in Ullrich's work. see Ullrich L., 'Local Intermediaries, Victims and the Justice Contestations of the International Criminal Court', (supra n. 8), at 550.

[62] See for instance Kendall S, 'UhuRuto' and Other Leviathans: The International Criminal Court and the Kenyan Political Order', (2014) 07 *African Journal of Legal Studies,* 399-427.

explanation, they expressed their disappointment in the Court and decided not to be part of its proceedings.[63]

Thirdly, communities affected by ICC proceedings may resist the Court's work or even sabotage its work through intermediaries. For example, supporters of accused persons may influence victims and witnesses interactions with the Court and impact intermediaries' credibility and reliability. This is evident in the Lubanga case where, according to Gaëlle Carayon, most child soldiers and NGOs on which the OTP relied on came from the same community.[64] It follows that in post-conflict situations, members of the communities affected by ICC proceedings can easily be victims and perpetrators at the same time. While the Court should enhance its partnerships with intermediaries, it should also take the necessary steps to avoid a naïve relationship with intermediaries. According to IRRI, OTP investigators are said to have trusted 'anyone who called themselves civil society'.[65] Practically, it may be the case that investigators need to collaborate more with political analysts to strengthen their understanding of local politics and power dynamics. As De Vos argued before, discussions about intermediaries should not be dominated by 'ill-intentioned' intermediaries because intermediaries are in many situations best placed to conduct investigations.[66] Rather, the Court should invest in finding solutions to address these problems. Excluding intermediaries or decreasing their involvement does not address these problems.

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[63] See Kendall S, 'Archiving Victimhood: Practices of Inscription in International Criminal Law ', (supra n. 53), at 13.

[64]Gaëlle Carayon, "Increased Use of Intermediaries: Increased Discontent," in ACCESS: Victims' rights before the International Criminal Court, Victims' Rights Working Group Bulletin, issue 20, (Spring 2012), 4-5

[65] IRRI, 'Steps Towards Justice, Frustrated Hopes: Some Reflections on the Experience of the International Criminal Court in Ituri', Just Justice? (2012) Civil Society, international Justice and the Search for Accountability in Africa, Discussion paper no 2, p20.

[66]De Vos C, 'A catalyst for justice? The International Criminal Court in Uganda, Kenya and the Democratic Republic of Congo', (2016) Ph.D Thesis Leiden University, p106-7, Available at < https://openaccess.leidenuniv.nl/bitstream/handle/1887/38562/A_Catalyst_for_Justice_DE_VOS.pdf?sequence=15> accessed (25 October 2018).

To summarise, in most situations, responses to ICC involvement are not divided in simple categories of those who support ICC prosecutions and those who oppose it. Rather, responses are often as complex as the conflicts that led to political violence in the first place. Every country's historical background is important to take into account in order to understand power relations in situation countries but thinking about intermediaries through in-between analysis helps identify which constituencies are likely to be heard and which voices are likely to be overlooked. As seen throughout this chapter, some intermediaries access international platforms while others do not, other times country level intermediaries are not best placed to act as mediators between the Court and the communities affected by its proceedings due to political or ethnic tensions within a situation country. It is also possible that if an ethnic group is dominant in an intermediary NGO, other communities may be less trusting which is likely going to limit access to victims and witnesses. On the surface interactions between intermediaries, states and international institutions have received attention in academic literature. However, there are other sites of interactions where subtle power dynamics take place. These new sites present opportunities and challenges to those who navigate them.

4. Concluding remarks

As mentioned in the previous chapter, in-between spaces are productive sites of interaction in international criminal law. This chapter focused on the way in which knowledge is produced, subjects are represented and power is exerted in in-between spaces. I explored three main points: intermediaries' visibility at the ICC, how intermediaries and other actors rely on representation to navigate in-between spaces, and lastly how intermediaries navigate between transitional justice and political transition.

With respect to knowledge production, this chapter has shown that while intermediaries produce knowledge for the Court, the knowledge we have of them is limited. The main reason to explain intermediaries' partial visibility is the nature of their role, their in-between status. Because intermediaries' are most needed in places they can access without being seen and without raising suspicion, they naturally operate in sites that are not accessible by everyone. In addition, intermediaries are made partially invisible because the Court is still struggling to recognise them as part of its structure. Finally, intermediaries' invisibility is caused by Court processes through, for example, the practice of redactions. I argued that while redactions are necessary for the proper running of criminal cases, questions must be raised about how the Units of the Court interact with intermediaries and what types of agreements exist between them.

With respect to representation, I discussed how in-between spaces create new forms of representation in international criminal law. Intermediaries rely on representation to make their voices in sites they cannot access themselves. For instance, I discussed how parties at the ICC represent intermediaries. It is both an opportunity and a challenge for intermediaries to be represented by parties because their priorities are already assigned to prosecuting, defending or representing victims. As a result, parties' representation of intermediaries is calculated to benefit their position. Thus, it is not surprising that intermediaries are not represented on institutional matters. However, Parties' representation of intermediaries is also an opportunity for intermediaries to make their voices heard before judges because decisions taken in court affect intermediaries and their work on the ground. I also discussed some of the ways in which senior, lead or capable intermediaries have engaged in representational practices. Essentially, I argued that the role played by international NGOs is confusing because their status as separate entities (that only interact with the Court through cooperation agreements) and as intermediaries overlap. What emerges from this chapter is that their relationship with less powerful intermediaries

is not always symbiotic; it is marked with friction. Ignoring these realities will only lead policy makers at the ICC to create weak frameworks as can be seen with the guidelines on intermediaries. Finally, I also discussed some of the ways in which intermediaries represent the Court to their communities. I argued that the Court's efforts to control or regulate this form of representation are likely to fail. It is an effect of in-between spaces, intermediaries are the primary mediators in these sites and they can use their position to represent the Court according to its expectations. At the same time, intermediaries can use their position to sabotage or resist the Court's work. These kinds of challenges are inevitable. Relying less on intermediaries, training intermediaries or even monitoring their every move cannot fully regulate their interactions with communities affected by its proceedings. What is needed therefore is working with intermediaries to find solutions to these problems.

In relation to power, I have shown throughout this chapter that in-between spaces are also sites where subtle power dynamics take place. This is visible in terms of how parties represent intermediaries or through frictions between different types of intermediaries. In the last part of the chapter, I focused the in-between space between transitional justice and political transition. Intermediaries operate in a dynamic environment where transition justice takes place alongside political transition in situation countries. I argued that Political dynamics in situation countries influence the relationship that communities relevant to ICC proceedings will have with the ICC. Local politics influences interactions between intermediaries and affected communities, some intermediaries have shown acts of resistance in unexpected ways. While some ill-intentioned intermediaries may sabotage the Court's work, their conduct should not dominate discussions about the role of intermediaries more broadly. What is more, some intermediaries' resistance to the Court's work merit attention as they enrich justice debates with different views.

CHAPTER 5: Time to share responsibility –Intermediaries' security

In this fifth chapter I continue the discussion by focusing on the question of security. Intermediaries play a key role in insuring the security of ICC staff, victims, victims – witnesses, victims-intermediaries in the field. In addition, their own security is often threatened as a result of their relationship with the Court. A key element of intermediaries' function is their ability to move and collect information with discretion. In some areas relevant to ICC proceedings, it is difficult for strangers to go into those places without being noticed. Thus intermediaries are essential to preserve the security of ICC staff, victims and potential witnesses.

Researchers have not discussed intermediaries' security in much detail even through it has been a controversial and much disputed subject between lawyers at the ICC. Since its very first case in 2004, the Court's operation on the ground depends heavily on different types of intermediaries to carry out its duties. As with any court, the security of relevant persons involved in a case is taken very seriously. In a domestic setting, law enforcement and courts' security staff would generally fulfil this role but ICC investigations require different logistics to ensure that those put at risk as a result of their involvement with the Court are protected. The ICC usually intervenes in countries that are going through or are transitioning from mass political violence which means that the units of the Court must work in a particularly dangerous environment. In some situations rebel groups are still active while in others heads of states are the target of investigations. These two examples illustrate the kind of climate in which intermediaries operate. Their security is often put at risk as a result of their activities as human rights activists, experts, interactions with UN peacekeeping missions or their interaction with the international Criminal Court (the Court).

The purpose of this chapter is neither to identify security threats against intermediaries *per se* nor to examine the ways in which the Court responds/should to them. Rather, this chapter is interested in the ways in which in-between spaces produce particular forms of security opportunities and challenges for intermediaries and those who rely on their services. As Luis Morenno Ocampo –former prosecutor of the ICC – once put it "living where they live, intermediaries are at real documented risk on account of the activities they undertake for the OTP and for other organs of the Court".[1] I argue, therefore, that the Court should engage more with intermediaries and have more discussions about how to ensure the security of those who mediate the Court's work on the ground. What is more, given the Court's heavy reliance on intermediaries and its inability to protect them, it would benefit both the Court and intermediaries if there were a sharing of responsibility between the Court and other actors of international criminal justice (International NGOs, UN or States).

This chapter will first examine the ICC legal framework on the protection of intermediaries and discuss its limits. I argue that it is limited and ineffective. Then I will move to discuss the ways in which intermediaries' security problems are presented and challenged at the ICC. I argue that parties mediate intermediaries and their security issues before ICC judges. Lastly, I will discuss the roles played by different actors including states, international NGOs and the UN in resolving the issue of intermediaries' security. Despite their flaws, there are more discussions to be had in the site of mediation between the Court and international criminal justice stakeholders in order to protect intermediaries and ensure that they are able to assist the Court without risking their lives.

[1] *Prosecutor v. Thomas Lubanga Dyilo*, Redacted Decision on Intermediaries, TC I (ICC-01/04-01/06-2434-Red2), 31May 2010, [61].

1. Limited legal framework

1.1 The guidelines on intermediaries

Before proceeding to examine the ways in which thinking through in-between analysis might help us think differently about intermediaries' security, it will be necessary to understand what the current legal framework is and how it operates. The Rome statute and the rules of evidence and procedure do not provide for a legal framework through which intermediaries' security problems can be addressed. However, according to the guidelines on intermediaries the management of risks to and protection of intermediaries fall under the responsibility of specialized entities of the Court (VWU, SSS) and the Prosecution.

According to the guidelines on intermediaries, the court has a duty to prevent and manage security risks to intermediaries. The general rule is that the court should avoid placing intermediaries in a situation where protective measures may become necessary.[2] Despite the effort shown in the guidelines to create a framework through which intermediaries' security problems might be addressed, these guidelines are still limited. The wording of the security section in the guidelines on intermediaries is vague and makes it difficult to determine how and whether they are followed in practice. Then there is the scope of the guidelines which is limited to a narrow group of intermediaries and consequently fails to address security needs for all the other intermediaries who voluntarily assist the units of the court on the ground. Another point is that international NGOs sometimes act as intermediaries and at other times as separate entities whose security policies do not depend on whether or not the ICC can protect them.

In addition, even though the guidelines specify that 'the need for and level of protection' is to be determined on a case-by-case basis, it is not entirely clear how

[2] International Criminal Court, 'Guidelines Governing the Relations between the Court and Intermediaries' for the Organs and Units of the Court and Counsel working with intermediaries, (2014) International Criminal Court, p14. (Hereinafter the guidelines on intermediaries).

such determinations are implemented in practice. The majority of studies published on intermediaries, to date, question the extent to which the guidelines are enforceable. On possible explanation may be that the ICC continues to struggle with funding these kinds of initiatives as Emily Haslam and Rod Edmunds pointed out.[3] This view is also supported by Leila Ullrich who writes that the promise of security made by the Court to intermediaries is somewhat 'elusive'.[4] Lastly, by focusing exclusively on what the responsibilities of different units toward intermediaries might be, the guidelines overlook the role played by other actors such as international NGOs or UN missions in relevant countries. The drafters of the guidelines failed to acknowledge the ways in which different units of the court, especially the office of the prosecutor, manage other security risks through intermediaries. What this analysis indicates is that efforts to adopt protective measures for intermediaries through the guidelines are weak and likely to be ineffective. The guidelines are limited in power, scope and budget.

1.2 Case law/practice

Having discussed the limits of the guidelines on intermediaries, I will now move on to discuss whether the Rome Statute provides for intermediaries' security. The prosecutor has, on several occasions, relied on different provisions of the Rome Statute to seek protective measures for its intermediaries. These provisions predominantly relate to procedural protection –as opposed to physical or psychological protection – and they include articles 54(3)(e), 54(3)(f), 43(6), and 68(1).

The issue of intermediaries' security was first brought up before the court in the case against Mr Lubanga. At the time, the prosecution refused to disclose the identities of

[3] See Haslam E. and Edmunds R, 'Managing A New 'Partnership': 'Professionalization', Intermediaries and the International Criminal Court (2012) Vol. 24:1 *Criminal Law Forum*, 49-85.

[4] Ullrich L., 'Local Intermediaries, Victims and the Justice Contestations of the International Criminal Court', (2016), Vol. 14: 3, *Journal of International Criminal Justice*, at 556.

the intermediaries who assisted its team in the DRC. As a result of this Trial Chamber I found that Mr Lubanga's right to a fair trial had been violated and ordered his release.[5] When the Prosecutor was ordered to disclose material to the Defence in this case, he invoked article 54(3)(e) of the Rome Statute and the cooperation agreement between the OTP and the UN arguing that information obtained under confidential agreements could not be disclosed.[6]

Article 54(3)(e) states that

'[the Prosecution shall] 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 purpose of generating new evidence, unless the provider of the information consents'.[7]

Article 18 (3) of the Negotiated Relationship Agreement between the International Criminal Court and the United Nations states that:

'The United Nations and the Prosecutor may agree that the United Nations provide documents or information to the Prosecutor on condition of confidentiality and solely for the purpose of generation new evidence and that such documents of information hall not be disclosed to other organs of the Court or to third parties, at any stage of the proceedings or thereafter, without the consent of the United Nations.'[8]

Trial Chamber I was not satisfied by the prosecution's arguments that disclosure would put intermediaries at risk and ordered the prosecution to disclose information

[5] *Prosecution v. Thomas Lubanga Dyilo,* (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), TC I (ICC-01/04-01-06/1401), 13 June 2008. Also see commentary in De Vos C., ''Someone who comes between one person and another': Lubanga, local cooperation and the Right to a fair trial', (2011) 12, *Melbourne Journal of international law,* at 217-236.

[6] The Rome Statute Article 54(3)(e) provides that the Prosecutor shall 'agree not to disclose, at any stage of the proceedings information that the Prosecutor obtains on the condition of confidentiality of the information consents'; The Cooperation agreement between the OTP and the UN provides that '[the UN] can provide documents or information to the Prosecutor on condition of confidentiality and solely for the purpose of generating new evidence and that such documents or information shall not be disclosed to other organs of the court or to third parties, at any stage of the proceedings or thereafter, without the consent of the United Nations. See Relationship agreement between the United Nations and the International Criminal Court 2283 UNTS 195 article 18 (3).

[7] Rome Statute of the International Criminal Court, (2002) Article 54 (3) (e).

[8] *Relationship Agreement between the United Nations and the International Criminal Court*, 2283 UNTS 195 (Signed and entered into force 4 October 2004) article 18 (3).

to the Defence. According to the Judges of Trial Chamber I, the prosecution had abused article 54 (3)(e) by making it 'routine' rather than 'exceptional' practice to obtain information under confidentiality clauses.[9] In addition to article 54 (3) (e), the prosecution also invoked article 54 (3) (f) which states that:

> '[the Prosecutor shall] Take necessary measures, or request that necessary measures be taken, to ensure that the confidentiality of information, the protection of any person or the preservation of evidence'.[10]

The prosecution therefore presented to the court that their office is 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'.[11] Clearly, the logic of the prosecution's argument is similar to that of the guidelines on intermediaries in the sense that the units that employ intermediaries are responsible for their security.[12] Having said that, the Lubanga case shows that it is not enough to 'promise' procedural protection through confidentiality agreements. Rather, these types of protective measures have to be balanced with defence rights. On the one hand, chambers have a double obligation to respect confidentiality agreements and ensure that the rights of the accused are respected. On the other hand, the prosecution may enter into confidentiality agreements even whilst having an obligation to disclose all relevant information to the defence. Now, to return to

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[9] *Prosecution v. Thomas Lubanga Dyilo ,* (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), (supra n. 5), [72-74].

[10] Rome Statute of the International Criminal Court, (2002), Article 54 (3) (f).

[11] Ibid*,* Rule 59 (2) of the Rules of Procedure and Evidence addresses the issue of provision of notice in certain situations requiring that the issue of such notice be consonant with the duty of the Court regarding

[12] The same disclosure problems encountered in the DRC cases also appear in the Kenyan cases. In 2013 the Prosecution was ordered to disclose to the Ruto and Sang Defence teams the list of witnesses with whom each intermediary had had contact and for what purpose. The Chamber was of the view that knowing the number of witnesses with whom an intermediary had contact may provide an important context to the assessment of the testimony of those witnesses. In addition, the Prosecution was ordered to provide the Defence teams with the schedule of intermediary/witness contacts including dates, locations and persons present. Here again the Chamber considered that this information was key for the Defence to prepare its case. See *The Prosecutor v. William Samoie Ruto and Joshua Arap Sang,* Decision on Disclosure of Information related to Prosecution Intermediaries, TC V(A) (ICC-01/09-01/11) 4 September 2013, at [52].

my illustration, this matter was brought before the Appeals Chamber which ruled that Trial Chamber I had an obligation to respect confidentiality agreements unless the information provider had given their consent.[13] On the whole, the Lubanga case illustrates some of the steps that the prosecution took to avoid the disclosure of prosecution intermediaries' identities and to share information with the defence. However, in cases where information provider does not consent to the disclosure to the Defence, the Chamber will have to 'determine whether and, if so, which counter-balancing measures can be taken to ensure that the rights of the accused are protected and that the trial is fair'.[14]

Other provisions which may be invoked by the prosecution include article 68 (4) of the Rome Statute and article 43 (6) of the Rome Statute.

Article 68 (4) states that:

> "The Victims and Witnesses Unit may advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counselling and assistance as referred to in article 43, paragraph 6."

Article 43 (6) states that:

> The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence.

These two provisions rest on the Prosecutor's obligation to take protective measures as provided by article 68(1) of the Rome Statute which refers to the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. According

[13] *Prosecutor v. Thomas Lubanga Dyilo,* Judgment on the Appeal of the Prosecutor against the Decision of the 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 Proceedings of the Accused, Together with Certain Other Issues Raised at the Status Conference on 10 June 2008', AC (ICC-01/04-01/06), 21 October 2008, [48].
[14] Ibid*,* [48].

to Otto Triffterer, a commentator on the Rome Statute, these provisions should be interpreted as to include persons at risks as a result of their activities for the Court.[15] The ways in which these provisions are enforced in the courtroom is illustrated by two Appeals Chamber decisions. The Appeals Chamber confirmed that a broader category of persons other than victims and witnesses can rely on the Court for protection as 'persons at risk on account of the activities of the Court', or as potential prosecution witnesses.[16] Briefly, the Prosecutor has the power to "take necessary measures, or requests that necessary measures be taken, to ensure the confidentiality of information the protection of any person or the preservation of evidence".[17]

According to William Schabas although article 54 generally applies to the investigation only, Trial Chamber I adopted a purposive interpretation in the Lubanga case by saying that it was "persuaded that this provision, notwithstanding where it is included in the Statute, has general applicability throughout all stages of the pre-trial and trial stage".[18] For him, this article demonstrates an intention that protection should, in principle, be available to anyone at risk by investigations of the Prosecutor.[19]

As was pointed out in the beginning of this sub-section, the ways in which intermediaries' security problems are dealt with in the courtroom has for the most

[15] Article 68(1) of the Rome Statute states that "The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. […]", Triffterer O., *Commentary on the Rome Statue of the International Criminal Court –Observer's Notes, Articles by Article,* (Verlag C. H.Beck: 2008), pp 10867.

[16] 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', *Prosecutor v Germain Katanga,* AC (ICC-01/04-01/07 OA), 13 May 2008.

[17] 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', *Prosecutor v Germain Katanga,* ICC-01/04-01/07 OA, AC, ICC 13 May 2008.

[18] *Prosecutor v.Thomas Lubanga Dyilo*, Reasons for Oral Decision lifting the stay of proceedings, TC I (ICC-01/04-01/06-1644) 23 January 2009.

[19] Schabas W., *The International Criminal Court: a commentary on the Rome Statute*, (Oxford University Press: 2010), p 1026; *Prosecutor v Katanga et al.,* 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', AC (ICC-01/04-01/07), 13 May 2008, [44].

part been about balancing the interests of the prosecution and the rights of the accused. In one sense the Court missed an opportunity to clearly set a precedent on the issue of security and prepared the ground for disputes over the same issue between different parties of the Court. In a system where different chambers continue to use different definitions of who an intermediary is, it remains unclear the extent to which articles 68 (4) and 43 (6) apply to intermediaries more generally.

Secondly, the issue of security is not something that can be discussed in open court because such discussions would compromise all efforts to protect the people who are put at risk as a result of their work with the court. Because of this, it is difficult for researchers or observers to access questions and analyse certain decisions such as decisions made behind closed doors, confidential agreements or other information that is simply not accessible to the public. Here the argument is not that all those decisions should be made public; rather, the argument is that it is difficult to examine how exactly the provisions cited above are applied in reality. Thirdly, there are questions that remain unanswered: Can individual intermediaries rely on any of the Rome Statute's articles or the guidelines on intermediaries to challenge the units that employ them? Also, considering that the Court is not bound by the guidelines' definition of the term intermediary, to what extent can volunteer intermediaries challenge the units that they assist?

This section discussed the issue of security from the perspective of the law and the prosecution. It showed that even though there is no legal framework through which intermediaries' security is addressed as such, the guidelines on intermediaries articles 54(3)(e), 54(3)(f), 43(6), and 68(1) provide for aspects of intermediaries' security. However, these provisions are limited in scope and it is difficult to examine how exactly they are implemented on the ground without exposing intermediaries' to greater security risks. The following section will discuss how the issue of intermediaries' security is a contested matter in the in-between space navigated by

the prosecution, the defence, legal representatives for victims and how judges rule on these disputes.

2. Negotiating intermediaries' security in The Hague

Turning now to the usefulness of in-between analysis, this section argues that Court processes expose intermediaries to security risks in addition to what intermediaries are already faced with on the ground. Through an interrogation of the ways in which intermediaries' security problems are presented and contested by the parties at the ICC, I show how intermediaries are mediated in the courtroom. Continuing with the Lubanga case, it can be seen that intermediaries' security problems came to the surface in heated disputes between the defence, the prosecution and Trial Chamber I.

As explained earlier, the prosecution presented intermediaries' security problems and defended intermediaries against Trial Chamber I' orders to disclose their [intermediaries] identities to the Defence.[20] But the Defence made the question of intermediaries (including their security) a matter of contestation and made it a central part of Defence strategy in the case against Lubanga and other cases before the Court.[21] Intermediaries soon found themselves in-between parties' arguments during the proceedings and this had an impact on their security in the field and their willingness to assist the Court.[22] According to Clancy, intermediaries on the ground were disappointed to find that 'confidentiality and anonymity promised by the Court

[20] *Prosecution v. Thomas Lubanga Dyilo,* Decision on the Consequences of Non-Disclosure of Exculpatory Materials covered by Article 54 (3)(e) Agreements, TC I (ICC-01/04-01/06/1401), 13 June 2008, [91-93].

[21] Other Cases such as *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus,* Defence Application to restrain legal representatives for the victims a/1646/10 and a/1647/10 from acting in proceedings and for an order excluding the involvement of specified intermediaries, PTC I , (ICC-02/05-03/09-113), 6 December 2010, [14-20]; *Prosecution v. Thomas Lubanga Dyilo,* Judgement pursuant to Article 74 of the Statute,TC I, (ICC-01/04-01/ 06-2842), 14 March 2012, [178-182]; Institute for War & Peace Reporting, ICC Intermediaries Allegedly Concocted Evidence, 12 February 2010; *Prosecution v. William Samoei Ruto and Joshua Arap Sang,* Public redacted version of 'Ruto defence request to appoint an amicus prosecutor'', 2 May 2016, TC V(A) (ICC-01/ 09-01/11-2028-Red), 2 May 2016, [1-4].

[22] See Clancy D., ''They told us we would be part of history' Reflections on the civil society intermediary experience in the Great Lakes region', in De Vos C., Kendall S., Stahn S. (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions,* (Cambridge University Press: 2015).

is not absolute'.[23] This is visible in the exchanges of documents between the prosecution, the defence, victims representatives, Trial Chamber I orders and the Appeals Chamber judgment which are put in conversation below.

On 8 June 2010, the Victims and Witnesses Unit (VWU) informed the Trial Chamber that the implementation of protective measures for intermediary 143 would be delayed until the week of 5 July 2010. At the time, Mr Lubanga Dyilo was scheduled to start the questioning of intermediary 321. On 6 July 2010, the Chamber and the Parties were informed that intermediary 143 was no longer satisfied with the protective measures offered to him by VWU and that he wished the level of protection to be 'stepped up'.[24] Then the Prosecutor informed the Trial Chamber that intermediary 143 was requesting a written proposal of protective measures and that the disclosure of his identity could be delayed until 16 July 2010 or later. But for The Trial Chamber I additional delay would inevitably be substantial. In particular, this delay had to be seen in the context of "the very considerable delays that have already been experienced in relation to this trial".[25]

In order to move the trial forward while adequately protecting intermediary 143 from any risks from disclosure of his identity, Trial Chamber I ordered a 'limited' disclosure of the identity of intermediary 143 to counsel for Mr Lubanga Dyilo, her assistants in the courtroom and the team's resource person in the Democratic Republic of the Congo only.[26] According to Trial Chamber I there was no increased risk to intermediary 143 from limited disclosure of his identity. As for the victims' representative, they were of the view that victims too had a right to a fair trial which

[23] Ibid, p 229.

[24] *Prosecutor v. Thomas Lubanga Dyilo (Transcript of Hearing)*, TC I (ICC-01/04-01/06-T-310-RED) 6July 2010, 63-5.; *Prosecution v. Thomas Lubanga Dyilo,* Defence Response to the "Prosecution's Document in Support of Appeal against Trial Chamber I's Oral Decision on the release of Thomas Lubanga Dyilo" dated 22 July 2010, AC (ICC-01/04-01/06), 29 July 2010, [8].

[25] See *Prosecutor v. Thomas Lubanga Dyilo*, Transcript of Hearing, TC I (ICC-01/04-01/06-T-3 10-RED), 6 July 2010, [63-65].

[26] Ibid.

should be guaranteed by Trial Chamber I.[27] Victims' representatives added that Trial Chamber I did not give enough time to the VWU to propose alternative security measures.[28] They also asked that the Prosecutor's consideration of issues of protection should not be seen as abuse of process.

In the end when the Appeals Chamber was seized of the matter, the question of whether intermediaries had received adequate protective measures was not raised.[29] The prosecution did not appeal any of the disclosure orders causing the Appeals Chamber to only address the issue of whether the prosecution refused to comply with the orders of the Trial Chamber and the propriety of the Trial Chamber's decision to impose a stay of proceedings as a consequence.[30]

This account sheds additional light on the role of Chambers in the security of intermediaries. It is argued here that Trial Chamber I potentially aggravated the security of intermediaries for two reasons. First, the current legal framework only authorises the OTP in consultation with the VWU to take or ask that measures be taken to protect intermediaries. But if a Chamber is seized of the matter the duty shifts from the Prosecutor to the Chamber. In the Lubanga case cited above, Trial Chamber I decided that revealing the identity of intermediary-143 to Counsel for Mr Lubanga, her assistants and defence intermediary in the DRC would not endanger intermediary-143' security.

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[27] See *Prosecutor v. Thomas Lubanga Dyilo,* Transcript of Hearing, TC I (ICC-01/04-01/06-T-3 11-RED), 7 July 2010, p 11-13-25.

[28] See footnote in *Prosecutor v Thomas Lubanga Dyilo*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled "Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU", AC (ICC-01/04-01/06 OA 18), 8 October 2010.

[29] See *Prosecution v. Thomas Lubanga Dyilo,* Defence Response to the "Prosecution's Document in Support of Appeal against Trial Chamber I's Oral Decision on the release of Thomas Lubanga Dyilo" dated 22 July 2010, AC (ICC-01/04-01/06), 29 July 2010, pp 7-12.

[30] See *Prosecutor v Thomas Lubanga Dyilo*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled "Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU", AC (ICC-01/04-01/06 OA 18), 8 October 2010.

In addition, Trial Chamber I disregarded intermediary-143 request for written protective measures. These decisions were not made in consultation with the VWU and the Chamber did not explain how it came to that conclusion. Understandably, Trial Chamber I was concerned with the length of proceedings and its responsibility to watch over Mr Lubanga's right to a fair trial. But the Prosecutor's failure to appeal the two disclosure orders also limited the Appeals Chamber. In a sense, the Prosecution missed an opportunity to raise questions about protective measures for intermediaries. Second, this account also shows that intermediaries find themselves between the interests of the units that employ them and the interests of the Chambers (or judges).

What emerges from the analysis above is that the promise made by units of the Court to intermediaries in the field about procedural protection through confidentiality agreements collapsed. The Lubanga case shows that judges are consumed with balancing rights between parties in proceedings irrespective of what agreements have been entered into by parties previously. The issue is that what intermediaries are told or led to believe in terms of anonymity or confidentiality can potentially change once proceedings start in The Hague. How ICC Judges make these determinations and on what basis they reject intermediaries' security plights are unclear.

Furthermore, if the Court were to use the narrow definition of the term intermediary provided in the guidelines on intermediaries, a good number of intermediaries would be left out of the current protective provisions. This is particularly troublesome because the fewer intermediaries are recognized the more the Court can rely on what Sara Kendall has termed to be the Court's 'informal economy'.[31] She argued

[31] Kendall S., 'Commodifying Global Justice - Economies of Accountability at the International Criminal Court', (2015) Vol. 13:1 *Journal of International Criminal Justice*, 113-134.

that the ICC's political economy is made of formal economy which is populated by its states parties, and an informal economy of other agents such as intermediaries.[32]

Similar observations can also be made in other cases. To give one example, the prosecution quoted itself in the Kenyan cases and referred to an argument the OTP made in the Lubanga case which is, 'intermediaries operate in an environment which is dangerous for both the witnesses and the intermediary him- or herself'.[33] Overall, the prosecution seems to be the most active in voicing intermediaries' security problems even though each time these requests rest on prosecution interests.

Defence intermediaries also called 'Defence resource persons' are the least visible in the exchanges between parties about intermediaries' security. This renders the relationship between intermediaries and Defence teams even more obscure. In addition, it is difficult to raise questions about whether Defence teams seek protection for their intermediaries and if they do under which framework. However, Defence teams at the ICC are very active in challenging the Prosecution's claims concerning intermediaries' security. This is visible in the cases against Lubanga, Katanga and Ngudjolo where Defence teams continuously argued that disclosure of prosecution intermediaries' identities would not expose intermediaries to security risks.[34] It could also be seen in the case against Mr Ruto where the Defence said that there were 'no security issues which would prevent the disclosure'. Then without explaining how they reached their conclusion, the Ruto Defence added that there were no 'objectively justifiable security risks for intermediaries themselves'. Furthermore it said that the Prosecution's resistance to disclosure 'should be interpreted by the Chamber in favor of materiality'.[35] Statements such as here

[32] Ibid, at 127.

[33] *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Disclosure of Information related to Prosecution Intermediaries, (ICC-01/09-01/11) TC V(A) 4 September 2013, [19].

[34] *Prosecutor v. Thomas Lubanga Dyilo*, Redacted Decision on Intermediaries, (supra n. 1), [65].

[35] *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Disclosure of Information related to Prosecution Intermediaries, (supra n. 33), [9].

appear in several Defence submissions.[36] Yet, the claims made by the Defence about intermediaries' security have not been addressed by any of the Court's Chambers up until this day. The Court' silences on these matters have huge impacts on how different units interact with intermediaries. This example also shows that intermediaries have little access to the Court as there is no mechanism through which they can challenge defence allegations for example or bring other matters to the Court's attention.

Similar to the Defence, the OPCV Legal representative acting on behalf of victims or legal representatives themselves often make submissions on matters relevant to them. In the Ruto Case, they [OPCV] submitted that the disclosure of the information might be prejudicial to the interests of certain victims.[37] The OPCV stated that the disclosure of the identity of intermediaries would put the intermediaries at risk, that the disclosure of their working methods would impede their future work which is not necessarily related to the activities of the Prosecution or the Court, that these security risks do not subside with the beginning of the trial and that intermediaries do not normally benefit from protective measures.[38] However, without any reference to the 2008 Decisions discussed earlier, the Legal Representative added that intermediaries should be asked for their consent prior to any disclosure of their identity, as is done in the case of victims and witnesses. This would be the ideal, but current practice suggests that Chambers decide on a case-by-case basis and that in at least one case (intermediary 143) the Chamber can precede without consent.

[36] See for example: *Prosecution v. Germain Katanga and Mathieu Ngudjolo Chui*, Second Corrigendum to the Defence Closing Brief, TC II (ICC-01/04-01/07-3266-Corr2-Red) 29 June 2012; *Prosecution v. Germain Katanga and Mathieu Ngudjolo Chui*, Second Corrigendum to the Defence Closing Brief, TC II (ICC-01/04-01/07-3266-Corr2-Red) 29 June 2012.

[37] *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Disclosure of Information related to Prosecution Intermediaries, (supra n. 33), [25].

[38] Ibid.

To sum up, because intermediaries work in dangerous zones, they agree to assist units of the Court such as the OTP under confidentiality agreements. This is often a prerequisite for intermediaries in order to engage with units of the Court. However, Trial Chamber may order the Prosecution to lift confidentiality clauses if the rights of the accused are threatened. The Chamber may choose to do so whether or not the concerned intermediary has given his/her consent. Also, the Chamber is expected to authorise disclosure in consultation with the VWS and it needs to be satisfied that the necessary security measures have been taken. However, the Lubanga case shows that the Chamber may also decide on protective measures matters without the VWS. On the one hand intermediaries find themselves between the OTP and the Chamber. On the other hand intermediaries find themselves between the interests of the units that employ them and competing interests of the ICC such as rights of the accused and rights of the victims. In both cases security risks against intermediaries are potentially intensified. Generally, ICC judges only make decisions based on contestations between parties even though similar contestations exist on the ground as well. What is still missing, therefore, is an institutional response to intermediaries' security concerns.

3. Protecting Intermediaries without Police Forces –The Controversial Role of States

From the previous discussions, it can be seen that the law on intermediaries' security is limited and ineffective; and intermediaries are for the most part excluded from discussions about their own security in court. In this section, I will discuss the issue of security in the in-between space as a site of mediation between states and ICC. States are unreliable to ensure the physical protection of intermediaries on the ground for three possible reasons: a) States are often party to the conflict that led to international prosecutions, b) After mass violence, state institutions may be unable to ensure the security of all who live on its territory, and c) states may simply oppose ICC involvement on all who collaborate with the court.

The Rome Statute system is built on the assumption that member states shall cooperate with the Court and provide the Court with any assistance necessary for the execution of orders, decisions and judgments.[39] However, it is clear for any observer that states are often parties to conflicts that led to international criminal investigations; because of this, some communities are likely to resist any cooperation with state agents such as the police or the army. In other words, the state itself may be the security threat that intermediaries need protection from. As far as Africa is concerned, tensions between communities and the state tend to be exacerbated by political violence which causes further distrust. This suggests that the application of, to give one example, article 93 (j) of the Rome statute which is about the protection of victims and witnesses reinforces the power of the state in an already difficult relationship.[40] And so in places where communities are in conflict with their own governments, as it was the case in Libya and Kenya, intermediaries are potentially exposed to greater security risks.[41]

It follows that for most African states, it is still a struggle to ensure the protection of those who live within their borders whether these people assist the ICC or not. This is partly because state formation in Africa is an on-going project and partly because ICC proceedings exacerbate some of the already existing conflicts between governments and communities.[42] In the situation of Northern Uganda, for instance, the government was willing to prosecute government troops domestically but referred key LRA leaders to the ICC. Adam Branch has gone as far as to say that the powerful minority within the Ugandan government found a case for a "military solution" before the international community through ICC intervention. According to Deidre

[39] See for example article 86 of the Rome Statute which states that 'states Parties shall, in accordance with the provisions of this Statute cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the court.'; Article 87 of the Rome Statute which is about the technicalities of requests for cooperation and article 93 which enumerates other forms of cooperation that the court may seek from states.

[40] Article 93 (j) of the Rome Statute states that [states parties shall provide the following assistance] the protection of victims and witnesses and the preservation of evidence.

[41] In other contexts, human rights groups can become government targets for reporting human rights abuses.

[42] Allen T., *Trial Justice: The international Criminal Court and the Lord's Resistance Army,* (Zed books: 2006).

Clancy, "intermediaries were attacked by those hostile to the work of the ICC". She also wrote that these attacks occurred in the form of harassment, detention, torture, attacks and sexual crimes against family members to name a few.[43] What is more, countries that are unable to carry out prosecutions because state institutions are weak will most likely struggle to execute certain requests including the protection of victims, witnesses or in this case intermediaries. What emerges from this analysis is that, even where the state is willing to implement protective measures, it may not have the ability to actually do it. As a result of this some intermediaries are potentially left without protection. However, it must be noted that where state institutions are weak, it is possible that intermediaries may use their positions to gain certain benefits such as economic support, relocation, housing and health care.[44]

Returning (briefly) to the issue of state cooperation, when a state refuses to cooperate with the court, then investigative teams must be creative to access necessary data. In these cases intermediaries are most valuable because units of the Court will most likely be least present on the ground or have very limited access to people and relevant data. In other instances, those intermediaries who are also human rights activists will often be in possession of first class data on the conflict, crimes and victims before the ICC decides to get involved. In the following paragraphs, I will give two examples of how states can make it difficult for their people to interact with the ICC. Then, I will briefly discuss how the hostile relationship between African states and the ICC may encourage (or legitimise) states' anti-ICC policies.

North Sudan gives us an example of how local authorities can make it difficult for its citizens to interact with the ICC. In Darfur, the OTP was unable to conduct onsite

[43] Clancy D., 'They Told us we would be part of history –Reflections on the civil society intermediary experience in the Great Lakes Region', in *Contested Justice,* (supra n. 22), p236.

[44] See Buisman C., 'Delegating Investigations: Lessons to be Learned from the Lubanga Judgment', (2013) Vol 11:3/3, *Northwestern Journal of International Human Rights*, at 60.

investigations because the government of Sudan rejected any collaboration with the ICC.[45] Investigators could not conduct field investigations before and after arrest warrants against Omar Al-Bashir, Ahmed Haroun, and Ali Kushayb were issued.[46] The situation in North Sudan reached a level of insecurity which prevented onsite investigations for all parties; and the government made public death threats against whoever would collaborate with the ICC.[47] Without the cooperation of North Sudan, there were restrictions on the ability of both Prosecution and Defence to secure evidence, access documents, and ensure the safety of witnesses even via telephone.[48]

When the matter was brought before the Court, Pre-Trial Chamber IV acknowledged that investigations on the ground were impossible but it rejected the Defence motion to stay proceedings on the basis that "the Statute [referring to Article 99 (4) of the Rome Statute] does not include an absolute and an all-encompassing right by the prosecution and the Defence to conduct on-site investigations."[49] Indeed the two subparagraphs of article 99(4) distinguish between a situation in which a state party that is requested to allow the investigation is the one where the alleged crime took place, and 'other cases'. William Schabas correctly observed that, "In the former

[45] *Prosecutor v. Ahmad Muhammad HARUN ("Ahmad Harun") & Ali Muhammad Ali ABD-AL-RAHMAN ("Ali Kushayb")*, "Prosecution request for a finding on the non-cooperation of the Government of the Sudan in the case of *Prosecutor v. Ahmad Harun and Ali Kushayb*, pursuant to Article 87 of the Rome Statute", PTC I (ICC-01/04-01/07-683) 19 July 2010., [18] sq.

[46] See *Situation in Darfur, Sudan*, Prosecutor's Responses to Cassese's Observation on Issues Concerning the Protection of Victims and the Preservation of Evidence in the Proceedings on Darfur Pending before the ICC, PTC I (ICC-02/05-16) 11 September 2006, [20].

[47] *Prosecutor v. Ahmad Muhammad HARUN ("Ahmad Harun") & Ali Muhammad Ali ABD-AL-RAHMAN ("Ali Kushayb")*, "Prosecution request for a finding on the non-cooperation of the Government of the Sudan in the case of *Prosecutor v. Ahmad Harun and Ali Kushayb*, pursuant to Article 87 of the Rome Statute", (supra n 45), [33–36]; Also see Defence motion for a temporary stay of proceedings due to inability to conduct investigations on the ground in *Prosecution v. Abdallah Banda Abakaer Nourain & Saleh Mohammed Jerbo Jamus,* with Public Annexures A, B, D, E, I, M, and O, Confidential Annexures C, J, L, and N, and Confidential and *ex parte* Annexures F, G, H and K available only to the Defence - Defence motion for a temporary stay of proceedings, TC IV (ICC-02/05-03/09-274), 6 January 2012, [8–35]; [40–47].

[48] Ibid*,* [8–15].

[49] *Prosecutor v. Abdallah Banda Abakaer Nourain & Saleh Mohammed Jerbo Jamus***,** Decision on the Defence Request for a Temporary Stay of Proceedings, PTC IV Case No: I ICC-02/05-03/09-410 (26 October 2012), [99].

there is an implied assumption that the state party will not cooperate with the Court, because there is a requirement that the case be determined to be admissible in accordance with articles 18 or 19."[50] What the case of North Sudan illustrates is that the state publically acknowledged that it would not assist the ICC with the protection of victims, witnesses, evidence, or - in the case that concerns us - intermediaries. In a way, the state of North Sudan positioned itself as a threat to intermediaries' security by targeting those who did or were perceived to collaborate with the Court.

Second, the Kenyan case allows us to see how political leaders may use their positions to influence interactions between the people living in their states with the ICC. It was post-elections violence of 2007 that attracted ICC's attention to Kenya. After several attempts to prosecute international crimes on the Kenyan territory, ICC prosecutor Fatou Bensouda continued what her predecessor had started and decided to take the matter in her hands.[51] Among the accused were Uhuru Kenyatta who was Finance Minister and William Ruto who was Education Minister. As the situation evolved, Kenyatta and Ruto became allies and eventually they respectively became Head of state and Vice president. Though the cases against them continued at the ICC, the prosecution struggled to secure Kenya's cooperation, evidence and witnesses' testimonies.[52] The collapse of these cases can be explained in many different ways but what I want to highlight here is that the suspects' profiles had a significant impact on the relationship between the ICC and the communities affected by its proceedings in Kenya. Sammy Gachigua whose work examines Kenyan engagement through editorial cartoons shows us how members of the communities

[50] Schabas W, *The International Criminal Court: a commentary on the Rome Statute*, (Oxford University Press: 2010), p 1049.

[51] *Situation in the Republic of Kenya,* Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, PT II (ICC-01/09-02/11), 8 March 2011, [15] sq.

[52] *Prosecutor v. Uhuru Muigai Kenyatta,* Decision on the withdrawal of charges against Mr Kenyatta, TC (V)B, (ICC-01/09-02/11-1005), 13 March 2015; Also see *Prosecutor v. Uhuru Muigai Kenyatta,* 'Second decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute, TC V(B) (ICC-01/09-02/11-1037), 19 September 2016.

affected by ICC proceedings lost trust in Kenyan authorities in a way that prevented and/or limited their engagement with the Court.[53] As a result of this, to come back to intermediaries, the intermediaries who work with communities affected by government crimes are at increased security risks.

As regards the African Union, political tensions between North and South led some AU members to criticise the Court for targeting Africa and threatened to withdraw from the ICC.[54] These efforts can be documented in the African Union's debates and documents but the first country to officially withdraw was Burundi.[55] In situations where a country's policy is to resist the work of the court, it can be said that such states would either fail to protect intermediaries or perceive intermediaries' assistance to the Court as a threat to national (or better state) policy.

As was pointed out in the introduction to this section, the role of state is very important in supporting the Court's work on the ground. However, where such support is missing, intermediaries' in-between status becomes even more relevant. For instance, as of October 25, 2017 Pre-Trial Chamber III authorised an investigation into the situation of Burundi but since Burundi's withdrawal is already in effect, this means that poor cooperation from Burundi can be anticipated.[56] It also means that

[53] Gachigua S., 'Discursive Reconstruction of the ICC-Kenyan Engagement through Kenyan Newspapers' Editorial Cartoons, in Clarke M.K, Knottnerus and De Volder (eds), Africa and the ICC, Perceptions of Justice, (Cambridge University Press: 2016), pp 187-232.

[54] See Helfer L.R. and Showalter A.E., 'Opposing International Justice: Kenya's Integrated Backlash Strategy Against the ICC, (2017) Vol. 7:1, *International Criminal Law Review,* 1-46*, available at* < https://scholarship.law.duke.edu/cgi/viewcontent.cgi?referer=https://scholar.google.ca/&httpsredir=1&article=6404&context=faculty_scholarship>; Mude T., 'Demystifying the International Criminal Court (ICC) Target Africa Political Rhetoric', (2017) *Open Journal of Political Science* 7, 178-188, Murrithi T., 'The African Union and the International Criminal Court: An Embattled Relationship?', (2013) No: 8 *The Institute for Justice and Reconciliation,* available at < file:///C:/Users/Josephine/Downloads/IJR_Policy_Brief_No_8_Tim_Miruthi.pdf>.

[55] Burundi Leaves International Criminal Court amid row, *BBC* (27 October 2017), available at < http://www.bbc.com/news/world-africa-41775951>, Burundi Withdraws From the International Criminal Court, *All Africa,* (27 October 2017), available at < http://allafrica.com/stories/201710280052.html>.

[56] *Situation in the Republic of Burundi,* Public Redacted Version of "Decision Pursuant to Article 15 of the Rome Statue on the Authorization of an Investigation into the Situation in the Republic of Burundi", PTC III (ICC-01/17-C) 9 November 2017.

intermediaries will likely become key players in mediating interactions between the court and the people of Burundi. On the question of security in particular, intermediaries may play a role in the security of ICC staff, witnesses, victims and other intermediaries. There are opportunities in working with in-between agents as can be seen in the DRC situation where intermediaries assisted investigation teams by contributing with the evaluation of the security situation.[57] The intermediaries who performed these tasks included members of the UN Mission in the Democratic Republic of the Congo (MONUC); and anyone with useful information on the security situation.[58] In some instances the tasks performed by intermediaries –such as providing information on the security situation[59] - became so important that the team decided to formalise their relationship with contractual agreements.[60]

Other times though, there are also challenges that come with intermediaries' in-between status and the in-between space between transitional justice and political transition. For instance, pro-government intermediaries may pose yet another challenge for the Court due to local politics. It is possible that victims or witnesses of crimes committed by the government against their community may be less willing to work with certain intermediaries if they are or perceived to be pro-government.[61] It is also possible that the government facilitate certain intermediaries more than others to expose the crimes committed by their opponents or anti-government forces. Such exploitation of intermediaries is inevitable; they are the product of in-between space as a site of mediation between transitional justice and political transition. In this site of mediation, non-members and member states to the Rome Statute engage with the ICC mostly for political reasons. As such, the ICC and states

[57] *Prosecutor v. Thomas Lubanga Dyilo,* Transcript of Deposition (closed session) 2010, TC I (ICC-01/04-01/06-Rule 68 Deposition) 16 November 2010, p 50, lines 17 – 21.

[58] Ibid, p 51, line 22 to p 52, line 5.

[59] Ibid, also see *Prosecution v. Thomas Lubanga Dyilo,* Judgment pursuant to Article 74 of the Statute, TC I (ICC-01/04-01/06-2842), 14 March 2012, [193].

[60] *Prosecutor v. Thomas Lubanga Dyilo,* Transcript of Deposition (closed session) 2010, (supra n. 57), p 53, lines 21-23; also see *Prosecution v. Thomas Lubanga Dyilo,* Judgment pursuant to Article 74 of the Statute (supra n. 59), [196].

[61] See for example Sudanese Intermediaries in Haslam E. and Edmunds R, 'Managing A New 'Partnership': 'Professionalization', Intermediaries and the International Criminal Court, (supra n. 3), at 69.

rarely pursue the same goals. Rather, they have tended to pursue different interests and sometimes opposing interests.

Overall, the Rome statute system is built on the assumption that the ICC and member states share certain responsibilities among which is the arrest and transfer of suspects transfer of evidence, witness and victims' protection and the security of ICC staff on the ground. Though intermediaries are not explicitly cited in article 93 of the Rome Statute, the court may request the relevant state to implement protective measures for intermediaries under article 93 (l) which provides for any other type of assistance to facilitate the investigation and prosecution of crimes within the jurisdiction of the Court. This section has shown that states may not be the best placed to protect intermediaries for three different reasons: a) states may be part of the conflict that led to international crimes, b) states' institutions may be unable to carry out this work, and c) states may categorically oppose the work of the ICC and target intermediaries.

Finally, this section has shown that where state cooperation is weak, intermediaries are most needed. Though some intermediaries have used their positions for their own personal benefit, intermediaries mediate the issue of security between the court and relevant communities by assisting the court with information on the security situation on the ground, arranging meetings in secure locations and helping witnesses travel safely to meet with the units of the court. This raises questions about the role of powerful intermediaries which will be discussed in the following section.

4. Intermediaries' Security: The role of NGOs

Before proceeding to examining the role played by NGOs intermediaries it is necessary to recall that NGOs may act as intermediaries and other times act in their own names as members of broader civil society. As explained in chapter I, some NGOs also work with intermediaries in situation countries. Because of this or as a result there may be situations where the same intermediary assists a unit of the Court and works for other entities such as international NGOs (INGOs) intermediaries, country level NGOs intermediaries or grassroots associations intermediaries. In this section, I will focus on in-between space as a site of mediation between intermediaries.

Intermediaries are able to change from one organisation to another, from one institution to another over a short period of time. This is illustrated in the Lubanga case where, one intermediary assisted the OTP while also working for the DRC government. Another intermediary worked for a victim centred NGO and assisted prosecution witnesses at the same time. This suggests that NGOs play an important role in international criminal justice affairs. I will discuss the ways in which the ICC mitigates some of the less powerful intermediaries' security problems through NGOs.

International NGOs have been the most active advocates for intermediaries by pushing for the Court to recognise intermediaries and to take increased and clearer measures for the protection of intermediaries. Their lobbying led to discussions between the Court and NGOs, leading to the draft guidelines on intermediaries and the adopted guidelines on Intermediaries. Generally, many of these NGOs view the guidelines on intermediaries as a step in the right direction even whilst remaining very critical of its numerous shortcomings. This can be seen in different commentaries issued by certain international NGOs. For the International Refugee Right Initiative (IRRI) together with the Open Society Justice Initiative (OSJI), the Court should take more responsibility to protect intermediaries and increase training for intermediaries. For both of these organisations the "ICC should ensure that

intermediaries are trained such that they are aware of and able to conduct themselves in line with good practices, particularly relating to security and confidentiality."[62]

Similarly, REDRESS was of the view that protection should be extended to 'psychosocial protection' and that training should include 'working with traumatised and vulnerable victims'.[63] However, these comments also seem to put all the responsibility on the Court without acknowledging that these same NGOs also work with local informants (in my view intermediaries) in situation countries. They also overlook some of the challenges that the ICC faces such as finances, logistics or poor state cooperation in relevant countries. Lastly, considering the limited framework through which intermediaries' security problems are addressed, these types of comments from NGOs put a lot of responsibility on intermediaries. Despite this, International NGOs (especially the financially capable organisations) play an important role in the security of intermediaries. A possible explanation for this might be that the ICC and states may fail to protect intermediaries as I have shown the two previous sections.

Deirdre Clancy challenges the role played by international NGOs and local NGOs in the protection of intermediaries. Essentially, she is of the view that these organisations are ill prepared for the task due to limited resources such as the lack of professional expertise.[64] In addition, Deirdre Clancy, alerts us to the possibility that international NGOs may act as 'proxy protectors' which might result in the Court taking less responsibility for the protection of intermediaries.[65] One question that

[62] IRRI & OSIJ, Commentary on the Draft Guidelines on Intermediaries, available at < https://www.opensocietyfoundations.org/sites/default/files/icc-intermediaries-commentary-20110818.pdf>.

[63] REDRESS, Commentary on the Draft Guidelines Governing Relations Between The Court and Intermediaries 2010, available at < http://www.redress.org/downloads/publications/Comment_on_draft_guidelines_on_intermediaries_15_Oct_2010.pdf>.

[64] Clancy D., 'They Told us we would be part of history –Reflections on the civil society intermediary experience in the Great Lakes Region', (supra n. 22), p236.

[65] Ibid.

needs to be asked, however, is whether these international/local NGOs act as intermediaries or in their own name. If an international NGO acts as an intermediary between the Court and the intermediary who needs protection, then the Court is essentially acting through the intermediary. Yet again, NGOs usually have their own missions, goals, budgets, different standards and perhaps even poor expertise (as Deirdre Clancy pointed out).

On the other hand, if international/local NGOs act in their own names this also raises questions about power imbalance within civil society. First, in the broader justice context, civil society is profoundly diverse and fragmented. Some Civil Society Organisations question the universality of human rights and justice arguing that these values have genealogically excluded large portions of humanity in the course of their development. Others typically international ones, believe unequivocally in the universality of human rights norms and seek to enforce them unaltered.[66] There are, however, some similarities when it comes to staff composition. International NGOs, country level NGOs or even grassroots associations tend to have local and international staff working together. In practice, however, transitional justice advocacy typically takes place in a post-conflict context in which the meaning of terms such as justice, truth, peace and reconciliation are ambiguous and in which competing narratives are negotiated.[67] By way of illustration, Leila Ullrich through one particular interview shows how the nature of conflicts influences the dynamics of NGOs. This was an interview of a civil representative in Kenya:

[66] Hovil L and Okello C. M., 'Editorial Note', (2001) 5, *The International Journal of Transitional Justice,* 133-344.

[67] An example of this phenomenon can be found in northern Uganda, where organizations that (two decades ago) were involved in various conflict resolution and peacebuilding initiatives –such as advocating for peace negotiations as an alternative to disastrous military campaigns and requesting that the government grant amnesty to the LRA rebel group –now find themselves having to forsake their experience and reframe their activities under the heading of transitional justice, a term that has become increasingly nebulous as a result. Having shifted positions to suit their international minders, many of the Civil Society Organisations are under pressure to disown the amnesty process in support of international prosecutions, the first in Uganda's war scarred history. See Branch A., *Displacing Human Rights: War and Intervention in Northern Uganda,* (Oxford University Press: 2011).

> '[…] There are some organisations where 75% of people came from one [ethnic] community and the perception from the public was: 'they will never help us because they come from there'.[68]

One question that needs to be asked, therefore, is whether NGOs are capable of protecting intermediaries that come from different communities. In a way, when NGOs are seen to be aligned with inter-community tensions, they become unreliable –just like states- for the protection of certain intermediaries. But unlike states, NGOs accountability is extremely complex.[69]

In terms of how international NGOs, country level intermediaries and community level organisations finance their activities, they mostly secure funds from international donors. One possible implication of this source of funding is that private donors may have an influence in justice or public affairs. According to Sara Kendall one of the dimensions of donor-driven justice is that "institutions and their supporters offer international criminal justice as a product on a broader market in competition with other tribunals and recipients of donor support".[70] According to Kendall, conceptualising international criminal justice as a commodity instead of a public good prevents "a space for contesting its social value within the public realm rather than within an economy of private interest". First she makes the observation that "the Court addresses its state members as shareholders in a particular vision of justice";[71] and second that the Court's reliance on intermediaries is "merely a matter of 'outsourcing' its work in order to conserve financial resources".[72] However, this argument ought to be extended to the different types of NGOs. As Leila Ullrich rightly pointed out, 'both local and international organisations are caught in a complex

[68] Ullrich L., 'Local Intermediaries, Victims and the Justice Contestations of the International Criminal Court', (supra n. 4), at 550.

[69] The question of NGOs accountability is further discussed in chapter 6.

[70] Kendall S., 'Donor's Justice: Recasting Criminal Accountability', (2011) Vol. 24:3, *Leiden Journal of International Law,* at 587.

[71] Kendall S., 'Commodifying Global Justice - Economies of Accountability at the International Criminal Court', (supra n. 31) at 125.

[72] Ibid*,* at 128.

amalgam of international donor pressure, national constraints and local politics.'[73] In other words, these different organisations also constantly market themselves to donors in order to secure funds.

This section has shown that NGOs involvement in international criminal justice comes with opportunities and challenges. They operate in the in-between spaces between the Court and affected communities, between types of intermediaries and between states and other NGOs. Their position as in-between agents who act in all these spaces allows them to have intimate knowledge of security needs on the ground. In a sense when the ICC is faced with intermediaries' security problems, some of these are dealt with through different types of NGOs. NGOs reaction time may be more effective than the Court's because they do not have to go through the same approval processes. In addition, where the Court only grants procedural protection such as redactions, NGOs are in a position to do more for intermediaries and develop on ground strategies for their safety. However their role also presents a number of challenges. First, it is important to bear in mind the possible bias in NGOs responses. Second, these different types of NGOs have poor resources and often lack professional training. Lastly, the ways in which these organisations are funded suggests that private donors may have an influence in international criminal justice. Despite these challenges, thinking about intermediaries' security should be a concerted effort between all the actors who play a role in it. Deeper discussions and enhanced partnership will help the Court focus its energy (and finances) on what it can actually do rather than making false promises to intermediaries.

[73] Ullrich L., 'Local Intermediaries, Victims and the Justice Contestations of the International Criminal Court', (supra n. 4), at 550.

5. The Confusing role of the UN in the field

So far this chapter has focused on the role of the ICC, states and NGOs in the protection of intermediaries. This section will discuss in-between space as a site of mediation between institutions. But before delving into the analysis of how the UN plays a role in the protection of intermediaries, it is necessary to understand how the UN relates to the ICC. The UN as an international political institution collaborates with the ICC through a negotiated relationship agreement between the ICC and the UN. Both institutions agreed to work 'closely' and collaborate on matters of mutual interests.[74] Aspects of the relationship between the UN and the ICC have received great attention in international criminal law literature.[75] One major criticism of the UN is that it fails to financially support the work of the ICC.[76] But there are other areas which have received little attention in academic literature such as the ways in which the UN supports the court's work on the ground (i.e. situation countries).

The UN is an important player in the operation of international criminal justice. In addition to the UN Security Council's ability to refer situations to the ICC, the UN is

[74] See Article 2 which states that 'The United Nations and the Court agree that, with a view to facilitating the effective discharge of their respective responsibilities, they shall cooperate closely, whenever appropriate, with each other and consult each other on matters of mutual interest pursuant to the provisions of the present Agreement and in conformity with the respective provisions of the Charter and the Statute'.

[75] There is a rich literature on UN Security Council referrals to the ICC. See for example Daphna S., 'Politics and Justice: The Role of the Security Council', in Cassese A., *The Oxford Companion to International Criminal Justice*, (Oxford University Press: 2009).; Akande D., 'The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities' (2009) 7 *Journal of International Criminal Justice*, 333-352.; Mégret F., 'ICC, R2P, and the International Community's evolving Interventionist Toolkit', (2010) Vol. 21:1, *The Finish Yearbook of International Law*; Sluiter G., 'Obtaining Cooperation from Sudan –Where is the Law?', (2008) Vol. 6:1, *Journal of International Criminal Justice,* 871-884*;* Yee L., 'The International Criminal Court and the Security Council', in Lee R. S. et al, *The International Criminal Court, The Making of the Rome Statute Issues, Negotiations, Results,* (Martinus Nijhoff Publishers: 1999); Perrin de Brichambaut M., 'the Role of the United Nations Security Council in the International Legal System', in M Byers (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law,* (Oxford University Press: 2000).

[76] See for example Arsanjani M. H., 'Financing', in Cassese A. Gaeta P. Jones J.R.W.D. (eds), *The Rome Statute of the International Criminal Court:* A commentary, (Oxford University Press: 2002), p 325 and Reisman M. W., 'On Paying the Piper: Financial Responsibility for the Security Council Referrals to the International Criminal Court', (2005) Vol. 99:33 *American Journal of International Law,* at 616-8. For a critical perspective see Kendall S., 'Commodifying Global Justice - Economies of Accountability at the International Criminal Court', (supra n. 31) at 113-134.

perhaps one the most important data collector in post-conflict societies. Often times, the UN is present on the ground way before the ICC's involvement. In these situations, the UN is likely to deploy missions with different types of mandates such as food distribution, health care, peacekeeping or the investigation of international crimes. The particularity of UN interventions is their ability to reach all who need assistance regardless of which side of the conflict is in question. In doing these different tasks, the UN collects data which is valuable to international criminal prosecutions. However, sharing information with the Court might expose UN staff (in relevant situations) to security risks. This might be the reason behind confidential agreements between the UN and the OTP that I mentioned at the beginning of this chapter. To recall (briefly) there have been instances where the OTP has relied on documents and other types of information collected by the UN in building its case. But when the time came to disclose this information to the Defence, the Prosecution argued that disclosure would expose their intermediary to security risks (here the UN). It took the authorization of the UN for that information to be used in the trial against Mr Lubanga. Overall, this analysis indicates that the UN has its own security concerns and specific ways of dealing with these –internally and in their relationship with the Court.

As regards the role played by the UN in the security of other actors, there is evidence that the UN may assist ICC staff on the ground.[77] This was certainly true in the early stages of investigations in the DRC. When investigative teams arrived in the DRC in 2004, armed groups were still active. The security situation was so serious that ICC staff decided to stay in an area where they could rely on UN protection for their security.[78] However, it is not clear whether all other units of the Court (e.g. defence

[77] Also see Articles 3, 8 and 18 of the Negotiated Relationship Agreement between the International Criminal Court and the United Nations, available at < https://www.icc-cpi.int/NR/rdonlyres/916FC6A2-7846-4177-A5EA-5AA9B6D1E96C/0/ICCASP3Res1_English.pdf >.

[78] *Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui*, ICC-01/04-01/07-T-81-Red-ENG, Trial Hearing, 21, 40 (Nov. 25, 2009), available at <http://www.icc-cpi.int/iccdocs/doc/doc787558.pdf>.

teams) benefit from this kind of protection. It is also not clear the extent to which different types of intermediaries may also rely on UN protection as Court assistants.

6. Concluding remarks

The purpose of this chapter was to analyse the ways in which in-between spaces are productive of particular security opportunities and challenges for intermediaries and those who rely on their services. I have shown that acting as an in-between agent in view of assisting international criminal processes (at the ICC) comes with great risks and opportunities for both intermediaries and ICC staff on the ground. Intermediaries play a crucial role in the security of victims, witnesses, ICC staff and other intermediaries. Through them, the Court has been able to collect data on the security situation in the countries relevant to its proceedings and adapt its strategies. As in-between agents, intermediaries are not just actors through whom the Court mitigates the security problems it meets on the ground. There is more to the position they occupy. Their in-between status allows them to assist the Court but it also causes them to be targets of security threats from Court processes, rebel groups, states, and sometimes their own communities.

This study has shown that intermediaries are exposed to security risks as a result tensions between transitional justice and political transition. Though several provisions can be relied on by the Prosecutor to take or ask that protective measures be taken to protect intermediaries, these provisions are limited. For instance, it is not entirely clear how the prosecution can seek protective measures for the intermediaries who assist other units of the Court such as the Trust fund of victims or the Defence. In addition, it is not clear how and/or whether intermediaries can rely on these provisions to seek protective measures. What is more, judges are often called to decide on disputes between parties about intermediaries' security which they tend to do from purely legalist approaches. For example, they overlook the fact that intermediaries navigate between transitional justice and political transition and

how that exposes some intermediaries to security risks more than others. Part of these problems is caused by the fact that international criminal law is built on the assumption that states can be relied on to ensure the security of those who live within their territories. However, this chapter has shown states' ability to protect intermediaries is constantly shifting depending on its politics of transition from war to peace. Ignoring these facts causes Court processes and Judges, particularly, to potentially aggravate security risks (for example by ordering disclosure of their identities without protective measures).

This chapter has also shown that intermediaries' security is extremely complicated because it involves several actors who have different (sometimes competing) agendas. In this sense, even if the Court had a coherent and clear framework through which these problems can be solved, it would still be limited. However, there are remaining efforts to be made in order to facilitate intermediaries' access to the Court. The way forward must and should take into account that parties' representations of intermediaries' do not always favour intermediaries. Intermediaries may have views or understandings of the situation on the ground which may differ from the parties who speak on their behalf.

CHAPTER 6: Accountability dynamics in in-between spaces–Who is accountable to whom? : Intermediaries and the ICC

Intermediaries' accountability has attracted the attention of practitioners, policy makers and members of the civil society after several allegations of tampering with witnesses' testimonies and evidence were made against certain intermediaries in the early years of the International Criminal Court (ICC).[1] Yet accountability as such is one of the issues that have been left unaddressed in the literature on intermediaries. That intermediaries should be accountable for their work is desirable for all who interact with them or rely on their services.

The argument of this chapter is not about how to improve intermediaries' accountability to the Court by identifying *lacunas* in the law on intermediaries *per se;* rather, it is interested in the effects or impact that different intersections in international justice have on intermediaries' accountability. Accordingly, it is argued here that intermediaries' accountability takes place in many different ways but only some of these relationships can be captured by international criminal law.

The first serious discussions and analyses of intermediaries' accountability began with Elena Baylis who gave very specific recommendations. For her, the OTP could effectively use UN and NGO expertise while maximizing control of its investigation and thus ensure transparency and reliability. She argues that the OTP could draw experts into its investigations from the UN mission and NGOs already operating in the relevant areas and/ or it could develop a set of detailed guidelines for the UN and NGOs to follow in carrying out their investigations.[2] In addition, these measures would partly resolve issues related to poor control over their methods of

[1]This is visible in the early stages of the case against Lubanga, *Prosecution v. Lubanga,* Redacted Decision on the "Defence Application Seeking a permanent stay of the Proceedings," TC I (ICC-01/04-01/06-2690-Red2), 7 March 201, [74-92].

[2] Baylis E.A., 'Outsourcing Investigations' (2009) 14 *Los Angeles Journal of International Law and Foreign Affairs* at 145.

investigations.[3] Although Elena Baylis does not explicitly state that these measures would enhance UN and NGO intermediaries' accountability to the OTP, these steps would allow the OTP to exercise direct and clear control over intermediaries. However, approaches like this carry with them various well known limitations. The UN and NGOs are not accountable to any judicial body.[4] Also, regulatory efforts through the guidelines on intermediaries only capture a small fraction of intermediaries' accountability. This is why this chapter looks at intermediaries' accountability in the broader context of post conflict societies. It is not limited to intermediaries' interactions with the ICC.

Unfortunately, accountability remains a poorly defined term and international criminal law literature on intermediaries is yet to engage with this concept. For this reason, I will use Koppel's framework of accountability which I borrow from public governance literature and apply in this chapter.[5] Building on previous discussions in chapters 4 and 5, I will now tackle accountability problems in in-between spaces. Throughout this chapter, I will show that Intermediaries' accountability is extremely complex. These complexities are mainly linked to intermediaries' in-between status and the fact that they navigate different types of in-between spaces but also, to 1) multiple meanings of accountability; 2) developing legal framework at the ICC; 3); inconsistencies in ICC case law; 4) representation practices in the world of intermediaries; and 5) NGOs' accountability. Thinking about intermediaries' accountability forces us to also consider some of the ways in which intermediaries mediate the Court's accountability problems on the ground.

By focusing on accountability, this chapter contributes to international criminal law literature which has, until now, understudied the concept. Still, I have had to borrow

[3] Ibid.

[4] Buisman C., 'Delegating Investigations: Lessons to be Learned from the Lubanga Judgment', (2013) Vol 11:3/3, *Northwestern Journal of International Human Rights*, at 55.

[5] Koppel J.G.S., 'Pathologies of Accountability: ICANN and the Challenge of "Multiple Accountabilities Disorder', (2005) Vol. 65: 1 *Public Administration Review,* 94-108.

a framework of accountability outside international criminal law literature to be able to conduct my analysis about intermediaries. This is the focus of the first section of this chapter. I will use Jonathan Koppel's framework of accountability and how I intend to use it for the purposes of my argument about accountability in in-between spaces. Though I focus on intermediaries, I hope to start discussions about accountability more broadly. Thinking about intermediaries' accountability forces us to also consider some of the ways in which intermediaries mediate the Court's accountability problems on the ground.

1. Defining accountability

This section provides a brief overview of accountability definitions. I argue that the complexity attached to the concept of accountability itself complicates what intermediaries' accountability is. The multiple meanings of accountability are in a way an indication that the ICC can only cover certain aspects of intermediaries' accountability. What is more, it is difficult to focus on a type of accountability because intermediaries come with different accountability registers. What this means is that focusing on legal accountability alone might limit our understanding of intermediaries. For this reason, I will consider legal accountability alongside with administrative accountability. Even so, accountability is a concept that has multiple meanings and facets but even though scholars fail to reach a consensus on the meaning of accountability, there is general agreement on the point that accountability is good.[6]

Given the difficulty of defining the concept of accountability, different authors approach the challenge from different perspectives. For instance, Robert Behn concerned himself with the question of why accountability was needed. To this he

[6] Behn D. Robert, *Rethinking democratic accountability*, (Brookings: 2001); Mulgan R., *Holding power to account: Accountability in modern democracies*, (Palgrave Mcmillan: 2003); Koppel J.G.S., 'Pathologies of Accountability: ICANN and the Challenge of "Multiple Accountabilities Disorder', (supra n. 5) at 94-108; Bovens M., 'Analysing and assessing accountability: A Conceptual Framework', (2007) 13 (4) *European Law Journal* 447-68.; Dubnick and Fredereickson 2011

argued that the traditional reasons for accountability are to ensure that an organization operates fairly; to ensure responsible spending in accordance with defined rules, to guard against the use or abuse of power, to ensure performance such that organisations or individuals meet targets; and finally to ensure that individuals entrusted with public money act in accordance with societal standards and values.[7] Together, Robert Behn's approach reflects a certain ideal of what accountability should be and do in terms of legitimacy, fairness and equitable democracy. However, as many other authors have pointed out, the implementation of these ideals is very difficult. Robert Behn's question about why accountability was needed inspired the development of my research as it led to additional questions: Why is intermediaries' accountability important? To whom are intermediaries accountable to and why is the accountability of intermediaries necessary at this stage in the development of international criminal justice? I will come back to these questions later.

On the other hand, Kopell concerned himself with the question of what the goals and objectives of accountability are. In his approach, he developed a framework which has five distinct dimensions of accountability: transparency, liability, controllability, responsibility and responsiveness. This is the framework that I found most helpful to examine the question of accountability in relation to intermediaries. Partly because I conceive the ICC as a public justice institution and partly because Koppel's framework is compatible with the analytical tool I adopted for this research. The following subheadings will explain how these different dimensions of accountability might help us begin to understand the goals and objectives of accountability in relation to intermediaries.

[7] Behn D. Robert, *Rethinking democratic accountability*, (supra n. 6), p2.

1.1 Transparency

The transparency dimension of accountability is the idea that 'an accountable bureaucrat and organization must explain or account for its actions'.[8] That some units think of intermediaries' accountability in this way can be seen in several Defence submissions. In particular, evidence from the Lubanga, Katanga and Ngudjolo cases suggest that the OTP was not transparent in their dealings with intermediaries. One possible explanation might be that it is inherently difficult to be transparent about individuals or entities whose assistance to the Court might expose them to security risks. But the lack of transparency also gave the work of intermediaries and intermediaries themselves a negative reputation inside and outside the courtroom. Because the OTP has had to fight disclosure orders on several occasions (as I explain in previous chapters), there is a general sense at the ICC that the OTP is secretive about its dealings with intermediaries. That said, there is evidence in the Lubanga judgment which suggests that members of the OTP have been asked to explain their dealings with intermediaries.[9] In one sense it can be said that there was a level of transparency in the OTP's dealings with intermediaries in the Lubanga case as the employers. However, it appears that the only reason the OTP was questioned was because allegations against intermediaries were made in the course of a trial; as opposed to having a structure in which the OTP is expected to be transparent about all its dealings with third parties. In addition, it can be said that intermediaries themselves are accountable to the units that employ them rather than being accountable to the Court as an institution of justice. Part of this lack of transparency is caused by their in-between status and it is inevitable.

As far as other units are concerned, there is little evidence (at least in the documents of the court) to suggest that they are transparent in their dealings with

[8]Koppel J.G.S., 'Pathologies of Accountability: ICANN and the Challenge of "Multiple Accountabilities Disorder', (supra n. 5), at 96.

[9] See for example the testimonies of Bernard Lavigne and Nicolas Sebire, *Prosecution v. Thomas Lubanga Dyilo,* Judgment pursuant to Article 74 of the Statute, TC I (ICC-01/04-01/06-2842), 14 March 2012, [125].

intermediaries. Take for instance Defence teams at the ICC; very little is known about how they interact with intermediaries in general. Transparency as a dimension of accountability suggests that alleged wrongdoing or perceived failure must be investigated and explained.[10] But in the case of intermediaries, it is very difficult to examine whether the Units of the Court are transparent in their dealings with intermediaries, partly because too much information might actually expose intermediaries to greater security risks on the ground. The issue that remains is that it becomes also difficult to raise questions about other areas of the relationship between intermediaries and the Court such as contracts, job description and paid fees. There is evidence showing that such information has also been withheld from other parties.[11]

Then there is the question of whether intermediaries are transparent in their work for the Units of the Court. According to the guidelines on intermediaries it is expected that the units of the court to 'supervise the work of the intermediary and keep a record of their supervisory methods and actions'.[12] It is not entirely clear how this is implemented in practice but the guidelines provide for a framework through which some intermediaries (those who fall under the definition of intermediary as per the guidelines) are accountable to the ICC.[13] In addition, it can be said that intermediaries are transparent whenever they consent to disclose information to other parties of the Court. The UN for instance has, upon requests, agreed to disclose documents to the Defence.

[10] Koppel J.G.S., 'Pathologies of Accountability: ICANN and the Challenge of "Multiple Accountabilities Disorder', (supra n. 5) at 96.

[11] *Prosecution v. Germain Katanga and Mathieu Ngudjolo Chui*, Second Corrigendum to the Defence Closing Brief, TC II (ICC-01/04-01/07-3266-Corr2-Red) 29 June 2012, [47].

[12] See International Criminal Court, 'Guidelines Governing the Relations between the Court and Intermediaries' for the Organs and Units of the Court and Counsel working with intermediaries (2014), p 11. (Hereinafter the guidelines on intermediaries).

[13] During my research I have not been able to access this information for reasons explained in the introduction.

1.2 Liability

Liability is a dimension of accountability which requires the staff of an organization 'to be held liable for their actions, punished for malfeasance, and rewarded for success.'[14] The key question, in Koppel's framework, is whether an individual or organization faces consequence related to performance. Though the following is subject to further research, there are several consequences that intermediaries might face if found guilty of misconduct. These include termination of formal or informal contracts and termination of benefits attached to the status of intermediaries (for example protective measures, financial support or health care). As far as the Units of the Court are concerned, the OTP and legal representatives for victims have expressed concerns that if there is misconduct (such as failing to respect confidential agreements between them and intermediaries) on their part, intermediaries might be reluctant to assist them in the future. However, a relationship in which Units of the court are liable to intermediaries is based on intermediaries' ability to stay 'relevant' to that particular unit. This may be true to powerful intermediaries such as the UN or international NGOs but such a relationship is likely to be more difficult to establish by less powerful intermediaries.

1.3 Controllability and Responsibility

Turning now to controllability and responsibility, I will discuss these two dimensions together because they are interlinked. Controllability is based on control while responsibility is the dimension of accountability which constrains individuals and organizations through laws, rules and norms.[15] Jonathan Koppell explains controllability as follows: 'if X can induce the behaviour of Y, it is said that X controls Y –and Y is accountable to X'.[16] But a more nuanced understanding of controllability and perhaps even more useful approach can be found in the study carried out by

[14] Koppell Jonathan, 'Pathologies of accountability: ICANN and the challenge of multiple accountabilities disorder' (supra n. 5), at 96.
[15] Ibid, at 98.
[16] Ibid, at 96.

Romzek and Dubnick. Their study seeks to identify who between individuals and agencies should be held accountable for underperformance. For Romzek and Dubinck, accountability is "a relationship in which an individual or agency is held to answer for performance that involves some delegation of authority to act".[17] In order to assess the accountability of individuals or agencies, Romzek and Dubnick developed a framework that incorporates methods of internal and external control to an organization by focusing on four systems of public accountability: external legal means, external political means, internal bureaucratic means and internal professional means.[18]

In the case of intermediaries, it is difficult to establish straightforward relationships between intermediaries and the Units of the Court, therefore assessing whether there is control is something that needs to be studied empirically. In other words, if the units of the Court can induce the behaviour of intermediaries, then the Units of the Court control intermediaries and intermediaries are accountable to Units of the Court. But since intermediaries operate in different types of in-between spaces, identifying the location of authority can be difficult. Are intermediaries accountable to units of the court, NGOs or other international institutions? In some ways the

[17] Romzek B. and Dubnick M., 'Accountability' in *International encyclopedia of public administration,* Vol I A-C, (Westview Press: 1998), p6.

[18] Ibid*, p* 227-30. In order to better understand the relevance of Romzek and Dubnick's work, it is necessary to return to some of their definitions of bureaucratic accountability systems and legal accountability.

"**Bureaucratic accountability** refers to mechanisms for managing public agency expectations. Under this approach, the expectations of public administrators are managed through focusing attention on the priorities of those at the top of the bureaucratic hierarchy. At the same time, supervisory control is applied intensively to a wide range of agency activities. The functioning of a bureaucratic accountability system involves two elements: an organized and legitimate relationship between a superior and a subordinate in which the need to follow "orders" is unquestioned; and close supervision or a surrogate system of standard operating procedures or clearly stated rules and regulations.

'**Legal accountability** is similar to the bureaucratic form in that it involves the frequent application of control to a wide range of public administration activities. However, legal accountability is based on relationships between a controlling party outside the agency and members of the organization. That outside the agency and member of the organization that outside party is not justify, it is thee individual or group in a position to impose legal sanctions or assert formal contractual obligations. Typically these outsiders make the laws and other policy mandates which the public administrator is obligated to enforce or implement."

question of who exercises control over whom is never really clear.[19] Is it the ICC (the institution), the Units of the Court (direct employers), NGOs (indirect employers) or local communities? In one sense all of these actors exercise some form of authority over intermediaries but they do so differently, through different registers and with different implications and challenges. Overall, it can be said that because of the different sites of mediation that intermediaries navigate, this element of accountability is constantly and continuously shifting.

1.4 Responsiveness

This dimension of accountability focuses on the *demands* and *needs* of the people being served. One way of looking at the Court's accountability to intermediaries is to look at the ways in which they respond to intermediaries' demands and needs.[20] On the one hand, it is commendable to see the Court working toward acknowledging the role of intermediaries through the adoption of the guidelines on intermediaries in 2014. However, as I have explained in chapters four and five, the guidelines on intermediaries are still very limited. There is a consensus among scholars who have written about intermediaries that the implementation of the non-binding guidelines on intermediaries is likely to fail.[21] To this, I add that because less powerful intermediaries rely on other intermediaries who represent their views, the Court's knowledge of intermediaries' demands and needs is likely to be incomplete. There is another aspect of this dimension of accountability, though beyond the scope of this

[19] Similar observation was made by Ullrich by raising the following question: 'Who is Controlling Whom? Powerful Court versus Weak Intermediaries?' in Ullrich L., 'Local Intermediaries, Victims and the Justice Contestations of the International Criminal Court', (2016), Vol. 14: 3, *Journal of International Criminal Justice*, at 551.

[20] Koppel J.G.S., 'Pathologies of Accountability: ICANN and the Challenge of "Multiple Accountabilities Disorder', (supra n. 5) at 98.

[21] See for example Haslam E. and Edmunds R, 'Managing A New 'Partnership': 'Professionalization', Intermediaries and the International Criminal Court (2012) Vol. 24:1 *Criminal Law Forum*, at 70-1; Clancy D., ''They told us we would be part of history' Reflections on the civil society intermediary experience in the Great Lakes region', in De Vos C., Kendall S., Stahn S. (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions,* (Cambridge University Press: 2015) p 222, p 238; Ullrich L., 'Local Intermediaries, Victims and the Justice Contestations of the International Criminal Court', (supra n. 19), at 552.

thesis, which merits academic attention. That is whether intermediaries respond to their communities' demands and needs.

To sum up, though accountability is a complex concept, Jonathan Kopell's framework, can help us with a common understanding of what is meant by accountability for the purposes of this thesis. Depending on which category of intermediaries is under examination, it appears that the dimensions of accountability discussed in this section have different implications for different entities. As seen throughout this section, analysing the accountability of an individual or an entity depends on how a wrongful act is defined and on who is 'being held accountable'. With this in mind I argued that the accountability of intermediaries can potentially have different meanings for policy makers, legal practitioners, intermediaries themselves and the communities they serve.

2. Developing legal framework for intermediaries accountability

So far, it is clear that intermediaries' accountability at the ICC has not received much academic attention. Yet intermediaries are heavily involved in Court's processes on the ground and they often represent the only opportunity for those victims who depend on their assistance to ever have any contact with Court. That said, aspects of intermediaries' accountability have dominated discussions at the ICC as De Vos observed.[22] In the first sub-section, I will discuss some of the ways in which the Court has had to deal with 'ill-intentioned' intermediaries. I argue that because of intermediaries' in-between status and the different spaces they navigate, the ICC is not always capable to intervene since intermediaries are the primary mediators in in-between spaces. In other words, one of the effects produced by intermediaries' in-between status is that the ICC is unable, even if it had adequate funding, to regulate all aspects of their accountability. The ICC can only capture a small fraction of

[22] De Vos C, 'A catalyst for justice? The International Criminal Court in Uganda, Kenya and the Democratic Republic of Congo', Ph.D Thesis Leiden University, p8.

intermediaries' accountability. Secondly, I will examine intermediaries' accountability in light of the current legal framework at the ICC. I argue that in general the law on intermediaries' accountability is limited. Though regulators have paid attention to intermediaries through the adoption of the guidelines on intermediaries in 2014, the legal framework on intermediaries' accountability is still in its infancy. Thirdly, I argue that the different in-between spaces in which intermediaries operate complicate their accountability and this is both an opportunity and a challenge for the ICC. Throughout this section, accountability is used to refer to controllability and responsibility in this section.

2.1 Multiple accountability mechanisms

As mentioned earlier, intermediaries fall under different registers of accountability. Intermediaries are accountable to the ICC through contractual agreements between them and the units of the court as provided by the guidelines on intermediaries. To some degree, it can be said that intermediaries' accountability to the ICC is regulated by the code of conduct for intermediaries. This is a five pages long document with eight sections enumerating the Court's expectations from intermediaries. It applies to individuals and organizations who fall under the meaning of intermediary as defined by the guidelines on intermediaries.[23] In other words, the scope of these guidelines is limited. What is more, despite its non- binding character, the guidelines on intermediaries reflect the desire to monitor intermediaries as part of intermediaries' accountability. For instance, this document states that 'the organ or unit of the Court or Counsel shall appoint one or more of their staff members to supervise the work of the intermediary and keep a record of their supervisory methods and actions'.[24] With this, it is likely that the intermediaries who assist the units of the court without contracts are also 'monitored' or 'supervised'.

[23] Detailed discussion of the definition can be found in Chapter 1.

[24] International Criminal Court, 'Guidelines Governing the Relations between the Court and Intermediaries' for the Organs and Units of the Court and Counsel working with intermediaries (2014), p 11. (Hereinafter the guidelines on intermediaries).

However, some aspects of these contracts between intermediaries and the units of the court are still obscure. The guidelines on intermediaries were adopted (in 2014) ten years after the first intermediaries began their work for the court (in 2004). Therefore, it is not entirely clear what the terms of contracts between intermediaries and units of the court were prior to the adoption of the guidelines or whether all units of court follow the recommendations of the guidelines since 2014. What is evident in the documents of the Court is that the prosecution has, on several occasions, entered into confidential agreements with intermediaries. These types of agreements between the OTP and intermediaries are, as I explain in chapter 5, regulated by articles 54(3)(e), 54(3)(f), 43(6), and 68(1).

Besides the guidelines on intermediaries and the Rome Statute, intermediaries also fall under other registers of accountability. In order to identify these other registers, it is important to recall the context in which intermediaries operate. Intermediaries work in a very dynamic environment where international criminal processes take place alongside other processes such as peace, reconciliation, conflict or resolution. This is to say that although the disciplines of international criminal law, international human rights, international peace studies, conflict resolution and transitional justice overlap, each one of these fields has its own accountability mechanisms. I will briefly come back to this in my discussion of NGOs accountability.

The following sections will focus on intermediaries' accountability from the perspective of ICC legal framework and then I will examine how this is put in practice through different intermediaries' cases.

2.2 Limited ICC legal framework

As mentioned at the start of this chapter, rules, regulations and norms are important in the determination of whether individuals or organisations are accountable. Despite efforts to regulate intermediaries' accountability, the law is still limited. Starting with the guidelines on intermediaries, they include what is expected from intermediaries to some degree but nothing is mentioned about the responsibility of ICC staff. Without rules regulating ICC staff accountability to intermediaries, intermediaries are put in a weak position that prevents them from challenging ICC staff behaviour on the ground. In other words, without a framework through which intermediaries' complaints are dealt with, much of the disputes between intermediaries and ICC staff are unlikely to be recorded.

Second, the code of conduct for intermediaries does not provide a framework through which conflicts between intermediaries themselves and intermediaries and the units that employ them ought to be addressed. For instance, an individual can hold an intermediary status in relation to a particular unit while at the same time working for an NGO-intermediary. This happened in the Lubanga case, where a prosecution intermediary also worked for an NGO whose mission was to assist victims in their applications.[25] In addition, most intermediaries seem to assist the Court at the different times and stages of the proceedings. This inevitably creates an administrative burden with financial implications that the Court is not necessarily ready to take upon itself. Intermediaries' ability to move in different spaces is a valuable quality but it renders their accountability extremely difficult. The problem of this code of conduct is not that the Court could or should have written a longer and detailed document. Rather, it is the failure to consider the broader context of intermediaries' work which significantly weakens these regulations.[26]

[25] See *Prosecutor v. Thomas Lubanga Dyilo*, Redacted Decision on Intermediaries, TC I (ICC-01/04-01/06-2434-Red2), 31 May 2010.

[26] See for example *Prosecution v. Thomas Lubanga Dyilo,* Judgment pursuant to Article 74 of the Statute, (supra n. 9) [203-205].

Moving now to the provisions of the Rome Statute and the rules of evidence and procedure, these texts do not explicitly deal with intermediaries' accountability. That said some intermediaries' misconduct may fall under article 70 of the Rome Statute. Following allegations against prosecution intermediaries in the DRC cases and in one of the Kenyan cases, Article 70 of the Rome Statute is now being tested.[27] According to this article, the exercise of jurisdiction is supposed to be discretionary, although the Court is guided by various factors. These include the availability and effectiveness of prosecution in a State Party, the seriousness of an offence, the possible joinder of charges under 70 with charges under articles 5,[28] the need to expedite proceedings, links with an ongoing investigation or a trial before the Court; and evidentiary considerations. Rule 162 of the rules of Procedure and Evidence also encourages states to take up such prosecutions under their own laws. The Prosecutor initiates and conducts investigations on her own initiative 'on the basis of information communicated by a Chamber or any reliable source'.[29] But these articles are limited for a number of reasons:

First of all, as Schabas pointed out the nature of these offences may occur in a situation where it would be inappropriate for the prosecutor to handle the case (for example where an official in the OTP is allegedly involved).[30] Nothing in this respect is provided in the Rules of Procedure and Evidence. Secondly, the role played by states in prosecuting these crimes overlooks the possibility that states may have competing interests with the Court. In fact, it is possible that intermediaries might

[27] Article 70 of the Rome Statute is about offences against the administration of justice. Article 70 prevails over the Code of Conduct on Intermediaries, see Section 2.3 "The Rome Statute, the Rules of Procedure and Evidence, the Regulations of the Court or any order or decision of a Chamber and, when applicable, the Regulations of the Office of the Prosecutor and the Regulations of the Registry shall prevail over this Code." In this sense the scope of Article 70 covers a greater range of intermediaries. However, this Article is still given the different levels in which intermediaries might 'influence' data or witnesses.

[28] Article 5 of the Rome Statue is about the crimes within the jurisdiction of the Court. These include the crime of genocide, crimes against humanity, war crimes and the crimes of aggression.

[29] Rules of Procedure and Evidence, Adopted by the Assembly of States Parties, ICC-ASP 13, Rule 162(1).

[30] Schabas W., *The International Criminal Court: a commentary on the Rome Statute*, (Oxford University Press: 2010), p 857

have a case against their own states. As seen in the previous chapter, states are sometimes unreliable to protect intermediaries. How, then, do they play a role in bringing intermediaries to justice? At this time there is no mechanism through which intermediaries can hold states accountable for their acts against intermediaries. In any event, it is a question that needs to be empirically examined.

Overall, there have been some efforts to manage intermediaries' accountability in international criminal law through the adoption of regulations such as the guidelines on intermediaries and the code of conduct for intermediaries. However, these regulatory efforts only capture a fraction of intermediaries' accountability. By focusing on intermediaries' accountability toward ICC staff, these regulatory efforts do not include the Court's responsibility toward intermediaries.

3. Bringing Intermediaries to Court: intermediaries' cases before the ICC

Intermediaries' close relationship with victims, victims' witnesses and other witnesses is one that facilitates contact between affected communities and the Court. In this sense, intermediaries play an important role in the administration of international criminal justice. Unlike domestic legal systems, those who rely on intermediaries for their investigations, for example, come from both civil and common law legal traditions. This is important because lawyers from civil law traditions tend to be less familiar with investigating, evidence gathering and meeting with witnesses to prepare them for trial. It is, therefore, important to appreciate differences of approaches and expectations that different investigative teams may have when they hire intermediaries. In other words, intermediaries' accountability may be understood differently by different units. However, for the purposes of this chapter the following paragraphs will discuss instances where intermediaries have been held accountable before the ICC from the perspective of the documents of the Court. In this section, I will discuss some of the cases brought against intermediaries

at the ICC. Some of these allegations have turned to be substantiated while others have not been substantiated.

3.1 Substantiated allegations against intermediaries

3.1.1 The Bemba Case

The Bemba bribery case is a great example of how intermediaries can be held accountable in the sense of liability and responsibility.[31] On October 19, 2016 Mr Jean-Pierre Bemba and four associates who include two of his former defence lawyers were convicted in a witness bribery trial at the ICC. The intermediaries in this case were Congolese Member of Parliament Fidèle Babala Wandu and Narcisse Arido a former soldier in the Central African Republic (CAR). Although they are not referred to as intermediaries they acted as bridges between witnesses and Defence lawyers for Mr Bemba. Mr Arido helped with recruiting witnesses D-2, D-3 D-4 and D6 for the main Defence case. He briefed and instructed the witnesses as to contents of their upcoming testimony, promising payment and relocation.[32] Mr Babala was listed as a Defence witness (although he did not testify in the main case). He served as a link between Mr Bemba and those who dealt directly with witnesses. His role as an intermediary facilitated the implementation of Bemba's instructions and he facilitated communication between the two (including i.e. money requests and subsequent payments).[33] Both were found guilty of aiding in corruptly influencing witnesses.

The false testimony mostly related to claims by witnesses that they served in the army of the Central African Republic (CAR), or in rebel forces, during 2002-2003 When Bemba's troops were in that country helping the government to fight back a coup attempt. These witnesses claimed that Bemba's troops were not responsible

[31] *Prosecutor v Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu, Narcisse Arido,* Judgement pursuant to Article 74 of the Statute, TC VII (ICC-01/05-01/13), 19 October 2016.

[32] Ibid, [872].

[33] Ibid, [873].

for the crimes committed during the conflict and that the Congolese troops fell under command of Central African generals. What is remarkable in this case is that Mr Babala and Mr Arido are not referred to as intermediaries, even though they clearly performed intermediaries' tasks. It is not entirely clear why this is the case but Defence teams in general refer to their intermediaries as 'resource persons'. Additionally, the guidelines on intermediaries and the code of conduct are not referred to in the trial proceedings of the bribery case which makes it even more difficult to determine when and how the guidelines are applicable.

3.1.2 The Lubanga Case

In order to better understand intermediaries' accountability at the ICC, it is first necessary to recall some of the events that led to their trials. Early in the Lubanga case, the Defence challenged the credibility and reliability of OTP intermediaries. The situation became so tense that the defence decided to apply for a stay of proceedings. The Defence had asked the prosecution to disclose the identities of its intermediaries because they wanted to investigate whether intermediaries might have influenced witness testimonies. According to the defence if that was a possibility, there were grounds to call into question the entire case.[34] In their response, the prosecution said that they had to rely on trusted intermediaries and revealing their identities would have an impact on their ability to secure such partnerships in the future. [35]

As arguments continued between the defence and the prosecution, the prosecution relied on Article 54(3)(f) of the statute along with the combined effect of Article

[34] *Prosecutor v. Thomas Lubanga Dyilo*, Redacted Decision on Intermediaries, (supra n. 25), [178].

[35] For Baylis the Prosecutor's reliance on third parties can be explained as follows: "On the one hand, this is an inevitable consequence of the Prosecutor's targeted, sequenced investigation strategy. The OTP has done a limited amount of investigation of its own, and therefore necessarily must rely on third-party investigations both to direct its initial design of an investigation and also to fill in the gaps in its own work." See Baylis E.A., 'Outsourcing Investigations', (supra n. 2), at 133.

68(1) and the jurisprudence of the Appeals Chamber[36] and it argued that the Court has a duty to take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of "persons at risk on account of the activities of the Court".[37] The prosecution also relied on Articles 64(6)(c) and (f) and 64(7) of the Statute, which enable the Court to protect confidential information and to derogate from the principle of holding a public trial in exceptional circumstances. Rules 88 enables the Chamber to order special measures, in order to facilitate the testimony of sensitive witnesses."[38]

In essence the Prosecution's argument was that any prejudice to the defence that may flow from the lack of disclosure of intermediaries' identities is outweighed by the prejudice that would result to the intermediaries and their families, along with the prosecution's on-going investigations.[39] For Trial Chamber I the issue at stake was whether 'prima facie' grounds had been identified suspecting intermediaries of being in contact with a witness whose testimony had been called into question. After deliberation, Trial Chamber I was satisfied that the threshold for disclosure was met for intermediaries 143 and 31, ruled in favour of the Defence and ordered the Prosecution to confidentially disclose relevant information.[40]

Eventually, the Defence requested a permanent stay of the proceedings, arguing that the evidence was so unreliable that a fair trial could no longer be guaranteed.[41] Initially, the position of Trial Chamber I in this case was that "disclosure of the

[36] *Prosecutor v. Germain Katanga,* 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", AC (ICC-01/04-01/07-475) 13 May 2008, [43-44]; [53-55].
Article 54 (3)f is about the right of the Prosecutor to request measures to protect "any person" and Article 68 is about the protection of the victims and witnesses and their participation in proceedings.

[37] *Prosecutor v. Thomas Lubanga Dyilo*, Redacted Decision on Intermediaries, (supra n. 25), [178].

[38] *Prosecution v. Thomas Lubanga Dyilo,* Prosecution Proposed Procedure for Dealing with Intermediaries, TC I (ICC-01/04-01/06-2362), 19 March 2010, [12-13].

[39] Ibid, [3-8].

[40] *Prosecutor v. Thomas Lubanga Dyilo* Redacted Decision on Intermediaries, (supra n. 25) [150].

[41] *Prosecution v. Thomas Lubanga Dyilo,* Redacted Decision on the "Defence Application Seeking a permanent stay of the Proceedings," (supra n. 1).

identities of the intermediaries was unnecessary because this information was irrelevant to the issues in the case."[42] But in the end the Chamber accepted there were grave grounds for concern, still it ruled that the trial should continue because the impact of intermediaries' involvement, as well as any prosecutorial misconduct or negligence, would be matters for its final judgments.[43] In the final judgment Trial Chamber I reiterated that intermediaries 143, 316 and 321 "may have persuaded, encouraged, or assisted witnesses to give false evidence" to the Prosecutor.[44]

Intermediary 143 was one of the first intermediaries accused of being ill-intentioned at the ICC. He became the first tainted Intermediaries and his identity was disclosed to the Defence early on in the case. Here is a brief account of how members of the OTP interacted with him.

> The OTP established certain criteria for identifying witnesses, which weren't revealed to Intermediary 143, and asked Intermediary 143 if he knew militia members. Intermediary 143 was expected to introduce children who were to be assessed by investigators but in practice he often identified children for the prosecution before investigators asked him to do so and P-0582 did not know the precise manner in which this occurred.[45] P-0582 indicated that on the basis of several meetings, as well as the assessment of the investigators who had direct links with Intermediary 143, he was quite content with the management of the child soldier witnesses and any relevant security measures. P-0582 explained that Intermediary 143 undertook the work assigned to him and they discussed his future role. It was P-0582's estimation that Intermediary 143 had a "really high idea of his activities and responsibilities and the fact that he was working for a cause that […] was dear to him". The Chamber found that there was a real possibility that Intermediary 143 corrupted the evidence of four witnesses.[46]

In effect because of intermediaries' in-between status, it is difficult for outsiders to monitor communication between them and potential witnesses. It is equally, difficult

[42] *Prosecutor v. Thomas Lubanga Dyilo*, Redacted Decision on Intermediaries, (supra n. 25), [6].
[43] *Prosecution v. Thomas Lubanga Dyilo,* Redacted Decision on the "Defence Application Seeking a permanent stay of the Proceedings," (supra n. 1), [74-92].
[44] *Prosecution v. Thomas Lubanga Dyilo,* Judgment pursuant to Article 74 of the Statute, (supra n. 9), [483], [502], [1361]; see also [291], [372-374], [450], [499-501].
[45] Ibid, [214].
[46] Ibid, [291].

to understand the kinds of challenges that intermediaries are faced with in making these connections possible. As a result, it appears that the OTP's decision was to simply trust intermediaries. Of course this approach was heavily critiqued by academics[47] as well as members of the civil society.[48] As for intermediary 316, he agreed to assist the OTP while he maintained his obligations towards the DRC government. He assisted the OTP and at the same time worked for the Congolese intelligence services, the *Agence Nationale de Renseignement*, "ANR"). For the OTP, the belief that intermediary 316's functions "were capable of undermining his impartiality"[49] was not enough to dismiss the kind of data they could collect through him.[50] Examples such as here show that intermediaries operate in in-between spaces that run in parallel. That is, while they act as in-between agents for the Court they also operate in the in-between space between transitional justice and political transition. In this case, it is evident that the DRC government was one of the parties in the DRC conflict. Thus there is ground for concern as to whether such an intermediary would assist investigators or sabotage their investigations. To sum up, thinking through in-between analysis allows us to understand that, in the site of mediation between the ICC and communities affected by its proceedings, intermediaries are the primary mediators and as such there are interactions (or dialogues) that are dependent on their participation in ICC processes. This is what makes intermediaries essential to the Court's work on the ground and ICC processes more broadly but it is also a challenge because engaging with in-between agents opens up possibilities for abuse. Intermediaries may use their position to facilitate data collection but they may also use their position to decide or influence the data itself.

[47] Buisman C., 'Delegating Investigations: Lessons to be Learned from the Lubanga Judgment', (supra n. 4), at 40.

[48] IRRI, 'Steps Towards Justice, Frustrated Hopes: Some Reflections on the Experience of the International Criminal Court in Ituri', Just Justice? (2012) Civil Society, international Justice and the Search for Accountability in Africa, Discussion paper no 2, at 20.

[49] *Prosecution v. Thomas Lubanga Dyilo,* Judgment pursuant to Article 74 of the Statute, (supra n. 9), [302].

[50] Ibid, [316].

Turning now to article 70, the Defence filed a request in which it asked the Prosecutor to disclose all the evidence collected in carrying out investigations against the said intermediaries following the Trial Chamber' Judgment against Thomas Lubanga. [51] The Defence submitted that the core of Mr Lubanga's defence revolved around the fact that intermediaries took part in the elaboration of false testimonies against him, in order to obtain his conviction.[52] Thus for the Defence it was paramount that the Prosecutor would be under the duty to conduct thorough investigations to establish the truth as to the alleged fraudulent acts committed by intermediaries.[53] The defence also referred to article 54(1)a to say that the Prosecutor had a duty to investigate incriminating and exonerating circumstances equally and to communicate, if necessary, any relevant evidence to the defence. The Prosecutor responded that Trial Chamber "could not and did not order" her to initiate or conduct investigations against the said intermediaries.[54] However, the Prosecutor hired Mr Harmon an 'independent consultant' to "examine information in the possession of […] the Prosecutor (including judgments and decisions, evidence, transcripts of testimonies, trial exhibits, and internal reports, memos and emails) and to advise the Prosecutor whether any further investigations and/or prosecutions pursuant to Article 70 were warranted."[55]

Based on Mr Harmon's report, the Prosecutor decided "not to pursue further investigations and/or prosecutions against any of the three named intermediaries, for any violations of Article 70".[56] As regards the submission that investigations against the three intermediaries would have led to prosecutions, the Prosecutor argued that the Trial Chamber convicted Mr Lubanga on evidence other than that provided by witnesses who had been in contact with the said intermediaries with the

[51] *Prosecutor v. Thomas Lubanga Dyilo,* Requête de la Défense de M. Lubanga aux fins de communication d'éléments de preuve recueillis par le Procureur dans le cadre des enquêtes conduits en vertu de l'Article 70, AC (ICC-01/04-01/06-3066) 28 February 2014.

[52] Ibid, [17-18].

[53] Ibid, [22-23].

[54] Ibid.

[55] Ibid, [21].

[56] Ibid, [23].

exception of two witnesses and thus the lack of further investigations against these intermediaries had no effect on the reliability of the final judgment.[57] The Appeals Chamber was satisfied with actions undertaken by the Prosecutor under Article 70 and was held that based on the Prosecutor's response it was satisfied that there was no evidence to be disclosed to Mr Lubanga.[58]

3.1.3. The Barasa Case

A third example in which intermediaries have been brought to trial can be found in the Kenyan cases. ICC Prosecutor initiated proceedings against Walter Osapiri Barasa a Kenyan journalist who acted as an intermediary between the OTP and Kenyan witnesses in the situation of Kenya before the ICC. He faced several allegations of offences against the administration of justice including tampering with prosecution witnesses and offering bribes to two other witnesses.[59] In his case the Defence raised the issue of whether and to what extent, a suspect, who was yet to appear before the Court was entitled to receive information in order to prepare for their defence.[60] In response, the Prosecution essentially argued that disclosure of the material sought by the Defence should be withheld until Mr Barasa is under the control of the Court and Pre-Trial Chamber II agreed with the prosecution.[61]

A question that Pre-Trial Chamber II emphasized in this case was the extent to which article 70(2) should be applied. It provides that proceedings over offenses of administration of justice shall be governed by domestic states. Judge Tarfusser noted that there are questions whether a state's discretion in the implementation of the

[57] *Prosecutor v. Thomas Lubanga Dyilo,* Prosecution Response to 'Requête de la Défense de M. Lubanga aux fins de communication d'élement de preuve recueillis par le Procureur dans le cadre des enquêtes conduits en vertu de l'Article 70', AC (ICC-01/04-01/06-3069) 25 March 2014, [18].

[58] *Prosecutor v. Thomas Lubanga Dyilo,* Decision on the request of the Defence in relation to investigations conducted pursuant to article 70 of the Statute, AC (ICC-01/04-01/06-3114), 14 June 2014.

[59] *Prosecution vs. Walter Osapiri Barasa,* Under seal *ex parte,* only available to the Prosecutor and the Registrar Warrant of arrest for Walter Osapiri Barasa, PTC II (ICC-01/09-01/13), 2 August 2013.

[60] Ibid, [10].

[61] Ibid, [6-8] and [17-18].

Statute into its domestic system can extend as far as making article 59, which provides for arrests and custody,[62] applicable to surrenders of suspects such as intermediaries.[63] Since Mr Barasa has not yet been arrested, it can be said that these articles are yet to be tested. However, thinking through in-between analysis has shown us so far that states are not always reliable to support ICC processes. In other words, in situations where a particular state is reluctant to cooperate with the ICC in the first place, it will unlikely deploy its resources for the prosecution of intermediaries. Conversely, these provisions are silent about the possibility that intermediaries might also need to bring to account those who rely on their services, especially the units of the Court.

3.2 Unsubstantiated allegations against intermediaries

While intermediaries' misconduct must be called into question, their involvement in ICC processes must not be viewed as a liability. In this section, I will discuss instances where intermediaries have been wrongly accused. Sadly and as has been argued throughout this chapter, there is no framework through which intermediaries might also hold those who rely on their services accountable. Instead, it appears that intermediaries rely on the units that employ them to also defend them in cases of un-substantiated allegations. This is visible in the Lubanga case in which the OTP insisted that not all intermediaries are 'tainted'.[64]

Overall, intermediaries are accountable to the ICC for their interactions with victims, victims' witnesses and witnesses. Intermediaries are expected to comply with the guidelines on intermediaries, the Code of Conduct and the Rome Statute, the rules of evidence and procedure and the case law of the ICC. One of the issues in the current accountability mechanism is that the law empowers the prosecution to conduct investigations when allegations are made against all intermediaries (meaning

[62] Article 59, Rome Statute, 2002.

[63] *Prosecutor v. Walter Osapiri Barasa,* Decision on the "Defence request for disclosure (1)", (supra n. 59), [16].

[64] *Prosecution v. Thomas Lubanga Dyilo,* Judgment pursuant to Article 74 of the Statute, (supra n. 9), [182].

independent of which unit employs them), including their own intermediaries. That the prosecution would also be responsible to investigate its own intermediaries raises questions about its ability to fairly and impartially perform its duties. However, when a case presented itself, the prosecution hired an independent consultant before it decided not to prosecute.

Secondly, Defence intermediaries do not seem to benefit from 'intermediary status' even though they act as intermediaries. This raises questions about what the place of Defence intermediaries is at the ICC. In addition, the Bemba case shows that several intermediaries were involved in linking witnesses to Mr Bemba's lawyers.[65] However only those who had direct contact with Mr Bemba or his lawyers were investigated. Whether the decision to prosecute those who had direct contact with Mr Bemba was done intentionally or unintentionally, little is said about how the Prosecution selection strategy. This further testifies to the complexity of intermediaries' accountability even to the ICC. Thirdly, ICC judges concern themselves with intermediaries' accountability only when there are problems arising in relation to specific trial proceedings. For this reason, other accountability issues such as ICC staff accountability to intermediaries, intermediaries accountability to other intermediaries are for the most part undocumented and therefore unnoticed.

4. Managing accountability problems through intermediaries

In addition to the Rome Statute, there are other entities to which intermediaries are accountable to. These other entities essentially come into the picture where intermediaries do not have direct contact with the ICC. There are (though not always) multiple layers of different types of intermediaries between affected

[65] Put differently, Mr Babala's driver made payments to a Defence witness. See *Prosecutor v Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu, Narcisse Arido,* Judgement pursuant to Article 74 of the Statute, TC VII (ICC-01/05-01/13) 19 October 2016, [690].

communities and the Court.[66] For this reason, not all types of intermediaries interact directly with affected communities. Noting that affected communities tend to perceive intermediaries as the presence of the Court on the ground, it is not surprising that they also hold intermediaries accountable (mostly in terms of legitimacy and perceptions) for their work with the ICC. This section looks at the ways in which, if any, local communities hold intermediaries accountable for their work. Unlike intermediaries' accountability to donors and to the ICC which are more formal in the sense that they involve certain administrative steps, intermediaries' accountability to local communities seems to be more informal. After intermediaries assist victims in filling out forms, linking witnesses to Units of the Court, they keep the communities up to date with developments in relevant cases. As a result it becomes difficult identify when intermediaries cease to be intermediaries. They continue to be the face of the Court on the ground and in so doing they speak on behalf of the Court. Of course the Court would not accept this but it is a challenge it is faced with and one that is yet to be addressed.

Regarding the question of whether intermediaries are accountable to the communities they serve, this question was inspired by my reading of African colonial intermediaries. As I explained in chapter 2, some African communities had systems in place to make sure to prevent intermediaries from abusing their positions.[67] This is what inspired my inquiry into whether contemporary intermediaries are accountable to their communities. Much of what follows is far from being a comprehensive account of intermediaries' accountability to affected communities but it contributes with a starting point of a conversation about the subject.

The literature on intermediaries thus far supports the idea that intermediaries are central to the communication between the ICC and affected communities. Deirdre

[66] See for example chapter 4 on victims-intermediaries, in Kenya, who wrote directly to the Court with a request to withdraw from proceedings.
[67] See chapter 2.

Clancy's empirical work, in particular, shows that many intermediaries "go beyond providing a mere 'link' to the ground, actively shaping the narratives emerging about the situation itself".[68] 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 Lubanga case, intermediaries also found themselves portrayed as betrayers of local communities and of international justice."[69] As a result of this, individual intermediaries have been targets of physical attacks by members of their own communities. Through intermediaries the Court mitigates its accountability to affected communities. It is regrettable that intermediaries should carry upon their shoulders the Court's accountability to local communities. Due to the in-between spaces in which intermediaries operate and their in-between status, the failures and successes of the Court are attributed to them on the ground. It also means that intermediaries play a great role in negotiating meeting points between local communities' expectations and the realities (meaning the limits and challenges) of international criminal prosecutions.

5. Complex NGO Accountability

Generally, NGOs are viewed as supporters of the Court's work. As seen throughout this thesis, the Court has and continues to rely on their work for many different tasks. Some NGOs have shown their ability to conduct investigations (despite their limits),[70] and others have written useful reports about the historical background of

[68] Clancy D., ''They told us we would be part of history' Reflections on the civil society intermediary experience in the Great Lakes region', (supra n. 21), p 227.

[69] Ibid, p 221.

[70] Buisman C., 'Delegating Investigations: Lessons to be Learned from the Lubanga Judgment', (supra n.4), at 53.

conflicts.[71] While NGOs play an important role in the Court's work, their accountability is extremely complex. Existing literature, though very limited, has tended to focus on questions of internal representativeness and accountability[72] or the need for increased formal regulations.[73] In this section, I will discuss some aspects of how NGO accountability operates in in-between spaces. I argue that the Court captures only a small fraction of NGO-intermediaries' accountability. First, NGOs position themselves as independent entities whose work includes monitoring Court practice on the ground. As such, the Court's efforts to hold them accountable through regulations are inherently limited. Secondly, intermediaries are likely to be accountable to their donors than to the Court even if it is only on matters of effectiveness and reliability.[74] In addition, the current framework does not provide for the Court's accountability to NGO-intermediaries.

With respect to NGO accountability to the Court, it is first necessary to reiterate that their role in international criminal justice goes beyond assisting the units of the Court on the ground. Even without the status of intermediary, NGOs are highly regarded at the ICC and the OTP has often been criticised for over-relying on their great contribution to the investigation of international crimes. However, NGOs are essentially separate from the Court; they position themselves as independent entities whose role is to watch over the interests of their constituents. NGOs are conceived as 'watchdogs' for the communities they claim to represent. Some of their responsibilities include for example: exposing states' violations of their international obligations. Looking at NGO intermediaries, it appears that the guidelines on intermediaries expect them to also be accountable to the Court. The guidelines state

[71] *Prosecution v. Laurent Gbagbo,* Decision adjourning the hearing on the confirmation of charges pursuant to article 31(7)(c)(i) of the Rome Statute, PTC I (ICC-02/11-01/11-432), 3 June 2013, [35].

[72] As can be seen in Simmons P.J., 'Learning to Live with NGOs', (1998) 112 *Foreign Policy,* 82-97.

[73] Blitt C. R., 'Who will watch the watchdogs? Human Rights Non-Governmental Organizations and the Case for Regulation', (2004) 10, *Buffalo Human Rights Law Review,* 261-398.

[74]Jordan L., *Mechanisms for NGO Accountability,* GPPi Research Paper Series no. 3, (Cambridge Mass: Global Public Policy Institute: 2005), pp 8-9.

for example that a member of ICC staff would 'supervise the work of the intermediary and keep a record of their supervisory methods and actions'.[75]

Yet some of these NGOs also position themselves as 'watchdogs' of the Court because it is a public institution.[76] In fact, it was NGOs that were first to raise intermediaries' issues before and during the process that led to the adoption of the guidelines on intermediaries. For example NGOs such as IRRI and Open Society expressed their concerns in relation to the draft guidelines on intermediaries.[77] As seen in chapter four, since NGOs move between acting in their own name (as members of broader civil society) to acting as ICC intermediaries, it is difficult to establish a relationship of authority between them and the Court. Put differently, since controllability and independence are opposites, it is not entirely clear how or whether NGO-intermediaries can be held accountable to the ICC.

NGOs are criticized across disciplines for having too much influence compared to their degree of representativeness and contribution.[78] African host governments and militants groups also perceive NGOs as working closely with the intelligence agencies of western donors.[79] The dominant sentiment in this literature is that although NGOs have good intentions (for example humanitarian or fighting against impunity), these intentions are not without political implications. I argue that such implications

[75] The guidelines on intermediaries, (supra n. 24), p 11.

[76] The term 'watchdogs' is borrowed from Blitt C. R., ' Who will watch the watchdogs? Human Rights Non-Governmental Organizations and the Case for Regulation', (2004) 10, *Buffalo Human Rights Law Review,* 261-398.

[77] Open Society & IRRI, 'Commentary on ICC Draft Guidelines on intermediaries', available at < https://www.opensocietyfoundations.org/sites/default/files/icc-intermediaries-commentary-20110818.pdf> accessed 07 March 2018; REDRESS, 'Comments on the Draft Guidelines Governing Relations between the Court and Intermediaries', (15 October 2010), available at < http://www.redress.org/downloads/publications/Comment_on_draft_guidelines_on_intermediaries_15_Oct_2010.pdf>

[78] Naidoo K., 'The end of blind faith? Civil society and the challenge of accountability, legitimacy and transparency, (2004), 2 *Accountability Forum,* available at < http://www.lasociedadcivil.org/wp-content/uploads/2014/11/the_end_of_blind_faith.pdf> accessed 06 May 2018, pp 14-25.

[79] Mayhew S., 'Hegemony, politics and ideology: The role of legislation in NGO-Government Relations in Asia', (2005) Vol. 41:5, *Journal of Development Studies,* 727-758; On western-liberal domination also see Mutua M., 'Human Rights International NGOs: A critical Evaluation', in Claude E. and Welch Jr., *NGOs and Human Rights: Promise and Performance,* (University of Philadelphia Press: 2001).

are exacerbated by the in-between space between transitional justice and political transition.

The Kony 2012 Campaign is a good example of how Invisible Children's humanitarian intentions or philanthropy translated into poor results.[80] The NGOs promoted Kony 2012 a short film in which Jason Russell narrates Uganda's long war, deaths and devastation it caused. The film oversimplifies the complex conflict of Uganda and promises the viewer that American intervention might help stop the 'bad' guys in the story and save the day for Ugandans. As the Youtube video was growing in popularity on social media so were reactions from members of the Ugandan community.[81] For example, Victor Ochen (director of African Youth Initiative Network an NGO located in Uganda) was interviewed by the Guardian and said that the film failed to reflect their lives.[82] According to Kamari Clarke, Kony 2012 is not an isolated case in terms of ICC justice contestations. There are multiple other examples in DRC, Kenya or Libya where the 'Court's agenda and the language deployed by human rights or rule of law advocates have afterlives that go well beyond the enactment of the law and the courtroom.'[83] The aftermath that Kamari Clarke explains, in her commentary, is an environment in which human rights or community building oriented NGOs are most active. And so, to return to invisible children's campaign, such discrepancies between NGOs action and community reaction increase the pressure on NGOs to demonstrate their credibility. What we also learn from this example is that the

[80] Von Engelhard J and Jansz J., 'Challenging humanitarian communication: An empirical exploration of Kony 2012', (2014) Vol. 76:6, *The International Communication Gazette,* 464-484; Bex S. and Craps S., 'Humanitarianism, Testimony, and the White Savior Industrial Complex: *What is The What vers Kony 2012,* (2016) Vol 92:1, *Cultural Critique,* 32-56. .

[81] Malcolm Webb, 'Ugandans react with anger to Kony video', *Al Jazeera,* (14 March 2012), available at < https://www.aljazeera.com/blogs/africa/2012/03/104756.html>, Accessed 18 April 2018.

[82] Rosebell Kagumire in Lira and David Smith in Johannesburg, 'Kony 2012 video screening met with anger in northern Uganda', *The Guardian,* (14 March 2012), available at < https://www.theguardian.com/world/2012/mar/14/kony-2012-screening-anger-northern-uganda>, Accessed 18 April 2018.

[83]Clarke M. K., 'Kony 2012, The ICC, And the Problem with the Peace and Justice Divide', in Schabas W., Tladi D., Clarke K.M. and Swaak-Goldman O., 'Annual Ben Ferencz session: Africa and the International Criminal Court' (Cambridge University Press: 2012), pp. 305-316.

relationship between different types of NGOs is complex. While some international NGOs are able to mobilise international media, as invisible children did, others with limited access to such platforms use their proximity and advanced understanding of local politics to their advantage.

Secondly, NGOs are likely to be accountable to their donors rather than to the ICC.[84] Literature on NGO accountability is large though still limited in international criminal law. A number of approaches have been developed by different stakeholders for understanding NGO accountability. These approaches include for example the development of internal accountability mechanisms such as infrastructure and management capacity tools, codes of conduct, monitoring and evaluation tools. However, there are limits to what can be achieved with these approaches. For example these approaches have traditionally given higher priority of accountability to donors and governments rather than communities. In addition, they tend to be controlling rather than collaborative.[85] In the context of the ICC, it means that NGO intermediaries should, at least, be accountable to the Court for their role in ICC processes. For example, if a victim orientated NGO is trusted by the Court for assistance, that NGO should not favour one group of victims over another.[86] At the moment, the Court's missing accountability toward intermediaries dominates conversations even where NGOs could improve their practice. Generally, more dialogues about intermediaries' accountability need to be had and these conversations should reflect differences between types of intermediaries.

[84] In addition, it has been argued that NGOs (especially fact-finding) should be accountable to the Public. Steinberg G. M. and Herzberg A.,'NGO Fact-Finding for IHL Enforcement: In Search of a New Model', (2018) 51(2), *Israel Law Review,* at 298.

[85] Jordan L., *Mechanisms for NGO Accountability,* GPPi Research Paper Series no. 3, (Cambridge Mass: Global Public Policy Institute: 2005), pp 8-9.

[86] On ethnic politics see Ullrich L., 'Local Intermediaries, Victims and the Justice Contestations of the International Criminal Court', (supra n. 19), at 550.

Overall, NGO-intermediary accountability towards the ICC is complex. On the one hand, NGOs in general position themselves as independent and watchdogs of public institutions and as such it is difficult to conceive a relationship in which the same institution would also hold them accountable. Secondly, I argued that NGOs are likely to be accountable to their donors and states than to the ICC. Even so, NGO intermediaries should at least be accountable to the ICC on matters that involve Court processes. As regards the Court's accountability toward NGO-intermediaries, the current system does not make any provision for this matter.

6. Concluding remarks

The purpose of this chapter was to show how accountability operates in in-between spaces. As shown throughout this chapter, intermediaries' accountability is important for the Court's credibility, the protection of victims' right to participate in proceedings, for intermediaries and those who rely on their services. I relied on Jonathan Koppel's framework of accountability to establish a common understanding of the concept for the purposes of this thesis. I argued that depending on which categories of intermediaries are under examination, the five dimensions of accountability (transparency, liability, controllability, responsibility and responsiveness) have different implications for different intermediaries. I explained that the analysis of accountability issues in relation to an individual or an entity depends on how a wrongful act is defined and on who is 'being held accountable'. Consequently, in-between spaces are productive of a practice whereby, intermediaries' accountability is constantly negotiated by policy makers, legal practitioners, intermediaries themselves and the communities they serve. In this final section, I will briefly come back to the main findings of this study and discuss their implications.

First, I discussed the current legal framework for intermediaries. Generally, intermediaries fall under multiple accountability mechanisms because of the different spaces they navigate. For instance, while the guidelines on intermediaries regulate aspects of intermediaries, they are also subject to contractual agreements between them and the different units of the Court. Through it is not entirely clear how and whether the guidelines on intermediaries changed the ways in which the units of the Court interact with intermediaries, what emerges from the documents of the Court is that intermediaries should be accountable to the units that employ them. In addition, because intermediaries operate in-between transitional justice and political transition, several other accountability mechanisms run in that in-between space. These include, for example, accountability mechanisms in international human rights, conflict resolution, or international peace studies. These different accountability registers run at the same time as international criminal law and this is an opportunity for the ICC because intermediaries are accountable to many different actors.

Specifically, aspects of intermediaries' accountability are regulated by the guidelines on intermediaries and the intermediaries' code of conduct. These two non-binding documents only apply to a small number of intermediaries as they are essentially limited in scope and substance. That said some intermediaries' misconduct may fall under article 70 of the Rome Statute which gives ICC prosecutor the responsibility to investigate cases of obstruction of justice. However, because some intermediaries are attached the OTP, article 70 is flawed as it would be inappropriate for the prosecution to investigate its own intermediaries. In practice, the prosecution has demonstrated its ability to pursue investigations against its intermediaries by hiring an independent investigator. Even through nothing came of his report, the method used by the prosecution to manage this situation was respectable. Overall, there have been efforts to manage intermediaries' accountability through regulation however, these efforts are limited.

Secondly, I examined four case studies in which intermediaries were brought before the court to face charges of tampering with witnesses' testimonies or bribery. What emerges from these cases is that while some allegations against intermediaries are substantiated, others are not. As regards the substantiated allegations, prosecuting in-between agents has been difficult. The main challenges come from the in-between space between the ICC and states. Where the ICC issues arrest warrants against intermediaries, it depends on states to enforce them and bring those intermediaries to face charges before the Court. However, states are not always willing to cooperate with the ICC on these matters and this is a challenge the Court will continue to face as long as it relies on states for enforcement. Overall, I argued that while intermediaries should be accountable to the Court, allegations of misconduct are not enough to conceive their role in ICC processes as a liability.

Thirdly, I discussed how the ICC manages its accountability to communities affected by its proceedings through intermediaries. As the faces of the Court on the ground, intermediaries are often held responsible for the Court's action (or lack of) by the communities affected by its proceedings. This form of accountability, which is an effect of intermediaries' in-between status, is essentially related to questions of legitimacy and perceptions rather than ethical. Still, it was sufficient to cause physical attacks against intermediaries. Overall, it is unacceptable for the Court to 'use' intermediaries in this way and fail to take responsibility for their security.

Fourthly, I discussed NGO-intermediaries' accountability. To recall briefly my categorisation of intermediaries, NGO-intermediaries include international, regional, country level and community level NGOs. The main issue with NGOs accountability is that because they position themselves as independent separate entities from public institutions, it is difficult to conceive a relationship in which watchdogs would be accountable to the public institutions they watch. In fact, the guidelines on

intermediaries do not consider international NGOs as intermediaries. Still, I argued that NGO-intermediaries should at least be accountable to the Court for their involvement in its processes.

All together analyses conducted in this chapter show that while ICC accountability framework is limited there has been some cases in which intermediaries were brought to trial to face allegations of misconduct. It has also shown that urgent attention from policy makers and members of the civil society is needed to address the issue of accountability in more detail. For instance, the current framework excludes a great deal of ICC's accountability to intermediaries.

CONCLUSION: A complex role for the Court's in-between agents

The International Criminal Court is set up in such a way that it will always rely on intermediaries for its work on the ground. The most critiqued areas of its relationship with intermediaries relate to investigations and witnesses' testimonies. However, intermediaries are involved in all ICC processes on the ground and their participation in these processes cannot and should not be ignored. Throughout this thesis it has been argued that international criminal justice also takes place in in-between spaces. However, these in-between spaces have largely been overlooked in dominant literature in international criminal law and these spaces are hardly capable of regulation.

The main question that this project was undertaken to answer is: what is the place of intermediaries in international criminal justice? Specifically, what is the place of intermediaries at the ICC? In order to answer these questions, it was first necessary to address the question of what analytical frame is best suited to analyse in-between spaces. Then in the last three chapters, the thesis sought to answer the following question: what are the effects of in-between spaces on international criminal justice processes, especially on ICC processes? As seen in the introduction of the thesis, a small but growing literature on contemporary intermediaries has investigated aspects of the relationship between intermediaries and the Court. However, it has left some questions unaddressed either because it tends to focus on institutional practices or by studying the relationship between the Court and communities affected by its proceedings through global/local lenses. This research contributes to literature on intermediaries and international criminal law by offering a new perspective on the practice of international criminal justice which does not focus on institutions and which takes place in in-between spaces. Because this practice takes place in in-between spaces, it has largely evolved in the background without being noticed by international policy makers (for example at the ICC) and academics. In

order to make these arguments, I conducted my analysis through the prism of in-between spaces without which we may overlook the existence of that practice. As seen throughout this thesis, thinking through in-between spaces, both analytically and empirically, opens up new sites for opportunity and challenge for the Court's work on the ground and the practice of international criminal law. In this work, I examined five in-between spaces including in-between status, in-between parties, in-between intermediaries, in-between regulation and in-between transitional justice and political transition.

In terms of what the place of intermediaries is in international criminal justice, I argued that adopting a complex understanding of 'in-between' helps us overcome the limits of global/local framings and answer that question. A complex approach to in-between means that the practice of international criminal justice in in-between spaces is enabled by the active participation of in-between agents or intermediaries who negotiate meeting points between the Court and the communities affected by its proceedings and through forms of mediation (of intermediaries) by those who rely on intermediaries' services. At this point in literature on intermediaries, what was needed first was a theorization of what the place of intermediaries is. I have argued that intermediaries are in-between actors whose in-between status produces effects. In order to support this claim, I have had to rely on empirical work conducted by others.[1] Despite the limits of this method, still this project contributes to existing literature contributing new conversations about intermediaries.

[1] For example Clancy D., ''They told us we would be part of history' Reflections on the civil society intermediary experience in the Great Lakes region', in De Vos C., Kendall S., Stahn S. (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions,* (Cambridge University Press: 2015) and Ullrich L., 'Local Intermediaries, Victims and the Justice Contestations of the International Criminal Court', (2016), Vol. 14: 3, *Journal of International Criminal Justice*, 543-568. Also see Human Rights Center, 'The Victims' Court?' A study of 622 Victims Participants at the International Criminal Court, (UC Berkely School of Law: 2015), < https://www.law.berkeley.edu/wp-content/uploads/2015/04/VP_report_2015_final_full2.pdf> accessed, 10 November 2017; Open Society & IRRIN, 'Commentary on ICC Draft Guidelines on intermediaries', available at < https://www.opensocietyfoundations.org/sites/default/files/icc-intermediaries-commentary-20110818.pdf> accessed 07 March 2018; REDRESS, 'Comments on the Draft Guidelines Governing Relations between the Court and Intermediaries', (15 October 2010), available at <

The Court should enhance its partnership with intermediaries and engage with them differently because of the way these in-between spaces are productive of a new kind of practice. The thesis explained that in-between spaces are sites of mediation in which intermediaries act as the primary mediators and other times intermediaries are mediated by those who rely on their services. One of the ways the Court could engage differently is to recognise intermediaries as part of its work on the ground. This recognition should extend to all types of intermediaries and go beyond the limits of the guidelines on intermediaries. As I have shown throughout this thesis, failing to recognise intermediaries in this way has not prevented unrecognised intermediaries from assisting the Court. On the contrary, the Court has and continues to benefit greatly from their support whether it is for economic or political reasons.[2] Regrettably, the ways in which the Court manages its current relationship with intermediaries tends to be top-down. As a result, the Court's procedures and its conceptualisation of intermediaries as 'someone who comes between one and other' limit their participation in justice processes. Yet, as I have shown throughout this project, intermediaries' participation in these processes enriches the Court's work on the ground and the development of international criminal law more generally. Despite the challenges that such partnerships may bring, intermediaries are indispensable to the Court's work on the ground.

As I come to the end of this project, the following sections will discuss the following: First, I will come back to the ways in which in-between are productive of a new practice and re-asses how knowledge is produced, subjects are represented and power is exerted in these in-between spaces; security and accountability operate in

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http://www.redress.org/downloads/publications/Comment_on_draft_guidelines_on_intermediaries_15_Oct_2010.pdf> and Victims Rights Working Group, 'Comments on the Role and Relationship of 'Intermediaries' with the International Criminal Court' VRWG, (6 February 2009), available at
< http://www.vrwg.org/VRWG_DOC/2009_Feb_VRWG_intermediaries.pdf>.

[2] On intermediaries' free labour see Kendall S., 'Commodifying Global Justice - Economies of Accountability at the International Criminal Court', (2015) Vol. 13:1 *Journal of International Criminal Justice*, at 134. ; on using intermediaries to counter states' poor cooperation see De Silva N., 'Intermediary Complexity in Regulatory Governance : The International Criminal Court's Use of NGO's in Regulating International Crimes', (2017), Vol. 670:1, *The ANNLS of the American Academy of Political and Social Science,* pp 172-176 and 178-182.

sites of mediation between the ICC and communities affected by its proceedings. Secondly, I will discuss, in more detail, the opportunities and challenges of in-between spaces as an analytical tool and as a reality description. Thirdly, I will discuss avenues for future research.

1. In-between spaces –Reassessing Effects

It is clear from international criminal law literature that intermediaries are key players in ICC procedures. Despite the proliferation of international criminal law literature since the 90s, it was not until 2008 that academics paid attention to intermediaries. All this time, intermediaries had generally been evolving in the background with very little interest from academics and policy makers. Though the Rome Statute and the Rules of evidence and procedure do not expressly provide for a framework through which intermediaries ought to interact with the Court, the year of 2008 marked the beginning of formal recognition of the role played by intermediaries at the ICC through ICC guidelines on intermediaries.

Turning to intermediaries for the Court's work on the ground started with the very first investigative teams in the situation of the Democratic Republic of Congo. When ICC teams were deployed in relevant countries, they faced a number of challenges which they could not overcome without the assistance of intermediaries. However the ICC has and continues to struggle with managing its relationship with intermediaries. Even literature on intermediaries is divided on whether the Court should enhance its partnership with intermediaries or limit their involvement in its processes. According to Groome, for example, intermediaries should 'only be used to convey a request to speak with potential witnesses and not in the selection of witnesses themselves'.[3] In addition, Groome is of the view that intermediaries 'should not be involved in any interviews or exchange of substantive evidential information between investigators and witnesses'.[4] Conversely, De Vos argued that

[3] Groome D., 'No Witness, No Case: An Assessment of the Conduct and Quality of ICC Investigations', (2014) Vol 3:1 *Penn State Journal of Law and International Affairs,* at 25.
[4] Ibid.

intermediaries are 'often better placed to gather evidence than many Hague-based investigators'.[5] In my view, the Court should enhance its partnerships with different types of intermediaries and work through the challenges it faces in collaborating with them. What is more, the Court is not in a position to dismiss or reject intermediaries' involvement in its process due to reasons that are beyond its control such as the lack of proper funding or poor state cooperation. For example, IRRI reported that OTP investigators tended to 'trust anyone who called themselves civil society' when they first arrived in the DRC.[6] Such errors cannot be solved by reducing engagement with intermediaries. On the contrary, these experiences can serve to strengthen the Court's work on the ground. Thinking through in-between analysis has shown us that because of intermediaries' in-between status, there are sites of mediation which cannot be monitored by the Court. For example, when intermediaries complete forms and write answers on behalf of victims, in that moment, they have a certain control of knowledge. What is needed therefore is a change of approach and a realisation that intermediaries are not necessarily a liability for justice processes.[7]

In chapter 1, I discussed the definition of the term intermediary(ies) and explained that part of the Court' struggle to recognise intermediaries is linked to its conceptualisation of intermediaries as in-between agents and without interrogating what in-between means. I argued that thinking through in-between spaces as an analytical tool allows us to see intermediaries' in-between status (as a description of their reality). As a result, I conceive intermediaries to be in-between agents whose in-between status produces a particular way of doing international criminal law.

[5] De Vos C, 'A catalyst for justice? The International Criminal Court in Uganda, Kenya and the Democratic Republic of Congo', Ph.D Thesis Leiden University, p 105.

[6] IRRI, 'Steps Towards Justice, Frustrated Hopes: Some Reflections on the Experience of the International Criminal Court in Ituri', Just Justice? (2012) Civil Society, international Justice and the Search for Accountability in Africa, Discussion paper no 2, p 20.

[7] According to Kambale, intermediaries should not be 'sidelined'. Kambale P.K., 'A story of missed opportunities: The role of the International Criminal Court in the Democratic Republic of Congo, in in De Vos C., Kendall S., Stahn S. (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions,* (Cambridge University Press: 2015), p 191.

Accordingly, it can be said that this research contributes to existing definitions by problematizing the concept of in-between.

Inspired, mostly, by African colonial intermediaries, my personal observations on contemporary intermediaries and the lack of an adequate analytical frame, I developed a new device through which we might better understand a) how intermediaries mediate interactions between ideas, institutions and individuals; and how they are mediated by those rely on their services. The analytical frame through which I conducted my analyses is called in-between spaces. I used in-between spaces both as an analytical tool and as a reality description. It is the second contribution of this research. In-between spaces, as an analytical tool (or in-between analysis), is an artificial concept which allows us to understand the effects of in-between spaces (as a descriptive reality). In-between spaces, as a descriptive reality, on the other hand, refers to sites of mediation in which intermediaries are sometimes the primary mediators and other times they are mediated by those who rely on their services. As seen in chapter 3, the in-between spaces analysed in this thesis include: in-between status, in-between intermediaries, in-between regulation and in-between transitional justice and political transition. The following sections will reassess the effects of in-between spaces analysed in chapters four, five and six.

1.1 Knowledge production, representation and power

As seen in chapter four, because intermediaries operate in several sites of mediation, they produce knowledge for different entities including the units of the Court and other types of intermediaries. In fact, early writings on intermediaries in international criminal law tended to present intermediaries as data collectors only. Up until now, intermediaries were believed to collect data for the purposes of the Court's work on the ground. However, this thesis has shown that the production of knowledge in in-between spaces serves different actors and as such different purposes. For example, intermediaries may collect information about the security situation on the ground for the OTP, the legal representatives for victims or for

victims orientated NGOs. While this knowledge may serve as basis for OTP on ground and case management, it serves the legal representatives for their work on the ground and it shapes narratives of conflicts. In this scenario what thinking through in-between analysis allows us to understand is that these different units will very likely use that intelligence to suit their goals.

What is more, intermediaries usually play a greater role than that of simply collecting data to be processed by the Units of the Court. On several occasions, Defence teams have challenged the role played by intermediaries in carrying out prosecutorial responsibilities without the authority or the expertise to do so. Even with respect to victims' participation, evidence suggests that intermediaries shape the kinds of claims that victims bring forward or in other instance the kinds of victims that express their desire to participate in international criminal processes. Overall, it is clear that intermediaries play a greater role than it is currently recognized.

If intermediaries are essential to the work of the Court in the field, why is it that they seem to be invisible on the Court's official interface and in Court documents? As I have shown in chapter four, intermediaries' invisibility is caused by a number of reasons. Before proceeding with more relevant criticisms it is first and foremost necessary to point out that the official website of the International Criminal Court is not always clear and accessible. This observation is based on my personal experience as a former intern at the ICC and as a researcher.[8] And so, to return to the question of intermediaries, it is possible that intermediaries' invisibility on the Court's official website is related to the issue of recognition. It is not entirely clear why or whether the Court recognises intermediaries as part of its structure. Secondly, it may be impractical to present intermediaries due to their in-between status and the nature of their work. In other words, because intermediaries operate (and move) in different spaces at different times it contributes to their invisibility. Thirdly, Court processes increase intermediaries' invisibility. Overall it can be said that

[8] On the contrary the International Criminal Tribunal for former Yugoslavia is commendable.

Intermediaries' invisibility limits what is knowable (from the perspective of research) about them, what is knowable about how the Court interacts with them and therefore the kinds of questions that can be asked.

As regards intermediaries' diversity, this thesis has shown some of the ways in which different types of intermediaries contribute to the development of international criminal law. Intermediaries come with different cultural, economic and political backgrounds which influence the ways in which they collect and move knowledge, interact with other actors (that is affected communities, the Court and other intermediaries) and navigate different in-between spaces. Thinking about intermediaries through in-between spaces sheds light on the many ways in which less powerful intermediaries rely on capable intermediaries to represent them on international platforms or how parties to proceedings represent intermediaries' views in Court.

This form of representation is inevitable it is one of the effects of in-between spaces. For example, while Eldoret (Kenya) or Giru (Uganda) based intermediaries are in proximity with communities affected by ICC proceedings, other intermediaries such as REDRESS or IRRI have a relationship with situation countries based intermediaries and access to The Hague based Court. Thus, it is not surprising that through these International NGOs reports, less powerful intermediaries' views are represented.[9] Similarly, parties to proceedings directly or indirectly represent intermediaries' views to ICC Judges. Overall, the implication of these representational practices is that those who represent intermediaries' views often have different (and sometimes competing) agendas. Put differently, the prosecution is likely to represent intermediaries' views in a way that benefits their interests. Therefore, it is questionable whether the Court is aware of intermediaries' concerns at all. Instead, the Court should enhance its interaction with intermediaries because relying on parties' representation of intermediaries' issues will likely lead to inadequate

[9] This is for example visible in the process that led to the adoption of Guidelines on intermediaries which is discussed in chapter 4.

responses. The complexity of intermediaries as new actors in international criminal justice is further intensified by the fact that transitional justice (through, say, international criminal prosecutions) takes place alongside political transition. I argued that local politics influences which individuals and entities (especially country level and community level intermediaries) become intermediaries.

1.2 Security

Intermediaries' security has and continues to be a lively issue at the ICC. Current research shows that the promise or lack of security impacts the relationship that intermediaries have with the Court.[10] As seen in Chapter 5, the Court is well aware of this problem as the Office of the Prosecutor champions protective measures requests. Though the Rome Statute and the Rules of Evidence and Procedure do not provide a framework through which intermediaries may be dealt with, I have shown in chapter 5 that there are several other rules and regulations on which the prosecution may rely on to obtain protection for intermediaries. However, it is not entirely clear how other Units such as the Outreach Program or Defence may seek protective measures for their intermediaries.

In essence, it seems that intermediaries' security problems are directly linked to the nature of 'in-between' which places them in a vulnerable position. Because intermediaries act for example in-between different jurisdictions (domestic vs international criminal law), there are potentially different legal mechanisms through which intermediaries may seek protection. In practice however, it seems that different entities are unwilling to take or share the responsibility of protecting intermediaries. Even through decisions made by ICC judges, it seems that a lot of responsibility is put on intermediaries when it comes to their security. How this happens is visible in the ways that different parties negotiate intermediaries' security in Court in in-between spaces between parties. While some seek increased protective measures others claim that there are no security threats to deal with in

[10] See Ullrich L., 'Local Intermediaries, Victims and the Justice Contestations of the International Criminal Court', (supra n. 1).

the first place. Yet without further on-site investigation and in the absence of intermediaries, ICC judges rule on these issues from purely legalistic approaches. One possible explanation might be that in some areas the ICC continues to think of itself as a 'regular' criminal court which would not rely on intermediaries for its work in the field. This is regrettable. That said, intermediaries' security is an extremely complicated issue because it involves many different actors with sometimes competing agendas. And so, even if the Court had the financial capacity to identify and implement protective measures for intermediaries, it would still be limited.

Just as intermediaries work for different people at different times, different actors play a role in their security. The most remarkable player in this regard is the state. The Rome Statute system is built on the assumption that states will fully collaborate with the court in all relevant aspects. However, as I have shown in chapter five, states may be unable, reluctant or simply oppose the work of the Court. In all those scenarios intermediaries are likely to find themselves in-between ICC and their home states negotiations. Similarly, capable international NGOs may have the ability to protect intermediaries but the role of NGOs in criminal justice processes can be taxing on the quality and integrity of justice in general. What is more, the complexity of the role played by NGOs at the ICC is intensified by the fact that some NGOs are considered as intermediaries by the guidelines while others are not. Yet some NGOs cannot be easily fitted in one category or another as they occupy overlapping function in the course of their work. For the purposes of this thesis I have considered all NGOs as intermediaries in the sense that, in a way or another, they navigate sites of mediation between the Court and communities affected by its proceedings. In doing so, the implication is that it is not always clear which NGOs are targeted by ICC regulation and which NGOs are not.

1.3 Accountability

As seen throughout this thesis, intermediaries are characterised by their ability to get involved with different actors in order to facilitate the movement (or access to) of

knowledge, the meeting of people or places. In the case of the ICC it means that intermediaries must be able to connect units of the court with relevant individuals in the field such as victims and survivors, witnesses, communities or relevant entities such as grassroots associations or community level NGOs. It can therefore be said that in doing this work intermediaries automatically become accountable to those who rely on their services. Because of the nature of 'in-between' all who seek intermediaries' services are likely have some form of accountability mechanism in place whether it is the ICC, International NGOs, the UN, grassroots associations or communities affected by ICC proceedings.

As seen in chapter 6, intermediaries' accountability has multiple facets. For instance, I examined the question of whether intermediaries are accountable to the ICC and if so through which legal framework. I argued that the guidelines on intermediaries and the Rome Statute are limited in that they only provide for some aspects of intermediaries' accountability to the Court. However, my analysis also revealed that the ICC (institution and particular units) are not accountable to intermediaries in the current framework. Instead, the Court manages its accountability to communities affected by its proceedings through intermediaries. As I have shown, intermediaries are the face of the Court in the field and as such they enjoy and (mostly) suffer the consequences of the Court's involvement in their home countries. The use of 'in-between spaces' as a theoretical tool has helped us 'see' differently the issue of the Court's accountability to its constituents.

As explained in the final chapter of this thesis, a great number of intermediaries are non-governmental organizations. In exploring NGO intermediaries' accountability, it became evident that they are accountable to a number of actors including the ICC, donors, other intermediaries and the communities they claim to serve. Being accountable to these many actors is a direct result of operating in a dynamic environment whereby international criminal prosecutions, transitional justice, peace building or conflict resolution projects intersect. Each one of these different

disciplines comes with its own accountability mechanism and as such it could be said that intermediaries are accountable to different actors in different ways. Though the Court's legal framework on intermediaries' accountability may be limited, NGOs intermediaries are also regulated by their own constitutions and internal processes.

Overall, by focusing on knowledge production, representation and power (chapter four), security (chapter five) and accountability (chapter six), this research has gone some way towards enhancing our understanding of the place of intermediaries at the ICC. Intermediaries are in-between agents who act as mediators between the Court and the communities affected by its proceedings. Knowledge production, representation and power, security and accountability operated as effects of in-between spaces and as objects of analysis. As objects of my analysis, they influenced my reading court documents in relation to intermediaries. As explained already a substantial amount of data analysed in this thesis is extracted from submissions made by parties before different chambers of the Court. On the other hand, these are also effects of in-between spaces. Take for example the issue of security it is produced by a number of in-between spaces including 1) in-between institutions (For example State, ICC or UN); 2) in-between regulations or legislation (domestic law and guidelines on intermediaries); or 3) in-between types of intermediaries (international NGOs and country level intermediaries).

As a whole, this project analysed in-between spaces and their effects on intermediaries. As such this project operates as a critique of ICC regulations on managing the relationship between intermediaries and the Court as well as the practice of the Court in its dealings with intermediaries. By focusing on knowledge production, security and accountability, this research shows the in-between spaces in which intermediaries operate and the impact that these in-between spaces have on them. In its entirety, these chapters serve to demonstrate the unique contribution of intermediaries in international criminal justice. Intermediaries' assistance to the Court in the field is essential to the operation of international

criminal justice processes. Deirdre Clancy has even gone as far as to state that intermediaries are simply the face of the Court on the ground).[11]

Yet the Court continues to struggle with where and how to place intermediaries in its structure. Even the Court's official website presentation of intermediaries is confusing. One implication of this is that since the ICC does not have an 'office for intermediaries', intermediaries concerns are either invisible or represented by those who have offices such as the prosecution, defence or the legal representation for victims. As a consequence, intermediaries' problems are discussed between parties in The Hague and it is not entirely clear how ICC judges rule on these matters. This is not to suggest that recognition would improve the intermediaries' relationship with the Court. Rather, my intention is to highlight some of the effects that the Court's practice has on intermediaries.

2. In-between spaces: Taking opportunities and Facing challenges

As mentioned in the introduction of this thesis, thinking through in-between spaces (both analytically and empirically) uncovers new sites for opportunity and challenge for intermediaries, those who rely on their services and international criminal law more broadly. In this section, I wish to come back to the findings of this research as a whole.

This research extends our understanding of the term 'intermediary' with two main points. Building on the Guidelines' definition which states that an intermediary is:

> "Someone who comes between one person and another; 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".[12]

First, I argued that because the idea of 'between' or 'in-between' is underdeveloped, even the essence of what it means to be an intermediary is limited. Instead,

[11] Clancy D., "They told us we would be part of history' Reflections on the civil society intermediary experience in the Great Lakes region', (supra n. 1), p 221.

[12] International Criminal Court, 'Guidelines Governing the Relations between the Court and Intermediaries' for the Organs and Units of the Court and Counsel working with intermediaries (2014) at 6.

conceiving the in-between as a productive site is more helpful to understand who intermediaries are and what they do. Secondly, this research contributes to international criminal law literature by expanding it with the introduction of Africans long history of acting as intermediaries. As seen in chapter two, historical literature on African colonial intermediaries has been a source of inspiration for the questions raised in this thesis as well as the analytical frame through which I conducted my analysis. In addition, literature on African colonial intermediaries can inspire the Court to interact with contemporary intermediaries differently by learning from past experiences. The Court could work toward finding a balance between professionalizing, exclusion and integration. While the case for enhanced training for intermediaries, especially in terms of security, is overwhelming in NGO reports it should not dominate the Court's approach to working with intermediaries.[13] As Emily Haslam and Rod rightly observed the challenge in working with professionalised intermediaries that share the Court's institutional view is 'the channelling of dissent'.[14] Conversely, excluding intermediaries by increasing ICC staff in the field would only lead to a similar outcome, channelling counter-hegemonic voices.[15] As for integration, there is ample evidence showing that while intermediaries assist those who rely on their services, there are challenges attached to their in-between status. For example, intermediaries exercise some level of power over the production of knowledge. That said integrating intermediaries into the Court's work on the ground also come with multiple possibilities. For example, the Court could benefit greatly from the work done by on ground gender orientated NGOs for its

[13] Open Society & IRRI, 'Commentary on ICC Draft Guidelines on intermediaries', (supra n. 1), p18-20.

[14] Haslam E. and Edmunds R, 'Managing A New 'Partnership': 'Professionalization', Intermediaries and the International Criminal Court (2012) Vol. 24:1 *Criminal Law Forum*, at 68.

[15] On exclusion see Ullrich L., 'Local Intermediaries, Victims and the Justice Contestations of the International Criminal Court', (supra n. 1), at 555. On significance of anti-hegemonic voices see Haslam E. and Edmunds R, 'Managing A New 'Partnership': 'Professionalization', Intermediaries and the International Criminal Court, (supra n. 14), at 68.

engagement with victims of mass violence, it could also benefit from raw intelligence collected by intermediaries prior to its own investigations, and more.

This study has also found that in general intermediaries contribute greatly to contemporary international criminal justice. From a practical perspective, intermediaries are, unlike the ICC, in close proximity with the beneficiaries of international criminal justice. Such proximity places intermediaries in a position that allows them to participate in international criminal processes through different tasks such as identifying witnesses, victims or collecting relevant data for particular cases. In doing this work, this study has shown that intermediaries' security is often put at risk. Sadly, existing protective measures for intermediaries are still very weak and ineffective. From a structural perspective, this research has shown that the ICC continues to struggle with whether it should recognise intermediaries as part of its structure. Recognition or lack of recognition has multiple implications as seen in chapters four, five and six.

From a conceptual perspective, which was the main focus of this thesis, it has been shown that 'in-between spaces' are rich, dynamic and unpredictable sites in which actors of international criminal justice interact. These sites are productive of a new kind of practice of international criminal justice which is not captured by dominant literature and which is hardly capable of regulation. For instance, in-between spaces are productive of a practice whereby lawyers at the ICC combine their primary duties with representing intermediaries' views. At the surface, this form of representation is an opportunity for intermediaries to make their voices heard at the ICC however this new form of representation seems to benefit legal processes or institutional interests rather than intermediaries. For example, intermediaries' security concerns were first articulated through the prosecution. Despite its merits, this form of representation also comes with great challenges. This is because parties' representation of intermediaries only goes as far as their interests allow, intermediaries are not really represented on institutional matters. What is more, judges make decisions that

affect intermediaries without interrogating intermediaries themselves and with little knowledge of the situation on the ground. This goes to show that despite the adoption of guidelines on intermediaries, a framework through which the Court interacts with intermediaries (even on institutional matters) is still missing.

Turning now to in-between intermediaries, I discussed how International NGOs also described as capable, lead or senior intermediaries come with great opportunities for the ICC. Essentially, these organizations have infrastructures that are strong enough to collect data on conflict or build relationships with communities against whom international crimes are committed. However there are challenges which are yet to be addressed as far as the current framework is concerned.[16] The guidelines on intermediaries do not consider these international NGOs to be intermediaries yet they also act as bridges between the Court and communities affected by its proceedings.[17] Therefore it is not entirely clear what, for example, accountability mechanism applies to them or how they interact with individual and community level intermediaries.

Traditionally, international criminal law takes place in the global (or the international) and in the local whereas domestic criminal law takes place at the country level. In this thesis, I argued that one of the effects of in-between spaces is that those boundaries are not as clear cut. As such, aspects of in-between spaces cannot be regulated and this is a challenge for policy makers (at the ICC and the country level). In-between regulation is a site where different laws, rules and regulations cross or intersect without the possibility of clearly dissociating what falls under which regulatory authority.

[16] The guidelines on intermediaries distinguish NGO-intermediaries from NGOs whose interaction with the Court is regulated by cooperation agreements. However, it is not clear which NGOs fall in this category and which NGOs are considered to be intermediaries (Regardless of their international character). International Criminal Court, 'Guidelines Governing the Relations between the Court and Intermediaries' for the Organs and Units of the Court and Counsel working with intermediaries, (2014) International Criminal Court, p 6. (hereinafter the guidelines on intermediaries).

[17] The guidelines on intermediaries, p 6.

Finally, I argued that intermediaries operate in-between transitional justice and political transition. Thinking through this in-between space sheds additional light in terms of the Court's limitations. Post-conflict environments are very dynamic sites in which concepts of justice; truth and reconciliation are in constant negotiation. Even with a cooperating state, local politics often influences how intermediaries mediate interactions between affected communities and the ICC but also how they navigate between the Court and their home state. Understanding local politics or local power dynamics can help the Court discern how to interact with intermediaries and maximise engagement with victims.

3. In-Between Spaces: The way forward

I close this thesis with reflections on its limits and avenues for future research. I hope to have started new conversations about intermediaries that add to the existing literature and the great contribution of global/local framings. Thinking through in-between analysis exposed the limits of Court practices and our knowledge of intermediaries. How much do we really know about intermediaries or what is knowable about intermediaries? These are questions I discussed in chapter 4 but they are also the major limit of this research. First, much of the data examined in this research comes from the documents of the Court. This is a limit because, as shown earlier, Court processes limit the public from accessing the relevant information about intermediaries. For instance, more research about contractual agreements between intermediaries and the units of the Court in the field are needed. Secondly, though I relied on existing empirical literature, the fact that it was done by others for different purposes is also limiting. Therefore, more research is required to examine how intermediaries navigate different in-between spaces. For example, researchers need to document and interrogate the in-between space between transitional justice and political transition.

This research has thrown up many questions in need of further investigations. As seen in chapter 2, further research could examine more closely the links between

African colonial intermediaries and contemporary intermediaries. In addition, so far as ICC intermediaries are concerned, this research has raised a number of questions and concerns which need to be examined empirically. For instance, the relationship between communities affected by ICC proceedings and intermediaries or the ways in which the Court interacts with its constituents (whoever they may be) is an area of research which is still very poor. This work may therefore serve as a basis for researchers interested in transitional justice as well as international criminal prosecutions processes.

The analytical frame provided in this research is a basis which others may utilise in other settings. In this research, power, representation and knowledge, security and accountability were both objects of analysis and effects of in-between spaces. It is possible to imagine more in-between spaces and consequently more or other effects and objects of analyses. For instance, one possible research avenue would be to use 'in-between spaces' as an analytical tool to examine the relatively recent occurrence and the role played by female intermediaries and the impact that different in-between spaces might have on them.

In terms of regulation, I pointed out areas of weakness in the guidelines on intermediaries which might be constructive criticisms. For policy makers, what is now needed are consultations between all relevant actors of international criminal law involved with the ICC to re-examine the guidelines on intermediaries in a way that promotes shared responsibility among those who rely on intermediaries' services. Regulation alone is not sufficient to build strong partnerships between intermediaries and the Court. What is needed is finding a balance between the demands and needs of intermediaries and those who rely on their services.

Bibliography

1. International criminal Court Sources

1.1. International Criminal Court Cases

Pre-Trial Chamber Cases

a) Pre –Trial Chamber

Prosecution v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Defence Application to restrain legal representatives for the victims a/1646/10 & a/1647/10 from acting in proceedings and for an order excluding the involvement of specified intermediaries, PTC I (ICC-02/05-03/09-113), 6 December 2010.

Prosecution v. Callixte Mbarushimana, Decision on the applications for participation of victim applicants a/2176/11 and a/2195/11, PTC I (ICC-01/04-01/10-441), 23 September 2011.

Prosecution v. Germain Katanga and Mathieu Ngudjolo Chui, Review of the "Decision on the Conditions of the Pre-Trial Detention of Germain Katanga", PTC I (01/04-01/07-702), 18 August 2008.

Prosecution v. Laurent Gbagbo, Decision adjourning the hearing on the confirmation of charges pursuant to article 31(7)(c)(i) of the Rome Statute, PTC I (ICC-02/11-01/11-432), 3 June 2013.

Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Defence Application to restrain legal representatives for the victims a/1646/10 and a/1647/10 from acting in proceedings and for an order excluding the involvement of specified intermediaries, PTC I , (ICC-02/05-03/09-113), 6 December 2010.

Prosecutor v. Ahmad Muhammad HARUN ("Ahmad Harun") & Ali Muhammad Ali ABD-AL-RAHMAN ("Ali Kushayb"), "Prosecution request for a finding on the non-cooperation of the Government of the Sudan in the case of *Prosecutor v. Ahmad Harun and Ali Kushayb*, pursuant to Article 87 of the Rome Statute", PTC I (ICC-01/04-01/07-683), 19 July 2010.

Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Decision on the Prosecution requests for redactions pursuant to rule 81(2) and 81(4) of the Rules and for an Extension of

Time pursuant to regulation 35 of the Regulations of the Court, PTC I (ICC-01/04-01/07-312), 11 March 2008.

Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Decision on the Apparent Conflict of Interest in relation to the Legal Representative of Victims a/0015/08, a/0022/08, a/0024/08, a/0025/08, a/0027/08, a/0028/08, a/0029/08, a/0032/08, a/0033/08, a/0034/08 and a/0035/08, PTC I (ICC-01/04-01/07-683), 16 July 2008.

Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Public Redacted Version Decision on the Prosecution requests for redactions pursuant to rule 81(2) and 81(4) of the Rules and for an Extension of Time pursuant to regulation 35 of the Regulations of the Court, PTC I (01/04-01/07-312), 11 March 2008.

Prosecutor v. Laurent Gbagbo and Charles Blé Goudé, Decision on Prosecutor's requests for lifting of certain redactions in victim application forms (ICC-02/11-01/15-465 and ICC-02/11-01/15-493), TC I (ICC-02/11-01/15-506), 9 May 2015.

Prosecutor v. Thomas Lubanga Dyilo, Prosecution's Provision of Information on the witnesses dealing with the abuse of process and intermediaries, PTC I (ICC-01/04-01/06-2473-Red), 18 June 2010.

Prosecutor v. Thomas Lubanga Dyilo, Redacted Decision on Intermediaries, TC I (ICC-01/04-01/06-2434-Red2), 31 May 2010.

Prosecutor v. Thomas Lubanga Dyilo, Transcript of Deposition (closed session) 2010, TC I (ICC-01/04-01/06-Rule 68 Deposition), 16 November 2010.

Situation in Darfur, Sudan, Prosecutor's Responses to Cassese's Observation on Issues Concerning the Protection of Victims and the Preservation of Evidence in the Proceedings on Darfur Pending before the ICC, PTC I (ICC-02/05-16), 11 September 2006.

Situation in Democratic Republic of Congo, Decision on the Applications for Participation Filed in Connection with the Investigation in the Democratic Republic of Congo by Applicants a/0189/06 to a/0198/06, a/0200/06 to a/0202/06, a/0204/06 to a/0208/06, a/0210/06 to a/0213/06, a/0215/06 to a/0218/06, a/0219/06, a/0223/06, a/0332/07, a/0334/07 to a/0337/07, a/0001/08, a/0030/08 and a/0031/08, PTC I Case No:ICC-01/04-545, (4 November 2008).

Situation in Georgia, 'Decision on the Prosecutor's request for authorization of an investigation', PTC I (ICC-01/15-12), 27 January 2016.

*Situation in the Libyan Arab Jamahiriya, '*Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi' TC I (ICC-01/11), 4 March 2011.

b) Pre-Trial Chamber II

*Prosecution vs. Walter Osapiri Barasa,*Under seal *ex parte,* only available to the Prosecutor and the Registrar Warrant of arrest for Walter Osapiri Barasa, PTC II (ICC-01/09-01/13), 2 August 2013.

Prosecutor v. Walter Osapiri Barasa, Decision on the "Defence request for disclosure (1)", PTC II (ICC-01/09-01/13-23), 29 October 2013.

Situation in Uganda, OPCD observations on the Notification under Regulation 50 of the Regulation 50 of the Regulations of the Trust Fund for Victims, PTC II (ICC-02/04), 12 March 2008.

c) Pre-Trial Chamber III

Prosecutor v. Jean-Pierre Bemba Gombo, Public Document With confidential ex parte annexes only available to the Registry and the respective common legal representative Decision on 653 applications by victims to participate in the proceedings, PTC III (01/05-01/08-1091), 23 December 2010.

Situation in the Republic of Burundi, Public Redacted Version of "Decision Pursuant to Article 15 of the Rome Statue on the Authorization of an Investigation into the Situation in the Republic of Burundi", PTC III (ICC-01/17-C), 9 November 2017.

Trial Chamber cases

a) Trial Chamber I

Prosecution v. Lubanga Dyilo, Decision on the Consequences of Non-Disclosure of Exculpatory Materials covered by Article 54 (3)(e) Agreements, TC I (ICC-01/04-01/06/1401), 13 June 2008.

Prosecution v. Lubanga, Redacted Decision on the "Defence Application Seeking a permanent stay of the Proceedings," TC I (ICC-01/04-01/06-2690-Red2), 7 March 2011.

Prosecution v. Thomas Lubanga Dyilo, 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, TC I (ICC-01/04-01-06/1401), 13 June 2008.

Prosecution v. Thomas Lubanga Dyilo, Judgment pursuant to Article 74 of the Statute, TC I (ICC-01/04-01/06-2842), 14 March 2012.

Prosecution v. Thomas Lubanga Dyilo, Prosecution Proposed Procedure for Dealing with Intermediaries, TC I (ICC-01/04-01/06-2362), 19 March 2010.

Prosecution v. Thomas Lubanga Dyilo, Redacted Decision on the "Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information" of 5 December 2008 and Prosecution's Request for Non-Disclosure of Information in One Witness Statement containing Rule 77 Information" of 12 March 2009, TC I (ICC-01/04-01/06-1980-Anx2), 2 June 2009.

Prosecutor v. Katanga et al., 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', TC I (ICC-01/04-01/07), 13 May 2008.

Prosecutor v. Laurent Gbagbo and Charles Blé Goudé, Decision on Prosecutor's requests for lifting of certain redactions in victim application forms, TC I (ICC-02/11-01/15) 9 May 2015.

Prosecutor v. Laurent Gbagbo and Charles Blé Goudé, Defence response to the "Response to ICC-02/11-01/15 and request to maintain certain redactions in the victim applications of dual status individuals" (ICC-02/11-01/15-473), TC I (ICC-02/11-01/15), 07 April 2016.

Prosecutor v. Lubanga, Reasons for Oral Decision lifting the stay of proceedings, TC I (ICC-01/04-01/06-1644), 23 January 2009.

Prosecutor v. Thomas Lubanga Dyilo, Prosecution's Application for Leave to Appeal the "Decision on Intermediaries", TC I (ICC-01/04-01/06-2453-Red), 8 June 2010.

Prosecutor v. Thomas Lubanga Dyilo, Transcript of Hearing, TC I (ICC-01/04-01/06-T-3 10-RED), 6 July 2010.

b) Trial Chamber II

Prosecution v. Germain Katanga and Mathieu Ngudjolo Chui, Second Corrigendum to the Defence Closing Brief, TC II (ICC-01/04-01/07-3266-Corr2-Red) 29 June 2012.

Prosecution v. Thomas Lubanga Dyilo, Observation in relation to the victim identification and screening process pursuant to the Trial Chamber's order of 25 January 2018, TC II (ICC-01/04-01/06), 21 March 2018.

Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui, Transcripts, TC II (ICC-01/04-01/07-T-81-Red-ENG), 25 November 2009.

Prosecutor v. Walter Osapiri Barasa, Decision on the "Defence request for disclosure (1)", PTC II (ICC-01/09-01/13-23), 29 October 2013.

c) Trial Chamber IV

Prosecution v. Abdallah Banda Abakaer Nourain & Saleh Mohammed Jerbo Jamus, with Public Annexures A, B, D, E, I, M, and O, Confidential Annexures C, J, L, and N, and Confidential and *ex parte* Annexures F, G, H and K available only to the Defence - Defence motion for a temporary stay of proceedings, TC IV (ICC-02/05-03/09-274), 6 January 2012.

d) Trial Chamber V

Prosecutor v William Samoei Ruto and Joshua Arap Sang, Decision on Disclosure of Information related to Prosecution Intermediaries, TC V(A) (ICC-01/09-01/11), 4 September 2013.

Prosecution v. William Samoei Ruto and Joshua Arap Sang, Public redacted version of 'Ruto defence request to appoint an amicus prosecutor'', 2 May 2016, TC V(A) (ICC-01/ 09-01/11-2028-Red), 2 May 2016.

e) Trial Chamber VII

Prosecutor v Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu, Narcisse Arido, Judgement pursuant to Article 74 of the Statute, TC VII (ICC-01/05-01/13) 19 October 2016.

Appeals Chamber Cases

Prosecution v. Thomas Lubanga Dyilo, Defence Response to the "Prosecution's Document in Support of Appeal against Trial Chamber I's Oral Decision on the release of Thomas Lubanga Dyilo" dated 22 July 2010, AC (ICC-01/04-01/06), 29 July 2010.

Prosecution v. Thomas Lubanga Dyilo, Judgment on the appeals against the « Decision establishing the principles and procedures to be applied to reparations » of 7 August 2012 with Amended order for reparations (Annex A) and public annexes 1 and 2, AC (ICC-01/04-01/06 A A 2 A 3), 3 March 2015.

Prosecutor v Thomas Lubanga Dyilo, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled "Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU", AC (ICC-01/04-01/06 OA 18), 8 October 2010.

Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Judgment on Appeal against the First Redaction Decision, AC (ICC-01/04-01/06-773 OA5), 14 December 2006.

Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Judgment on Appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled 'First Redaction Decision to Redact Witness Statements', AC (ICC-01/04-01/07-476), 13 May 2008.

Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Judgment on Appeal of the Prosecutor against the 'Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules' of Pre-Trial Chamber I, AC (ICC-01/04-01/07-776), 26 November 2008.

Prosecutor v. Germain Katanga, 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", AC (ICC-01/04-01/07-475) 13 May 2008.

Prosecutor v. Thomas Lubanga Dyilo, (Judgment on the Appeal of the Prosecutor against the Decision of the 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 Proceedings of the Accused, Together with Certain Other Issues Raised at the Status Conference on 10 June 2008'), AC (ICC-01/04-01/06), 21 October 2008.

Prosecutor v. Thomas Lubanga Dyilo, Decision on the request of the Defence in relation to investigations conducted pursuant to article 70 of the Statute, AC (ICC-01/04-01/06-3114), 14 June 2014.

Prosecutor v. Thomas Lubanga Dyilo, Prosecution Response to 'Requête de la Défense de M. Lubanga aux fins de communication d'éléments de preuve recueillis par le Procureur dans le cadre des enquêtes conduits en vertu de l'Article 70', AC (ICC-01/04-01/06-3069), 25 March 2014.

Prosecutor v. Thomas Lubanga Dyilo, Requête de la Défense de M. Lubanga aux fins de communication d'éléments de preuve recueillis par le Procureur dans le cadre des enquêtes conduits en vertu de l'Article 70, AC (ICC-01/04-01/06-3066), 28 February 2014.

Prosecutor v. Germain Katanga, 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'', AC (ICC-01/04-01/07 OA), 13 May 2008.

1.2. Other ICC Sources

Assembly of States Parties, The Strategic Plan for Outreach was published by the Court in September 2006, on the occasion of the fifth session of the Assembly of States Parties, 5th Session ICC-ASP/5/12 (29 September 2006) available at<http://www.icc-cpi.int/NR/rdonlyres/FB4C75CF-FD15-4B06-B1E3-E22618FB404C/185051/ICCASP512_English1.pdf > para 66.

International Criminal Court, 'Draft Guidelines Governing the Relations between the Court and Intermediaries' for the Organs and Units of the Court and Counsel working with intermediaries', (2012) International Criminal Court, accessed on file.

International Criminal Court, 'Guidelines Governing the Relations between the Court and Intermediaries' for the Organs and Units of the Court and Counsel working with intermediaries, (2014) International Criminal Court.

Outreach Report 2010 Public Information and Documentation Section-Outreach Unit, (2010) available at http://www.icc-cpi.int/iccdocs/PIDS/publications/OUR2010Eng.pdf>.

Relationship agreement between the United Nations and the International Criminal Court 2283 UNTS.

Resolution ICC-ASP/4/Res.3.

UNSC Res 1970 (26 February 2011) UN Doc S/Res/1970.

2. Books

Akingbolahan A. in Paul De Hert, Mathias Holvoet, Jean Flamme, Olivia Struyven Eds., *Code of International Criminal Law and Procedure*, (Larcier: 2013).

Allen T., *Trial Justice: The international Criminal Court and the Lord's Resistance Army,* (Zed books: 2006)

Arsanjani M. H., 'Financing', in Cassese A. Gaeta P. Jones J.R.W.D. (eds), *The Rome Statute of the International Criminal Court:* A commentary, (Oxford University Press: 2002).

Behn D. R., *Rethinking democratic accountability*, (Brookings: 2001);

Berry S., *No Condition is Permanent: The Social Dynamics of Agrarian Change in Sub-Saharan Africa* (University of Wisconsin Press: 1993).

Bhabha H., 'Culture's in between', in Bennet D. (ed.), '*Multicultural States: Rethinking Difference and Identity,* (Routledge: 1998)

Bhabha H.K., *the location of Culture,* (Routledge: 1994).

Bohannan P., *Justice and Judgment among the Tiv,* (Oxford University Press: 1957).

Branch A., *Displacing Human Rights: War and Intervention in Northern Uganda,* (Oxford University Press: 2011).

Chanock M., *Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia* (Cambridge University Press: 1985).

Christelow A., *Thus Ruled Emir Abbas: Selected Cases from the Records of the Emir of Kano's Judicial Council* (East Lansing, Mich.: Michigan State University Press, 1994).

Clarke K.M., *Fictions of Justice –The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa,* (Cambridge University Press: 2009).

Clarke M. K., Knottnerus and De Volder (eds), *Africa and the ICC, Perceptions of Justice,* (Cambridge University Press: 2016)

Clarke M.K, Knottnerus and De Volder (eds), *Africa and the ICC, Perceptions of Justice,* (Cambridge University Press: 2016)

Corradi G., Brems E., & Goodale M. (eds), *Human Rights Encounter Legal Pluralism: Normative and Empirical Approaches,* (Oxford, Hart Publishings: 2017).

Cryer R, Frieman H., Robinson D., Wilmshurst E., *An Introduction to international criminal law and procedure,* (Cambridge University Press: 2010).

Cvetkovitc A. and Kellner D., *Articulating the Global and the Local: Globalisation and cultural studies,* (Boulder Westview Press: 1997).

De Vos C., Kendall S., Stahn S. (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions,* (Cambridge University Press: 2015).

Dubois F., *Tombouctou la Mystérieuse,* (E. Flammarion: 1897), Translated in English by White D, *Timbuctoo the Mysterious,* (Longmans, Green and Co.: 1897).

Edsman B. M., *Lawyers in Gold Coast Politics, c.1900–1945: From Mensah Sarbah to J. B. Danquah* (Almqvist & Wiksell: 1979).

Elias T.O., *Groundwork of Nigerian Law* (Routledge & Kegan: 1954).

Eslava L., *Local Space, Global Life: The Everyday Operation of International Law and Development,* (Cambridge University Press: 2015).

Glasius, Marlies. *Expertise in the cause of justice: Global civil society influence on the statute for an international criminal court*, (Oxford University Press: 2010).

Haslam E., 'Victim Participation at the International Criminal Court: A Triumph of Hope over Experience?' in D McGoldrick, P Rowe, and E Donnelly (eds), *The Permanent International Criminal Court: Legal and Policy Issues*, (Oxford: Hart Publishing, 2004).

Jorda C. and De Hemptinne J, 'The Status and Role of the Victim' in A Cassese A., Gaeta P., and Jones J. (eds), The Rome Statute of the International Criminal Court: A Commentary (Oxford University Press: 2002).

Kendall S., 'Archiving Victimhood: Practices of Inscription in International Criminal Law ', in Stewart Motha and Honni van Rijswijk (eds), *Law Memory Violence: Uncovering the counter-archive*, (Routledge: 2016).

Kenneth S. Broun, *Black Lawyers, White Courts: The Soul of South African Law* (Ohio University Press, 2000).

Kingdon D., '*The Laws of the Gold Coast Colony: Containing the Ordinances of the Gold Coast Colony and the orders, proclamations, rules, regulations and bye-laws made thereunder in force on the 31st day of December, 1919, and the principal imperial statutes, orders in Council, letters patent and royal instructions relating to the Gold Coast colony prepared under the authority of the Revised edition of the laws ordinance, 1920,* (Stevens & sons, ltd: 1920) Vol 2.

Lawrance B. N., Osborn E. L. and Roberts R., *Intermediaries, Interpreters, and Clerks: African Employees in the Making of Colonial Africa,* (University of Wisconsin Press: 2006).

Margery Perham, *Native Administration in Nigeria,* (Oxford University Press: 1937).

McGregor L., 'International Law as a 'Tiered Process': Transitional Justice at the Local, National and International Level, in McEvoy K. & McGregor L., *Transitional Justice from Below,* Grassroots Activism and the Struggle for Change, (Oxford, Hart Publishings: 2008).

Mulgan R., *Holding power to account: Accountability in modern democracies*, (Palgrave Mcmillan: 2003).

Omoniyi A., *The Judicial System in Southern Nigeria, 1854–1954* (Atlantic Highlands, NJ: Humanities Press, 1977).

Parker J. and Reid R. (eds),Roberts R., 'Law; Crime and Punishment in Colonial Africa', in *The Oxford Handbook of Modern African History,* Parker J. and Reid R. (eds) (Oxford University Press: 2013).

Ranger O. T., 'African Reactions To The Imposition of Colonial Rule In East And Central Africa', in Gann L. H. and Duigman P., *Colonialism in Africa 1870-1960,* Volume 1 The History And Politics Of Colonialism 1870-1914, (Cambridge University Press:1969).

Roberts R. and Mann K, *Law in Colonial Africa,* (Heinemann Educational Books: 1991).

Romzek B. and Dubnick M., 'Accountability' in *International encyclopedia of public administration,* Vol I A-C, (Westview Press: 1998).

Schabas W, *The International Criminal Court: a commentary on the Rome Statute*, (Oxford University Press: 2010).

Schabas W., Tladi D., Clarke K.M. and Swaak-Goldman O., 'Annual Ben Ferencz session: Africa and the International Criminal Court' (Cambridge University Press: 2012)

Schabas W., Tladi D., Clarke K.M. and Swaak-Goldman O., '*Annual Ben Ferencz session: Africa and the International Criminal Court',* (Cambridge University Press: 2012)

Schapera I., *A Handbook of Tswana Law and Custom,* (Oxford University Press: 1938).

Spear T., 'Neo-Traditionalism and Limits of Invention of Tradition in British Colonial Africa', Journal of African History, 44/1 (2003); also see Hamilton C., *Terrific Majesty: The Powers of Shaka Zulu and the Limits of Historical Invention* (Harvard University Press: 1998).

Starr J. and Collier J., *History and Power in the Study of Law: New Directions in Legal Anthropology* (Cornell University Press, 1989).

Schwöbel C., *Critical Approaches to international Criminal Law: An Introduction,* (Routledge: 2014).

Stockreiter E., 'Child Marriage and Domestic Violence: Islamic and Colonial Discourses on Gender and the Female Status in Zanzibar', in Burrill S.E., Roberts R.L. and Thornberry E., '*Domestic Violence and the Law in Colonial and Postcolonial Africa,* (Ohio University Press: 2010).

Triffterer O., *Commentary on the Rome Statue of the International Criminal Court – Observer's Notes, Articles by Article,* (Verlag C. H.Beck: 2008).

Van der Merwe A., 'Oral Evidence', in Schwikkard P.J. & Van der Merwe S.E., *Principles of* Evidence, (Juta Cape Town: 2009).

Van Sliedregt E. & Vasiliev S., *Pluralism in international criminal law,* (Oxford University Press: 2014).

Waldorf and P. Hazan (eds), *Localizing Transitional Justice: Interventions and Priorities after Mass Violence*, (Standford University Press: 2010).

Webner P and Modood T., *Debating Cultural Hybridity –Multicultural identities and the politics of anti-racism,* (ZED: 1997).

Yee L., 'The International Criminal Court and the Security Council', in Lee R. S. et al, *The International Criminal Court, The Making of the Rome Statute Issues, Negotiations, Results,* (Martinus Nijhoff Publishers: 1999).

Young R., *Colonial Desire: Hybridity in Theory, Culture and Race,* (Routledge: 1996)

3. Journal Articles

Ahmad A., 'The Politics of literary postcoloniality', (1995) Vol. 36:3, *Race &* Class, 1-20.

Akande D., 'The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities' (2009) 7 *Journal of International Criminal Justice*, 333-352.

Akurang-Parry, Kwabena O., ''A Smattering of Education' and Petitions as Sources: A Study of African Slave Holders' Response to Abolition in the Gold Coast.' (2000) *History in Africa 27,* 39-60.

Anthias F., 'New Hybridities, Old Concepts: The Limits of "Culture"', (2001) Vol. 24:4 *European Law Review*, 619-41.

Apuuli K. P., 'Peace over Justice: The Acholi Religious Leaders Peace Initiative (ARLPI) vs the International Criminal Court (ICC in Northern Uganda', (2011) Vol 11: 1 *Studies in Ethnicity and Nationalism,* 116-129.

Baines E.K., 'The Haunting of Alice: Local Approaches to Justice and Reconciliation in Northen Uganda 1', (2007) Vol. 1:1 *International Journal of Transitional Justice,* 91-114.

Baylis E.A., 'Outsourcing Investigations', (2009) Vol. 14 University of California, *Los Angeles Journal of International Law and Foreign Affairs* 121.

Bex S. and Craps S., 'Humanitarianism, Testimony, and the White Saviour Industrial Complex: *What is The What vers Kony 2012,* (2016) Vol 92:1, *Cultural Critique,* 32-56.

Blitt C. R., 'Who will watch the watchdogs? Human Rights Non-Governmental Organizations and the Case for Regulation', (2004) 10, *Buffalo Human Rights Law Review,* 261-398.

Bovens M., 'Analysing and assessing accountability: A Conceptual Framework', (2007) 13 (4) *European Law Journal* 447-68.

Branch A., 'Uganda's Civil War and the Politics of ICC Intervention', (2007) Vol 21:2 *Ethics & International Affairs,* 179-198.

Buisman C., 'Delegating Investigations: Lessons to be Learned from the Lubanga Judgment', (2013) Vol 11:3/3, *Northwestern Journal of International Human Rights*.

Cannon J. B., 'The International Criminal Court and Africa: Contextualizing the Anti-ICC Narrative', (2017) (2) 1-2, *African Journal of International Criminal Justice.*

Chimni B.S., 'International Institutions Today: An Imperial Global State in the Making', *European Journal of International Law*, Vol. 15, No. 1, 2004, pp. 1-37.

Clark J. N., 'International War Crimes Tribunals and the Challenge of Outreach', (2009) 9, *International Criminal Law Review,* 99-116.

Daphna S., 'Politics and Justice: The Role of the Security Council', in Cassese A., *The Oxford Companion to International Criminal Justice*, (Oxford University Press: 2009).

De Silva N., 'Intermediary Complexity in Regulatory Governance : The International Criminal Court's Use of NGO's in Regulating International Crimes', (2017), Vol. 670:1, *The ANNLS of the American Academy of Political and Social Science,* 170-188*.*

De Vos C., ''Someone who comes between one person and another': Lubanga, local cooperation and the Right to a fair trial'*,* (2011) 12, *Melbourne Journal of international law,* at 217-236.

De Vos M.C., 'Investigating from Afar: The ICC's Evidence Problem', (2013) Vol 26:4 *Leiden Journal of International Law*, 1009-1012.

Dicker R, and Keppler E., *Beyond The Hague: The Challenges of International Justice,* in Human Rights Watch World Report 2004: Human Rights and Armed Conflict, (2004)

Dickson L.A., 'Comment, The Promise of Hybrid Courts', (2003) 97 *American Journal of International Law,* 295-314.

Friman H., 'The International Criminal Court and Participation of Victims: A Third Party to the Proceedings?' (2009) Vol. 22:3 *Leiden Journal of International Law,* 485-500.

Galand S. A., 'A global public goods perspective on the legitimacy of the international criminal court', (2017) 41 *Loyola of Los Angeles International and Comparative Law Review*.

Groome D., 'No Witness, No Case: An Assessment of the Conduct and Quality of ICC Investigations', (2014) Vol 3:1 *Penn State Journal of Law and International Affairs,* 1-29.

Haslam E. and Edmunds R, 'Managing A New 'Partnership': 'Professionalization', Intermediaries and the International Criminal Court (2012) Vol. 24:1 *Criminal Law Forum*, 49-85.

Haslam E., 'Subjects and Objects: International Criminal Law and the Institutionalization of Civil Society', (2011) Vol. 5:2 *International Journal of Transitional Justice,* 221-240.

Helfer L.R. and Showalter A.E., 'Opposing International Justice: Kenya's Integrated Backlash Strategy Against the ICC, (2017) Vol. 7:1, *International Criminal Law Review,* 1-46.

Hobbs H., 'Hybrid Tribunals and the Composition of the Court: Search of Sociological Legitimacy', (2016) Vol. 16: 2, Article 5, *Chicago Journal of International Law,* 482-520.

Hovil L. and Okello C. M., 'Editorial Note', (2001) 5, *The International Journal of Transitional Justice,* 133-344.

Jones G. I., 'The Warrant Chiefs: Indirect Rule in South eastern Nigeria, 1891-1929 by A. E. Afigbo', (1973) Vol. 6: 4, *The International Journal of African Historical Studies,* 716-718.

Jordan L., *Mechanisms for NGO Accountability,* GPPi Research Paper Series no. 3, (Cambridge Mass: Global Public Policy Institute: 2005).

Kendall S, 'UhuRuto' and Other Leviathans: The International Criminal Court and the Kenyan Political Order', (2014) 07 *African Journal of Legal Studies,* 399-427.

Kendall S. and Nowen S., 'Representational Practices at the International court: The Gap between Juridified and Abstract Victimhood', (2014) Vol: 76, *Law and Contemporary Problems,* 235-262.

Kendall S., 'Commodifying Global Justice - Economies of Accountability at the International Criminal Court', (2015) Vol. 13:1 *Journal of International Criminal Justice*, 113-134.

Kendall S., 'Donor's Justice: Recasting Criminal Accountability', (2011) Vol. 24:3, *Leiden Journal of International Law,* 585-606.

Kirk-Greene A., 'The Thin White Line: The Size of the British Colonial Service in Africa', (1980) Vol 79: 314, *African Affairs*, 25-44.

Koppel J.G.S., 'Pathologies of Accountability: ICANN and the Challenge of "Multiple Accountabilities Disorder', (2005) Vol. 65: 1 *Public Administration Review,* 94-108.

Koskenniemi M. and Leino P., 'Fragmentation of International law? Postmodern Anxieties', (2002) 15 (3) *Leiden Journal of International Law,* 553-579.

Koskenniemi, 'The Politics of International Law –20 Years Later', (2009) 20(1) *European Journal of International Law,* at 7-19.

Maragia B., ' Almost there; Another Way of Conceptualizing and Explaining NGOs' Quest for Legitimacy in Global Politics', (2002) 2(3) *Non-State Actors and International Law,* 301-332.

Mayhew S., 'Hegemony, politics and ideology: The role of legislation in NGO-Government Relations in Asia', (2005) Vol. 41:5, *Journal of Development Studies,* 727-758.

Mégret F., 'ICC, R2P, and the International Community's evolving Interventionist Toolkit', (2010) Vol. 21:1, *The Finish Yearbook of International Law.*

Moore S. F. , 'Treating Law as Knowledge: Telling Colonial Officers What to Say to Africans about Running "Their Own" Native Courts', (1992) Vol. 26:1 *Law and Society Review*, 11-46.

Mude T., 'Demystifying the International Criminal Court (ICC) Target Africa Political Rhetoric', (2017) *Open Journal of Political Science* 7, 178-188.

Muvingi I., 'Donor-Driven Transitional Justice and Peacebuilding', (2016) Vol. 11:1 *Journal of Peace building and Development*, 10-24.

Naidoo K., 'The end of blind faith? Civil society and the challenge of accountability, legitimacy and transparency, (2004), 2 *Accountability Forum,* 14-25.

Ntanda Nsereko DD, 'The Role of Victims in Criminal Proceedings – Lessons National Jurisdictions can Learn from the ICC' (2010) Vo. 21:3-4, *Criminal Law Forum,* 399-415.

Oko O., 'The Challenges of International Criminal Prosecutions in Africa', (2008) 31 *Fordham International Law Journal,* 380-387.

Osborn E. L., ''Circle of Iron': African Colonial Employees and the Interpretation of Colonial Rule in French West Africa' (2003), Vol. 44:1, *The Journal of African History,* 29-50.

Pahuja S., 'Trading Spaces: Locating Sites for Challenge within International Trade Law', (2000) Vol. 14, *Australian Feminist Law Journal,* 38-54.

Perrin de Brichambaut M., 'the Role of the United Nations Security Council in the International Legal System', in M Byers (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law,* (Oxford University Press: 2000).

Pieterse J. N., 'Hybridity, So What? The Anti-hybridity Backlash and the Riddles of Recognition', (2001) Vol. 18:2-3, *Theory, Culture & Society*, 219-245.

Reisman M. W., 'On Paying the Piper: Financial Responsibility for the Security Council Referrals to the International Criminal Court', (2005) Vol. 99:33 *American Journal of International Law,* 615-618.

SaCouto S. and Cleary., 'Victims' Participation in the Investigations of the International Criminal Court' (2008) Vol. 17:73, *Transnational Law and Contemporary Problems*.

Simmons P.J., 'Learning to Live with NGOs', (1998) 112:82 *Foreign Policy, 82-96*

Sluiter G., 'Obtaining Cooperation from Sudan –Where is the Law?', (2008) Vol. 6:1, *Journal of International Criminal Justice,* 871-884.

Solomos J & Les Back, 'Identity, Hybridity and New Ethnicities', (1996), *Racism and Society,* 121-155.

Southwick K., 'Investigating War in Northern Uganda: Dilemmas for the International Criminal Court', (2005) 1 *Yale Journal of International Affairs,* 105-113.

Spear T., 'Neo-Traditionalism and Limits of Invention of Tradition in British Colonial Africa', Journal of African History, 44/1 (2003);

Steinberg G. M. and Herzberg A.,'NGO Fact-Finding for IHL Enforcement: In Search of a New Model', (2018) 51(2), *Israel Law Review,* 261-299.

Terretta M., 'Anti-Colonial Lawyering, Postwar Human Rights, and Decolonization across Imperial Boundaries in Africa', (2017) 52:3 *Canadian Journal of History,* at 450.

Ullrich L., 'Local Intermediaries, Victims and the Justice Contestations of the International Criminal Court', (2016), Vol. 14: 3, *Journal of International Criminal Justice*, 543-568.

Von Engelhard J and Jansz J., 'Challenging humanitarian communication: An empirical exploration of Kony 2012', (2014) Vol. 76:6, *The International Communication Gazette,* 464-484.

Wartanian A., 'The ICC Prosecutor's battlefield: Combating Atrocities While Fighting for States' Cooperation –Lessons from the U.N. Tribunals Applied to the Case of Uganda', (2004) 36 *Georgetown Journal of International Law* 1289-1316;

Wemmers J-A, 'Victims' Rights and the International Criminal Court: Perceptions within the Court Regarding the Victims' Right to Participate' (2010) Vol. 23: 3 *Leiden Journal of International Law,* 629-643.

Wemmers J-A, 'Where Do They Belong? Giving Victims a Place in the Criminal Justice Process', (2009) Vol. 20:4, *Criminal Law Forum,* 395.

Westcott H.L., 'Cross examination, sexual abuse and child witness identity', (2002), Vol. 11:3, *Child Abuse Review,* 137-152.

Yigzaw D. A., 'The international Criminal Court: Biased Against Africa or Weak Towards the Powerful?', (2018) 43:3 *North Carolina Journal of International law*, 204-239.

Zappala` S., 'The Rights of Victims v. the Rights of the Accused', (2010) Vol. 8:1 *Journal of International Criminal Justice,* 137-152.

4. Reports

'World Report' events of 2009, (USA: 2010), < https://www.hrw.org/sites/default/files/reports/wr2010.pdf>, accessed 11 November 2017.

ACCESS: Victims rights before the International Criminal Court, Victims' Rights Working Group Bulletin, issue 20, (Spring 2012)

Amnesty International, ''Libya of Tomorrow': What Hope For Human Rights', (UK: 2010), available at< https://www.amnesty.org/en/documents/MDE19/007/2010/en/> , accessed 11 November 2017.

Amnesty International, 'The Battle for Libya' killings, disappearances and torture, (UK: 2011), available at< https://www.amnesty.org/en/documents/MDE19/025/2011/en/ >, accessed 11 November 2017

Glassborow K., 'Intermediaries in Peril' Those who provide vital link between victims and ICC under threat, *Institute for War & Peace Reporting,* (28 July 2008), < https://iwpr.net/global-voices/intermediaries-peril>.

Hendrickson D. and Tumutegyereize K., Dealing with complexity in peace negotiations: Reflections on the Lord's Resistance Army and the Juba talks, (2012) *Conciliation Resources*, available at < http://www.operationspaix.net/DATA/DOCUMENT/6894~v~Dealing_with_Complexity_in_Peace_Negotiations__Reflections_on_the_Lord_s_Resistance_Army_and_the_Juba_Talks.pdf >.

Human Rights Center, 'The Victims' Court?' A study of 622 Victims Participants at the International Criminal Court, (UC Berkely School of Law: 2015), < https://www.law.berkeley.edu/wp-content/uploads/2015/04/VP_report_2015_final_full2.pdf> accessed, 10 November 2017.

Human Rights Watch, 'The War Within The War' Sexual Violence Against Women and Girls in Eastern Congo, (USA: 2002)

Human Rights Watch, 'World Report' events of 2010, (USA: 2011), < https://www.hrw.org/sites/default/files/world_report_download/wr2011_book_complete.pdf >, accessed 11 November 2017.

Institute for War & Peace Reporting, ICC Intermediaries Allegedly Concocted Evidence, 12 February 2010, available at < https://iwpr.net/global-voices/icc-intermediaries-allegedly-concocted-evidence>.

International Bar Association (IBA)/ICC Monitoring and Outreach Programme, 'The ICC's trials: an examination of key judicial developments at the International Criminal Court between November 2009 and April 2010', (2010) available at < https://www.icc-cpi.int/RelatedRecords/CR2010_03706.PDF>.

IRRI, 'Steps Towards Justice, Frustrated Hopes: Some Reflections on the Experience of the International Criminal Court in Ituri', Just Justice? (2012) Civil Society, international Justice and the Search for Accountability in Africa, Discussion paper no 2.

Murrithi T., 'The African Union and the International Criminal Court: An Embattled Relationshp?', (2013) No: 8 *The Institute for Justice and Reconciliation,* Accessed on file.

Open Society & IRRIN, 'Commentary on ICC Draft Guidelines on intermediaries', available at < https://www.opensocietyfoundations.org/sites/default/files/icc-intermediaries-commentary-20110818.pdf> accessed 07 March 2018.

REDRESS, 'Comments on the Draft Guidelines Governing Relations between the Court and Intermediaries', (15 October 2010), available at < http://www.redress.org/downloads/publications/Comment_on_draft_guidelines_on_intermediaries_15_Oct_2010.pdf>.

Victims Rights Working Group, 'Comments on the Role and Relationship of 'Intermediaries' with the International Criminal Court' VRWG, (2009), available at < http://www.vrwg.org/VRWG_DOC/2009_Feb_VRWG_intermediaries.pdf>.

War Crimes Research Office, Victim Participation before the International Criminal Court (Washington: War Crimes Research Office, 2007).

5. News Articles

Bosco D., 'Why is the International Criminal Court picking only on Africa?, *The Whatshington Post, 29* March 2013, available at < https://www.washingtonpost.com/opinions/why-is-the-international-criminal-court-picking-only-on-africa/2013/03/29/cb9bf5da-96f7-11e2-97cd-3d8c1afe4f0f_story.html?noredirect=on&utm_term=.c1417a41c9ef>.

Burundi Leaves International Criminal Court amid row, *BBC* (27 October 2017), available at < http://www.bbc.com/news/world-africa-41775951>

Burundi Withdraws From the International Criminal Court, *All Africa,* (27 October 2017), available at < http://allafrica.com/stories/201710280052.html>.

Cashman R., 'The Geopolitics of International Criminal Justice', *9BRi Lobbying Forum*, 4 March 2014.

Cole A., 'Lubanga judgment marks milestone in the path towards accountability', *The Guardian,* (14 March 2012), available at < https://www.theguardian.com/law/2012/mar/14/lubanga-icc-milestone-accountability>.

ICC finds Congo warlord Thomas Lubanga Dyilo guilty, *BBC,* (14 March 2012), available at < http://www.bbc.com/news/world-africa-17364988>.

ICC Orders Release of Thomas Lubanga Dyilo, *Radio Netherlands Worldwide,* available at < https://www.rnw.org/archive/icc-orders-release-thomas-lubanga>.

ICC/ Lubanga –Intermediaries in Lubanga case could face charges of "offence", *Hirondelle News Agency,* (21 march 2012) available at< https://www.justiceinfo.net/en/component/k2/24337-210312-icclubanga-intermediaries-in-lubanga-case-could-face-charges-of-offence.html> Accessed 30 March 2018.

Makau W. M., 'Africa and the International Criminal Court: Closing the impunity gap', *The Broker Magazine,* (07 December 2010).

Malcolm Webb, 'Ugandans react with anger to Kony video', *Al Jazeera,* (14 March 2012), available at < https://www.aljazeera.com/blogs/africa/2012/03/104756.html>.

Mamdani M., 'Darfur, ICC and the New Humanitarian Order', *Pambazuka News*, Nairobi, 2008.

Murithi T., 'The African Union and the International Criminal Court: An Embattled Relationship?' *The Institute for Justice and Reconciliation, Policy Brief No. 8*, 2013.

Recent Developments in the ICC Trial of Thomas Lubanga Dyilo, *Human Rights Watch,* (16 July 2010) available at < https://www.hrw.org/news/2010/07/16/recent-developments-icc-trial-thomas-lubanga>.

Registered Intermediary Procedural Guidance Manual (2012) [Hereinafter Intermediary Procedural Guidance] available at < http://www.cps.gov.uk/publications/docs/RI_ProceduralGuidanceManual_2012.pdf>

Rosebell Kagumire in Lira and David Smith in Johannesburg, 'Kony 2012 video screening met with anger in northern Uganda', *The Guardian,* (14 March 2012), available at < https://www.theguardian.com/world/2012/mar/14/kony-2012-screening-anger-northern-uganda>.

6. Other sources

De Vos C, 'A catalyst for justice? The International Criminal Court in Uganda, Kenya and the Democratic Republic of Congo', (2006) Ph.D Thesis Leiden University.

MacNamee T., 'The ICC and Africa Between Aspiration and Reality: Making International Justice Work Better for Africa', *in Reflections on a High-level Roundtable*, 18-19 March 2014, Addis Ababa, Ethiopia, co-hosted by The Brenthurst Foundation and the Africa Center for Strategic Studies, pp. 1-17. Available at: <www. nurembergacademy. org/ fileadmin/ user_ upload/ Kenya. pdf>

n *K v The Regional Court Magistrate NO, and Others* (1996 (1) SACR 434 (E).

Rick J., 'Analysis: A History and Typology of International Criminal Institutions', available at < http://www.kirschinstitute.ca/history-typology-international-criminal-institutions/>, Accessed 22 November 2018.

Schoeman, U.C.W., *A Timing Program for Intermediaries for the Child Witness in South African Courts,* (2006), Doctoral Thesis, University of Pretoria.