

## 1

*Introduction**The Warlord in the Forecourt***Introduction**

On the morning of Monday, 18 March 2013, a white taxi pulled up outside the United States (US) embassy in the Rwandan capital, Kigali.<sup>1</sup> A broad-shouldered man wearing a dark blue jacket and a black baseball cap stepped out of the vehicle and walked into the security office to the left of the main gates. At the front desk, he demanded to speak to the US ambassador. The security official asked whether he had an appointment, to which he replied, ‘When you tell the ambassador who I am, I’m sure he’ll want to see me.’ The official asked the man to take a seat while she made a telephone call. He remained there for one hour before being motioned through the metal detectors and told to wait in the paved forecourt, dotted with green ferns, between the office and the white-columned doors of the embassy. Pacing back and forth, he waited another hour before an embassy official emerged and whisked him inside.

The man in question was the Congolese rebel leader, Bosco Ntaganda. In 2006 and 2012, the International Criminal Court (ICC) issued warrants for his arrest on eighteen counts of war crimes and crimes against humanity committed in the Ituri district of north-eastern Democratic Republic of Congo (DRC) in 2002 and 2003.<sup>2</sup> Once Ntaganda was safely inside the embassy, he informed US officials that he wanted to hand himself over to the ICC. For two hours one of the world’s most wanted fugitives – dubbed ‘The Terminator’ by much

<sup>1</sup> The account that follows here is based on the author’s interviews with US embassy staff and other foreign diplomats, 4–10 April 2013, Kigali.

<sup>2</sup> International Criminal Court, ‘The Prosecutor *v.* Bosco Ntaganda’, ICC-01/04-02/06, [www.icc-cpi.int/drc/ntaganda](http://www.icc-cpi.int/drc/ntaganda).

of the international press<sup>3</sup> – had waited outside the embassy, unsure if he would be allowed to surrender himself to justice.

By the end of that Monday, word had reached the global media that Ntaganda was in US custody.<sup>4</sup> A rumour, almost certainly false, spread through Kigali that the taxi driver who delivered Ntaganda to the embassy, upon discovering the identity of his passenger, contacted the US authorities to claim the \$5 million legislated two months earlier under the US War Crimes Reward Program for anyone providing information leading to the arrest, transfer or conviction of a suspected perpetrator of international crimes.<sup>5</sup> Baffled US and Rwandan officials meanwhile debated what to do with Ntaganda. Neither state is a signatory to the Rome Statute governing the ICC, and both have often been openly hostile toward the Court. Neither government wanted to be seen to aid the ICC by handing over Ntaganda, and both wanted to extract vital intelligence from him before deciding their next moves.

For Rwanda in particular, Ntaganda was potentially a political timebomb. The Rwandan government had trained, armed and supported Ntaganda – a Congolese citizen but born in Kinigi, a small border town in north-western Rwanda in the foothills of the Virunga mountain range – as he led various rebel groups in eastern DRC before being integrated into the Congolese national army and rising to the rank of colonel. Rwanda feared that any international trial of Ntaganda could uncover incriminating details of its military involvement in eastern DRC.

The immediate events leading to Ntaganda's surrender were especially fraught for Rwanda. In April 2012, integrated rebels from the former Congrès National pour la Défense du Peuple (CNDP), led by Ntaganda, mutinied against the Congolese army and formed a new

<sup>3</sup> See, for example, D. Smith, 'Hunting The Terminator: Congo Continues Search for Bosco Ntaganda', *Guardian*, 28 November 2012, [www.theguardian.com/world/2012/nov/28/terminator-search-bosco-ntaganda-congo](http://www.theguardian.com/world/2012/nov/28/terminator-search-bosco-ntaganda-congo); K. Manson, 'Tea with The Terminator: The Day I Met Bosco Ntaganda', *Financial Times*, 23 March 2013, <http://blogs.ft.com/the-world/2013/03/tea-with-the-terminator-the-day-i-met-bosco-ntaganda/>.

<sup>4</sup> See, for example, BBC, 'Bosco Ntaganda: Wanted Congolese in US Mission in Rwanda', 18 March 2013, [www.bbc.co.uk/news/world-africa-21835345](http://www.bbc.co.uk/news/world-africa-21835345).

<sup>5</sup> United States Department of State, 'War Crimes Reward Program', [www.state.gov/j/gcj/wcrp/](http://www.state.gov/j/gcj/wcrp/). This rumour was still doing the rounds when I arrived in Kigali on 3 April 2013.

rebel group, the March 23 Movement (M23).<sup>6</sup> In November 2012, the M23 seized control of Goma, the provincial capital of North Kivu, sparking a conflict with the Congolese army and the United Nations (UN) peacekeeping mission, MONUSCO<sup>7</sup>, which forcibly displaced nearly 200,000 civilians. After the M23 capture of Goma, several international donors, including the US, suspended part or all of their foreign aid to Rwanda, which they accused of backing the M23 rebellion.<sup>8</sup>

As this diplomatic controversy unfolded in early 2013, in-fighting among the M23 leadership caused a violent split between factions led by Ntaganda and Sultani Makenga, respectively. The Makenga faction quickly gained ascendancy and routed Ntaganda's forces. On 16 March 2013, Ntaganda and 200 of his men fled into the forests of the Virunga National Park.<sup>9</sup> Caught between his former M23 allies and an unknown fate if he found himself in Rwandan government hands, Ntaganda entered Rwanda on foot two days later and made his way to Kigali, believing the refuge of the US embassy and a ticket to face international justice in The Hague were his only means of survival.<sup>10</sup>

The path to the ICC, however, was not nearly as smooth as Ntaganda might have hoped. It took US and Rwandan authorities – with their own tensions over the M23 situation – four days to negotiate his fate. On 22 March 2013, they transported him under heavy security to Kigali's Grégoire Kayibanda airport. Accompanied by diplomats from the US, the United Kingdom (UK), the Netherlands, Belgium and the European Union (EU), Ntaganda was held in the airport VIP lounge waiting to board a plane sent by the Dutch government to transfer him

<sup>6</sup> The name M23 refers to the 23 March 2009 peace deal signed by the CNDP and the Congolese government. The rebels alleged that the government had reneged on the deal by not paying their salaries and threatening to disperse their ranks across the DRC, thus disrupting a parallel chain of command that the rebels maintained within the national army.

<sup>7</sup> MONUSCO is the abbreviation for the Mission de l'Organisation des Nations Unies pour la Stabilisation en République Démocratique du Congo (United Nations Organisation Stabilisation Mission in the Democratic Republic of Congo).

<sup>8</sup> See, for example, Al Jazeera, 'Germany Latest to Suspend Rwanda Aid', 29 July 2012, [www.aljazeera.com/news/africa/2012/07/20127281579389961.html](http://www.aljazeera.com/news/africa/2012/07/20127281579389961.html).

<sup>9</sup> See, for example, Gulf Times, 'Defeated Congo Rebels Surrender', 16 March 2013, [www.gulf-times.com/story/345710/Defeated-Congo-rebels-surrender](http://www.gulf-times.com/story/345710/Defeated-Congo-rebels-surrender).

<sup>10</sup> Author's interviews, US and other foreign diplomats, Kigali, 4–10 April 2013.

to The Hague. While Ntaganda waited, the diplomats argued over which government was responsible for purchasing the fuel for his flight. The Dutch representative protested that the Netherlands had paid for the incoming flight and it was therefore the other states' responsibility to cover the return journey. The American diplomat argued that, as a non-signatory to the Rome Statute, the US could not be seen to support the ICC financially in any way. After hours of wrangling and frantic phone calls to various European capitals, the remaining officials handed over their credit cards, the plane was refuelled and Ntaganda, flanked by Dutch security guards, was led onboard.

Delivered into ICC custody in The Hague on the night of 22 March 2013, Ntaganda made his first appearance before the ICC judges four days later. He denied all of the charges against him. The charges were confirmed on 9 June 2014 – meaning that he had a *prima facie* case to answer – and his trial began on 2 September 2015, almost two and a half years after he nervously paced the embassy forecourt in Kigali.

### *Intervention and Intersections: Analysing the ICC's Political Impact in Africa*

The broad purpose of this book is to assess critically the politics of the ICC in Uganda and the DRC – and Africa more broadly – focusing on the Court's impact on national politics and the lives of everyday citizens. The book uses the central concept of 'distance' to examine the effects in central Africa of delivering justice from afar. 'Distance' in this context denotes the physical location of the ICC in The Hague, removed from the sites where it investigates crimes and extracts suspects and witnesses; the philosophical underpinnings of the ICC's model of 'neutral and impartial' justice; and the Court's predominantly non-African staff, many of whom have limited previous experience of the people and places on which they now work. These themes are highly salient, given the recent threat by various members of the African Union (AU) to withdraw their ratifications of the Rome Statute on the grounds of the Court's neo-colonialist meddling on the continent.<sup>11</sup> Concerns over the ICC's political impact in Africa have

<sup>11</sup> See, for example, Guardian, 'African Leaders Plan Mass Withdrawal from the International Criminal Court', 31 January 2017, [www.theguardian.com/law/2017/jan/31/african-leaders-plan-mass-withdrawal-from-international-criminal-court](http://www.theguardian.com/law/2017/jan/31/african-leaders-plan-mass-withdrawal-from-international-criminal-court).

also gained prominence because of the Court's arrest warrants against Sudanese President Omar al-Bashir, Kenyan President Uhuru Kenyatta, Kenyan Deputy President William Ruto William Ruto, former Ivorian President Laurent Gbagbo and former Congolese Vice President Jean-Pierre Bemba.<sup>12</sup>

As the Ntaganda transfer highlights, enacting the high-minded ideals of international justice involves messy political and security machinations 'on the ground'. It shows the entanglement of the ICC with volatile conflict dynamics and unpredictable events such as the rupture within the M23 that led to Ntaganda's surrender; delicate political negotiations, as witnessed between the US and Rwanda over whether to send Ntaganda to The Hague; and the cooperation of states such as those that agreed to refuel Ntaganda's plane. As we will see, the ICC's reliance on state cooperation – including with states that are not signatories to the Rome Statute – and on serendipity rather than strategy have been recurring features of the Court's work in Africa to date. Later chapters will also analyse the difficulties for the ICC posed by Ntaganda's involvement in peace talks in eastern DRC and his potential eligibility for a national amnesty.

This book has three specific aims: to explore the domestic political impact of the ICC through two detailed case studies, Uganda and the DRC; to examine the resonance of these two cases in the ICC's wider work across Africa; and to highlight the theoretical relevance of these issues for broader debates about appropriate legal and non-legal responses to mass atrocity in Africa and beyond. Regarding the first aim, the book focuses heavily on Uganda and the DRC because these situations led to the ICC's first ever full investigations and thus highlight the Court's early steps and precedents established for its cases elsewhere.<sup>13</sup> They are also therefore the most developed of the ICC's situations, providing the Court with four out of its five completed trials to date in the cases of Thomas Lubanga, Germain Katanga, Mathieu

<sup>12</sup> On broad antagonisms between the ICC and the AU, see M. Mutua, 'Africans and the ICC', in K. Clarke, A. Knotterus and E. de Volder (eds.), *Africa and the ICC: Perceptions of Justice*, Cambridge University Press, 2016, pp. 39–46; and J-B. J. Vilmer, 'The African Union and the International Criminal Court: Counteracting the Crisis', *International Affairs*, 92, 6, 2016, pp. 1319–42.

<sup>13</sup> In the parlance of the ICC, a 'situation' refers to the broad conflict within which crimes are investigated (for example, the 'situation in the DRC') while a 'case' refers to the prosecution of a particular suspect or group of suspects (for example, the case of *The Prosecutor v. Bosco Ntaganda*).

Ngudjolo and Bemba, the last a Congolese national convicted of crimes committed in the Central African Republic (CAR).<sup>14</sup> Uganda and the DRC have also generated three out of the five trials currently ongoing at the ICC in the cases of Ntaganda, Dominic Ongwen and a new trial against Bemba and four associates for witness tampering, while another Ugandan suspect – Joseph Kony – remains at large.<sup>15</sup>

An in-depth analysis of two cases allows for a comprehensive exploration of the ICC's impact on specific African societies.<sup>16</sup> Comparing these cases then highlights structural features of the ICC's work as well as important differences that stem from the varied local contexts in which the Court operates. Furthermore, as neighbouring states, Uganda and the DRC permit an exploration of a widespread feature of the ICC's investigations across Africa, namely the complications caused by working on contiguous cases, with overlapping conflict and political dynamics and investigators shared across borders. In Chapters 3–7 – which focus on various features of the ICC's operations in Uganda and the DRC – the two country situations are analysed in sequence, highlighting key similarities and distinctions between them. Chapter 8 then provides a broad brushstroke analysis of the six other ICC situations in Africa, exploring the extent to which dynamics identified in the principal case studies manifest across the continent.

In methodological terms, this book analyses the ICC as an external *intervention* into African societies that experiences a range of *intersections* with domestic actors, institutions, networks and processes. While various authors have analysed the interventionist nature of the ICC,<sup>17</sup> highlighting the powerful entry of the Court into complex local environments, the focus on intersections locates the Court within a richer

<sup>14</sup> See International Criminal Court, 'Situations under Investigation', [www.icc-cpi.int/pages/situations.aspx](http://www.icc-cpi.int/pages/situations.aspx).

<sup>15</sup> Ibid.

<sup>16</sup> For a broader discussion of the need for empirically grounded, comparative analysis of the impact of transitional justice processes to substantiate the normative claims made by scholars in the field, see O. Thoms, J. Ron and R. Paris, 'State-Level Effects of Transitional Justice: What Do We Know?', *International Journal of Transitional Justice*, 4, 3, 2010, pp. 329–54.

<sup>17</sup> See, for example, A. Branch, *Displacing Human Rights: War and Intervention in Northern Uganda*, Oxford University Press, 2011; M. Kersten, *Justice in Conflict: The Effects of the International Criminal Court's Interventions on Ending Wars and Building Peace*, Oxford University Press, 2016.

political, social and cultural sphere and a more variegated realm of power relations, where the Court is not always the predominant actor. Mark Kersten argues that the ICC is typically expected to be among the ‘first-responders’ to mass conflict around the world.<sup>18</sup> As this book highlights, the ICC is usually a late responder, arriving long after a range of other international, national and community-level actors and processes have already begun addressing violence.

The emphasis on intersections facilitates an analysis of new dynamics created when the ICC interacts with domestic players and processes. While this book differentiates among international, national and community levels, it focuses on their dynamic interactions.<sup>19</sup> Crucially, the ICC’s intersections at multiple levels influence one another. For example, the extent of the Court’s cooperation with national governments affects its interactions with everyday citizens, many of whom hope the Court will hold state officials accountable for serious crimes.

As this book argues, the ICC generally has paid insufficient attention to these intersections, preferring to imagine Africa as a largely inert space in which it will easily wield its influence, rather than an arena of vibrant agency and contestation, much of which is fundamentally opposed to external intervention. A handful of actors within the ICC have discussed the Court’s intersections with other institutional responses to conflict. For example, Matthew Brubacher, the Office of the Prosecutor’s (OTP) international cooperation advisor on Uganda, argues that the Court operates ‘among a multitude of other diplomatic, humanitarian and military-related initiatives, each pursuing their respective’ aims.<sup>20</sup> Tellingly, however, Brubacher overlooks other legal or transitional justice processes – including those that may directly challenge the ICC’s own jurisdiction over particular situations or cases – preferring to discuss the role of these other actors either in fostering the degree of peace and stability necessary for the ICC to

<sup>18</sup> Kersten, *Justice in Conflict*, p. 5.

<sup>19</sup> In this regard, the book is framed contrary to a current trend in the literature to blur these levels beyond distinction, for example the literature on the ‘glocal’ or melding of the global and local levels. See, for example, B. Mazlish, ‘The Global and the Local’, *Current Sociology*, 35, 1, 2005, pp. 93–111; and J. Brewer, *Peace Processes: A Sociological Approach*, Polity, 2010.

<sup>20</sup> M. Brubacher, ‘The ICC Investigation of the Lord’s Resistance Army: An Insider’s View’, in T. Allen and K. Vlassenroot (eds.), *The Lord’s Resistance Army: Myth and Reality*, Zed Books, 2010, p. 263.

conduct its operations or pursuing aims such as ‘social equilibrium’ that he believes are beyond the purview of the Court.<sup>21</sup>

Reflecting this focus on intervention and intersections, this book adopts a multi-sited, multi-level methodology. It is based on eleven years of research between 2006 and 2017, encompassing 653 interviews with ICC personnel (including the first Prosecutor, Luis Moreno Ocampo), senior Ugandan and Congolese political and judicial officials (including the Ministers of Justice and other cabinet ministers in both countries), international and local civil society actors, journalists, customary and religious leaders, former rebel combatants and affected communities, with 426 of those interviews conducted with everyday people. Wherever possible, quotes are attributed to named public officials; however, some statements are anonymised either to protect respondents’ security or because, especially with some ICC or political officials, they would only speak on this basis. The names of all everyday interviewees have been changed to protect their security.

The empirical research for this book comprised nineteen field trips to rural and urban areas in Uganda and the DRC (each lasting between two weeks and five months) and seven visits to the ICC headquarters in The Hague (including the observation of trials and other Court behaviour), supplemented by interviews conducted in Rwanda, South Sudan, Kenya, Tanzania, South Africa, the US, the UK, France and Belgium and an analysis of ICC judgments, court transcripts and public statements by ICC officials. Much of the literature on the ICC focuses either on international and national elites or on the Court’s grassroots impact.<sup>22</sup> A comprehensive understanding of the ICC and its impact, however, requires examining its work in The Hague as well as in Ugandan and Congolese capitals and villages. This book attempts to

<sup>21</sup> Ibid., p. 264. For further discussion on this theme, see M. Newton, ‘A Synthesis of Community-Based Justice and Complementarity’, in C. De Vos, S. Kendall and C. Stahn (eds.), *Contested Justice: The Politics and Practice of International Criminal Court Interventions*, Cambridge University Press, 2015, pp. 131–8.

<sup>22</sup> See, for example, T. Allen, *Trial Justice: The International Criminal Court and the Lord’s Resistance Army*, Zed Books, 2006; Branch, *Displacing Human Rights*; P. Kastner, *International Criminal Justice in Bello? The ICC between Law and Politics in Darfur and Northern Uganda*, Martinus Nijhoff, 2012; S. Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan*, Cambridge University Press, 2013; and Kersten, *Justice in Conflict*.



link these levels, understanding – on its own terms – the Court’s objectives and modalities, as well as the ways in which the ICC is viewed and experienced by national and community elites and everyday citizens.

Underpinning this analysis is the recognition that none of these levels – international, national or local – is homogeneous. National elites, civil society and local communities in Uganda and the DRC express wide-ranging views on their intersections with the ICC. The analysis in this book therefore highlights critical disagreements within these categories of actors. Within the ICC itself – comprising the Presidency, the Judicial Division, the OTP and the Registry – there is also significant divergence over the Court’s aims, approaches and perceived effects. Inevitably, this book stresses the importance of the OTP, as the organ of the Court that wields the greatest influence over the direction and impact of the institution. The OTP shapes the function of the other branches and the fundamental nature of the ICC’s interventions by selecting which situations, cases and suspects the Court should pursue. This book also examines the role of the other three organs while maintaining a primary focus on the OTP’s operations in Uganda and the DRC.

The period of research covers the start of the ICC’s investigations in central Africa, the full duration of the ICC’s first completed trials of Lubanga, Katanga, Ngudjolo and Bemba and the ongoing trials of Ntaganda, Ongwen and Bemba and his associates. This eleven-year timeframe allows an extensive analysis of the ICC’s impact, which has fluctuated depending on legal developments in The Hague and broader political, economic, social and cultural dynamics in Uganda and the DRC. It also provides insights into the extent to which the ICC has ‘learnt’ during its first fifteen years of operation, improving its approaches based on recognised successes and missteps, and the extent to which national and community-level actors have ‘learnt’ how to engage with the ICC for their own purposes.

A longer timeframe facilitates a wide range of methodological approaches and different angles of analysis, extending from field-based research to participant observation in ICC cases. This comprises follow-up interviews with actors at all levels, sometimes a decade apart, to gauge changes in ICC practice and impact over time. My first field trip to Uganda and the DRC in January 2006 took place ten weeks after the issuance of the ICC’s first ever arrest warrants for five

commanders of the Lord's Resistance Army (LRA), including Joseph Kony.<sup>23</sup> I conducted interviews in the OTP in The Hague on the day of the transfer of the ICC's first ever suspect in custody, the Congolese rebel leader Thomas Lubanga, on 16 March 2006. I gained access to background meetings of the OTP discussing the Lubanga case and preparing the Prosecutor for his press conference to announce Lubanga's transfer. Later, I travelled several times to Juba in southern Sudan between 2006 and 2008 to conduct interviews around the peace talks between the Ugandan government and the LRA. In Juba, Gulu, Kampala and London, I interviewed many of the key players in the peace talks from the Ugandan government, LRA and the UN mediation team. In northern Uganda, I led a research project for the UN Office of the High Commissioner for Human Rights (OHCHR), which conducted focus group and individual interviews on peace, conflict and transitional justice with more than 1,700 internally displaced persons (IDPs) and victims of the twenty-year conflict across Acholi, Lango and Teso sub-regions. Some of the analysis in this book, especially Chapters 4 and 7, draws substantially on the OHCHR report that emerged from that research and on which I was the lead author.<sup>24</sup> In 2011, I was an expert witness for the ICC Defence in the case against alleged Congolese rebel leader, Callixte Mbarushimana.<sup>25</sup> The charges against Mbarushimana were not confirmed and the case did not reach the trial phase because the judges determined that the Prosecution had provided insufficient evidence to prosecute. In 2012, I co-produced a radio programme in northern Uganda and south-western Rwanda on local perceptions of justice, forgiveness and reconciliation, which was broadcast on Mega FM in Gulu.<sup>26</sup> In 2013, I travelled to Rwanda two

<sup>23</sup> International Criminal Court, 'Situation in Uganda', ICC-02/04, [www.icc-cpi.int/uganda](http://www.icc-cpi.int/uganda).

<sup>24</sup> United Nations Office of the High Commissioner for Human Rights, 'Making Peace Our Own: Victims' Perceptions of Accountability, Reconciliation and Transitional Justice in Northern Uganda', Geneva: OHCHR, 2007, [www.uganda.ohchr.org/Content/publications/Making%20Peace%20Our%20Own.pdf](http://www.uganda.ohchr.org/Content/publications/Making%20Peace%20Our%20Own.pdf).

<sup>25</sup> International Criminal Court, Pre-Trial Chamber I, 'Public Document: Decision on the Schedule of the Confirmation Hearing', Situation in the Democratic Republic of Congo, *The Prosecutor v. Callixte Mbarushimana*, 12 August 2011, [www.icc-cpi.int/CourtRecords/CR2011\\_12170.PDF](http://www.icc-cpi.int/CourtRecords/CR2011_12170.PDF).

<sup>26</sup> P. Clark, N. Palmer, D. Matthee and D. Matthee et al., 'Finding it within Ourselves: Forgiveness, Reconciliation and Rescue in Post-Atrocity Rwanda and Uganda (Luo version)', 2014, [www.youtube.com/watch?v=xu7nmqJLurk](http://www.youtube.com/watch?v=xu7nmqJLurk).