Local Ownership of Global Governance

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This paper is a work in progress examining the production of legitimacy in the context of global governance processes. It explores two cases – first, it examines how victim ownership of ICC processes gets scripted through a victim survey at a pivotal moment in the ICC’s engagement in Uganda. Second, it looks at how deferral to ICC jurisdiction becomes incorporated into an affirmation of DRC sovereignty. The issues explored in this draft, even at this early stage, and the other texts excerpted for this session are intended to provoke debate and provide a shared basis for conversation in the IGLP human rights stream.

Five years ago, on 18th October 2007, the International Criminal Court (ICC) established a field office in Bangui in the Central African Republic. This was the fifth field office that the ICC had established outside The Hague. The ICC already had a presence in Kampala, Uganda; Kinshasa and Bunia in the Democratic Republic of the Congo; and in Abéché, Chad. More than simply a local outpost from which to conduct investigations and coordinate logistics linked to the case, these field offices represented the ICC’s effort to perform outreach and engender local ownership of its processes. Indeed in opening the Bangui office, the registrar underscored that its work was critical to the legitimacy, and the perceived legitimacy, of the Court.

1 As this paper gets extended, the first section will examine the ICC’s discourse and practice of victim and community outreach (at this stage the focus is limited to a survey of the justice priorities of ‘victim’ communities by human rights groups), and the second section will further explore the phenomenon of self-referrals (at this stage the focus is limited to the General Katanga case in the DRC). I also hope to add a third section that will look at the role of national NGOs and other civil society groups working on ICC ratification and related ICC support initiatives.

2 Indeed originally the ICC did not anticipate the functional need for field offices and expected that it could conduct investigations and other in-country work through short-term staff missions from The Hague; accordingly, when it submitted its early budgets, the ICC made no provision for field offices. However, there was a growing recognition that this was not satisfactory and indeed that the functional tasks were but one component of the value of field offices in the interface with local communities. Thus today a field office is not merely a hub to coordinate its investigations for practical purposes but a platform for community engagement. See p. 99-101 of the Report Courting History by Human Rights Watch, http://www.hrw.org/sites/default/files/reports/icc0708webcovcover.pdf.

The discourse of local ownership and democratic legitimacy is front and center in contemporary discussions of the ICC. This is a relatively new development in international criminal law but it is not new to the realm of international institutions. Local ownership discourse has had a long shelf life in development, environment and other zones of global governance where, over time, a vast nomenclature has been generated to accompany the theme – local involvement, community empowerment, participatory development, civil society partnerships, accountability, local ownership, NGO and CBO engagement. Each of these generated its own set of programs (such as capacity development, stakeholder consultations, PRSPs) that then infused a new generation of development initiatives that sold themselves as “grounded in local realities”, as advancing “bottom-up” growth and as having met new metrics benchmarking “best practices” for stakeholder ownership. The legacies of international tribunals and war crimes trials emerging from the treaty of Versailles or the London Charter were not about a discourse of local

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5 Over the last two decades the local ownership discourse has gone beyond arenas such as development to also flood human rights and humanitarianism. These fields have seen numerous initiatives laying out the rationale for “local ownership” and/or practices to advance it. For instance see, Béatrice Pouligny (2009), Supporting Local Ownership in Humanitarian Action, Center for Transatlantic Relations (CTR) and Global Public Policy Institute (GPPi). Accessed @ http://www.gppi.net/fileadmin/gppi/GPPiPPR_local_ownership_2009.pdf.  
6 Poverty Reduction Strategy Papers (PRSPs) are required by the World Bank and the IMF in negotiating debt relief conditionalities; while required, paradoxically (!), they are also presented as ways for member countries and their populations to participate in the formulation of debt policies. Participation is highlighted as a key dimension through which the PRSPs are produced and the goals that they are intended to serve. For the IMF description of these initiatives, see http://www.imf.org/external/np/prsp/prsp.aspx. The Bank has embraced the discourse of participation even more emphatically, with its former head, James Wolfensohn, urging that aid recipients should be,” owning and implementing their development strategies.” (Quoted in p. 6 of Pouligny 2009). Accordingly, various World Bank initiatives devote themselves to maximizing participation through consultations, surveys, public hearings and the like. For instance, see the its initiative to establish Global Partnership for Enhanced Social Accountability Consultations, http://web.worldbank.org/WEBSITE/EXTERNAL/TOPICS/EXTSOCIALDEVELOPMENT/EXTPCENG/0,,contentMDK:23083929--menuPK:2643856--pagePK:64020865--piPK:149114--theSitePK:410306,00.html; similarly, another World Bank Group Affiliate produced a five point plan for consultation processes; See Stakeholder Consultations, http://www1.ifc.org/wps/wcm/connect/5a4e740048855591b724f76a6515bb18/PartOne_StakeholderConsultation.pdf?MOD=AJPERES&CACHEID=5a4e740048855591b724f76a6515bb18.  
7 These include earnest and fanciful schemes for addressing the “democracy deficit” by “ensuring meaningful stakeholder engagement”, establishing “participation quotas”, measuring local ownership, graphing the “consultation continuum” and the like. See, for instance, ISEAL Alliance (2005) Stakeholder Consultation Practices in Standards Development, http://inni.pacinst.org/inni/NGOParticipation/ISEAL_StakeholderConsultSept05.pdf. Indeed there now are organizations that are themselves devoted to maximizing local ownership that provide trainings and “how-to” guides in the “democracy for dummies” vein. For instance, see iap2, the International Association for Public Participation, http://iap2.affiniscape.com/calendar.cfm.  
ownership. As we know these trials were set-up at the initiative of war’s victors and were about prosecuting and perhaps persecuting the defeated. Even their PR machines did not cloak their efforts in claims to consult with stakeholders in Istanbul or Leipzig or empower local communities in Nuremberg and Tokyo. In some ways the ad hoc tribunals carried that legacy and were widely criticized for being spaceship like phenomena in The Hague and Arusha that had little resonance with the priorities of local communities where the atrocities they were adjudicating took place. Critics claimed that if anyone was being empowered it was international law and lawyers, not victim communities, grassroots justice movements, and local justice processes. However, with the discourse of local ownership emerging as the normative common sense of global governance, the ICTY and ICTR took steps to respond, even if inadequately, to these criticisms, review their proceedings and develop more extensive outreach initiatives. The institutional culture of the ad hoc tribunals began to reflect the fact that legitimacy, and more important the perception of legitimacy was no longer confined to the observation of procedural regularities within the four walls of the courtroom but also the politics of how “human rights” got translated into the local justice vernacular. The hybrid tribunals in Sierra Leone, Timor Leste and Cambodia are steps on the road to this rethinking. Of course the fact that these dynamics ran parallel to momentum towards an international criminal court meant that the court that would result was fundamentally shaped by this broader democracy discourse. Article 17’s doctrine on complementarity is then the ICC’s own homage to local ownership.

It is a telling irony that the currency of the discourse of ‘local ownership’ gained value in the human rights world in ways that were tied to good governance policy frameworks that are exemplars of the post-cold war liberal imperium. The focus on local ownership seemed to be most celebrated as an expression of self-determination precisely when it became embedded in an interventionist paradigm. It is a focus that is carried forward by both local and global dynamics; by definition, the gravitational pull of this focus on local ownership is context specific but it is

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9 For instance, see Koskenniemi, “Between Impunity and Show Trials,” Max Planck Yearbook of United Nations Law, vol. 6, 2002, pp. 1–35 where he notes that “It often seems that the memory for which the trial in the Hague is staged is not the memory of Balkan populations but that of an "international community" recounting its past as a progress narrative from "Nuremberg to the Hague," impunity to the Rule of Law. This "community" would construct itself in the image of a "public time" (in analogy with "public space") in which it would contemplate its past and give a moral meaning to disasters such as Rwanda or Srebrenica as implying a promise of radiant future.” P. 34-5.

also universally recognizable as a signature feature of every “best practice” list. It is a focus that is an expression of democracy and a project of democracy promotion. Indeed an ability to corral and carry these apparently contradictory discursive currents has emerged as critical to gaining traction in the institutional and normative architecture of contemporary global governance. The Rome Statute, is itself a powerful embodiment of these contradictory tendencies and was negotiated and passed in the context of this landscape. Article 17, the article clarifying the doctrine of complementarity is designed to affirm and advance this project. As the mechanism managing the tensions between national legitimacy and international governance technologies, Article 17 limits potential challenges to the reach of the ICC by confining such opposition to the terrain of national-international law complementarity. In instituting an elaborate institutional edifice to anchor that mechanism, the Rome statute details a range of procedures to review the admissibility of any potential case that defines the relationship between the jurisdiction of the court and the jurisdiction of national sovereignty. Advocates have argued that the architecture of the ICC entails exercising jurisdiction only when the state party concerned is unwilling or enable to advance an investigation and prosecution process such that it is not undermining but buttressing the primacy of national courts. Thus Article 17’s admissibility process is aimed at granting the imprimatur of local legitimacy on this global institutional actor.

When sworn into office in June 2003, the then prosecutor, Luis Moreno Ocampo argued that the principle of complementarity should shape our assessment of the role of the ICC with our radars trained on the functioning of domestic criminal justice processes rather than the number of ICC trials. This was in keeping with the party line that the ICC is a local sovereignty enhancing, non-intrusive “forum of last resort” that complements national criminal jurisdiction. Ocampo himself, referenced the ICC’s effort to steer a course between the seemingly contradictory goal posts of local ownership and global governance, noting that the “complementary nature of the court” requires recognition of interdependence as he laid out a vision of the ICC as” independent and interdependent at the same time”. Accordingly, the first initiative he announced was the

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11 Luis Moreno Ocampo, Statement made at the ceremony for the solemn undertaking of the Chief Prosecutor of the ICC, Monday, 16 June 2003 The Peace Palace The Hague, The Netherlands: “The Court is complementary to national systems. This means that whenever there is genuine State action, the Court cannot and will not intervene. As a consequence of complementarity, the number of cases that reach the Court should not be a measure its efficiency. On the contrary, the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success.”
convening of a ‘public hearing for a ‘participatory dialogue’. Indeed that inaugural speech was infused with the vocabulary of local ownership and hit all the buzz words about ‘consultation’, ‘participation’, ‘diversity’ and ‘dialogue’. The overarching theme was that this was not only a court that would seek to have jurisdiction over the world, but that this was a court for and by the world.

Let me now turn to the two cases to trace how this paradox of independence and interdependence is performed and legitimacy managed in practice. These cases look at how victim ownership of ICC processes gets scripted through a victim survey at a pivotal moment in Uganda and how deferral to the ICC becomes incorporated into an affirmation of DRC sovereignty. In both these cases, the current work mines one narrow slice of the debate to look at how discussions of local ownership unfold at those very specific moments. It is not a discussion of how the ICC debate has unfolded in these countries outside of those very specific windows.

**Forgotten Voices**

On 8 July 2005 the ICC indicted Joseph Kony on 12 counts of crimes against humanity and 21 counts of war crimes in relation to the actions of the Lord’s Resistance Army (LRA) in Uganda. The indictments against Kony (and other LRA leaders) were issued while the Ugandan government and the LRA were engaged in peace negotiations. The indictments instantly catalyzed heated debate within Uganda as well as the wider human rights community. The ICC was criticized on a number of counts. Some criticized the ICC for being so hungry for a case that it ignored the human rights violations of government forces, flirted with the Ugandan President Museveni and the military and majoritarian policy ambitions of Kampala to pursue the LRA. Others criticized the ICC for formulating prosecutorial priorities in the Hague without coordinating with Acholi leaders and peace negotiators to ensure that the timing of the indictments would not run interference with the difficult currents of the peace process. Yet

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12 In fact, the ICC, is now giving rise to further expansion of the local ownership vocabulary – thus one commentator coins the term inreach “to describe the process of obtaining ideas, opinions and feedback from local populations about their expectations and responses to the transitional justice process. “Wendy Lambourne, “Outreach, Inreach and Local Ownership of Transitional Justice”

International Studies Association Annual Convention, New Orleans, 17-20 February 2010  She argues that the ICC “has incorporated innovative victim participation provisions and a sophisticated outreach program including action plans adapted to each context in which the Court is operating..”
others criticized the ICC for formulating prosecutorial priorities in The Hague without consulting sufficiently with the Acholi community to explore the alternative potential of the local restorative justice process known as Mato Oput. The ICC was also criticized for not doing sufficient outreach to ensure that victims knew about the Court and begun to appreciate and engage with its mission so that there could be local ownership of ICC actions. Indeed, from many quarters the one consistent theme was the argument that the ICC was not giving due regard for the justice priorities of those most affected.

Even as this debate continued to rage, a group of international human rights organizations surveyed almost 3000 individuals in 3 war affected districts regarding their transitional justice priorities to “represent the spectrum of attitudes and opinions of those most affected by the violence.” Soon Forgotten Voices, the report emerging from this survey, became one of the most critical anchors of the Uganda peace and justice debates - and indeed, it framed the terms for a new debate about “what do victims really want”. Arguably, within the dominant conversations of the transitional justice field, the victim survey in Uganda became the benchmark for constructive intervention and local consultation. Through fortuitous coincidence the survey reported that victims did prioritize justice, and indeed that peace and justice were deeply compatible. The survey report conveyed that in their wisdom the most affected communities were not as dismissive of ICC actions as the ICC critics; rather, they saw the relationship between prosecutions and the peace process as merely a question of political timing and strategic management of both processes to ensure their complementarities were appropriately synchronized. From this perspective, the ICC actions could not be dismissed as simply the imperial ambitions of the global North, in fact to do so would be to indulge in the racist stereotype that Africans did not want justice and that such ‘noble’ goals were the province

13P. 3 of Phuong Pham, Patrick Vinck, Marieke Wierda, Eric Stover, and Adrian di Giovanni (2005), Forgotten Voices: A Population-Based of Attitudes about Peace and Justice in Northern Uganda, International Center for Transitional Justice and Human Rights Center, University of California, Berkeley. “The report is based on the preliminary analysis of quantitative data collected from interviews with 2,585 residents of four northern districts— Gulu and Kitgum (both Acholi districts), and Lira and Soroti (both non-Acholi districts). The interviews were conducted by teams of trained interviewers led by researchers from the Human Rights Center (HRC), University of California, Berkeley, in partnership with the International Center for Transitional Justice (ICTJ). Makerere University Institute of Public Health partnered with UC Berkeley on two of the districts. The interviews took place between April 20 and May 2, 2005, using a structured questionnaire.” (p. 3).
of the ethically sensitive global North. Instead the survey was taken to affirm a “universal” quest for justice in ways that advance the spirit of Article 17. For advocates, the notion of complementarity invoked by Article 17 invokes that universality in the demand for justice, while also grounding itself in local legitimacy since the Rome Statute did not provide for universal jurisdiction. Accordingly, the victim survey mediates and manages those dual registers.

Victim surveys have become an increasingly common feature of the transitional justice field. From Uganda to Afghanistan large scale population surveys of conflict affected regions regarding transitional justice priorities have become an increasingly popular method of accessing” victims” voices. Surveys are one example of a broader turn to indicators and other measurement tools within human rights that are embedded in specific logics of power and knowledge. The Ugandan survey formulated questions, deployed researchers who brought back completed questionnaires, entered information, exported and analyzed it with the use of the software “Statistical Package for Social Science (SPSS)” and developed a narrative report that wrapped itself around those figures to “convey” victims’ voices. The survey treats victim preferences as defined in advance of answering the survey – the Ugandan survey flags the fact that while it has a “structured questionnaire” it utilizes “an open-ended questions format” so that victims have freedom to respond in any way they choose. However then the interviewer takes that response and fits it into a predetermined set of preferences: “Response options were given to facilitate the interviewer’s recording of the responses.” This process translates preferences in ways that can be recorded, tabulated and fed into an algorithm that makes them politically intelligible. Of course, this process is not only rendering those preferences intelligible, but it is also interpolating those “forgotten voices” as rights holding subjects who can be incorporated within the logic of the ICC conversation. ‘Victims’ become fungible in a universally recognizable currency of human rights in ways that makes it easier for the transitional justice

14 For instance, Paul van Zyl, the former Vice President of ICTJ often made this argument in describing the Ugandan debate and the value of the survey.
15 The report identified the following objectives of the survey process: “1. Measure the overall exposure to violence as a result of war and human rights abuses in Northern Uganda since 1987; 2. Understand the immediate needs and concerns of residents of towns, villages, and internally displaced person (IDP) camps in Northern Uganda; 3. Capture opinions and attitudes about specific transitional justice mechanisms, including trials, traditional justice, truth commissions, and reparations; and 4. Elucidate views on the relationship between peace and justice in Northern Uganda.” p. 4 of Pham et. al. 2005.
16 p. 4 of Pham et. al. 2005.
17 p. 4 of Pham et. al. 2005.
field to leave behind the complex socio-political stakes of specific contexts and translate transitional justice blue prints from South Africa to Peru, Uganda to the DRC. This yield is both an effect of the ‘success’ of the transitional justice field, and a prerequisite for the field to have a ‘recognizable’ legal and normative logic.

The power of the victim survey as a measurement tool has had an interesting and important role in the development of the field of transitional justice. The Berkeley Human Rights Center, the methodological lead in the Uganda survey and many analogous efforts, bills its efforts as the pursuit of “justice through science and law”. These efforts have gained traction partly as a response to the criticism that truth commissions, reparation programs and war crimes prosecution initiatives (whether sponsored by international actors or national political elites) have often been unresponsive to victim priorities and needs. As discussed earlier with reference to the ICTY and ICTR, transitional justice institutions such as the South African truth commission, have sometimes been charged with advancing the interests of the state or the international community; it is argued that these institutions are subject to elite capture and soon develop their own bureaucratic interests and ambitions and are increasingly deaf to victims” voices while advancing initiatives in victims” name. Against this backdrop, those deploying survey instruments present their work as a way of pulling marginalized groups into the transitional justice conversation.

Institutions such as the Berkeley Human Rights Center developed methodologies that seek to survey, analyze and convey victims’ voices in a register that is accessible and persuasive to policy makers. In The Rights Toolkit: Applying Research Methods in the Service of Human Rights, a recent publication on survey methods, they argued that “Appropriate methods are central to sound and reliable human rights research.. pairing quantitative information on “what happened and the prevalence/intensity of the violations” and qualitative information on “the details of an individual’s human rights violations experience” provides “the best overall picture of mass human rights violations.” The survey instruments allow us to escape from the messy dialogical terrain of political conflict while authoritatively weighing-in on transitional justice debates; they translate that conflict into something that can be summoned, appraised and audited

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18 http://www.law.berkeley.edu/hrc.htm
19 see p. 2 of The Right Toolkit; Available @ http://www.law.berkeley.edu/files/HRC/Publications_The-Right-Toolkit_04-2012.pdf
– and, in doing so preemptively legitimates the received boundaries of those debates. 20 These surveys reflect and assert a methodological certainty in survey instruments and this then becomes the basis for an empowered political certainty to extend democratic legitimacy to particular initiatives - even if it is at the cost of politics itself. 21

In this context, the survey presents the debate over the ICC indictments and their potential threat to the peace process (or their displacing of local justice mechanisms) as having been unnecessarily politicized when a noble apolitical approach was what was most constructive: “The peace-versus-justice debate in Northern Uganda has become unnecessarily polarized over the controversy surrounding the ICC, and is often put into stark terms of false alternatives between peace and justice. Indeed, the way forward in Northern Uganda should be driven by a comprehensive strategy that integrates the strengths of all mechanisms—formal and traditional—aimed at bringing peace and justice to the region.” 22 In presenting victims as having priorities and preferences that can be targeted through a finite option set, transitional justice institutions present themselves as producing policies that respond to those preferences. Rather than citizens

20 A range of factors has fueled the widespread turn towards measurement practices in the transitional justice field – sometimes driven by UN departments, NGOS or even truth commissions and other transitional justice institutions seeking to map and categorize the universe of ‘victims’ in a context it is investigating in the name of more effectively targeted redress or more efficient project management. This turn has also been directly encouraged by donor interest in quantifiable and generalizable metrics for evaluating projects. For this same reason, human rights advocates such as the Berkely center have developed indicators, survey instruments and other measurement tools to support arguments about victim priorities, the scale of particular human rights violations, the imperative for action etc. – moving, as some scholars see it from “faith based to fact based discussions of transitional justice”. This broader trend within human rights is reflective of how this field too has incorporated the disciplinary modalities of modern policy science and its' marshalling of information that constitutes the subjects it then governs. The deployment of measurement technologies in the human rights field can be situated in this larger dynamic of state structures mapping, surveying and administering populations - in their own interest.” For a more extended discussion of the issues flagged here with specific attention to truth commissions, see. Nesiah,” Icons and Indices” in Ashleigh Barnes and Priya Gupta, eds., Feminisms of Discontent: Global Perspectives, OUP Delhi (Forthcoming 2013?).

21 On the methodological point, it is worth noting that the 73 page report has only one page listing survey limitations; the limitations cited range from inadequate recall to the possibility that respondents provided answers that the interviewer may find favorable; yet the report urges that these issues were minimized by the structure of the survey and the fact that the ongoing conflict ensure that events were still fresh in people’s memory. There was concern that victims may have thought interviewers were government officials but again the report notes that they addressed this problem by asking for signed consent forms that would have underscored that interviewers were in fact independent actors. In a follow-up fifty page survey report, the authors have only one short paragraph listing five survey limitations, including geographic scope, fluctuating political context, the inaccessibility of some of those who were to be interviewed, errors by some of those interviewed and potential discomfort that some of those interviewed may have had in discussing sensitive issues with strangers; the authors note that “this may have affected some of their answers.” These modest cautions themselves suggest a breathtaking confidence in the capacity of survey instruments to capture and convey victim voices.

22 p. 7 of Pham et. al. 2005.
with contested and potentially irreconcilable desires, interests and commitments, victims become stakeholders with preferences that feed into a technocratic decision making processes. Victim surveys can mediate and ameliorate conflict; in harnessing all potential interventions within the framework of options presented in the survey, the survey instruments can pacify and assimilate critique. Accordingly, the Forgotten Voices report concludes with the following recommendation to the ICC: “Implement an outreach strategy that fosters greater awareness among Ugandans of the court’s mandate and mode of operations. This effort should aim to disseminate more information about the Court and engage the public in dialogue. Such a strategy should also seek to manage the expectations of victims, many of whom believe the ICC can deliver more than it is able. As part of such a strategy, the Court should establish a presence in the North so that people will have regular access to ICC staff. Finally, the ICC should consider holding trials in situ to increase public access to its proceedings.”

The victim survey works to anchor the ICC to a discussion about local justice priorities. In performing this mediation of global governance and local ownership in ways that are formulated as matters of technical methodology (not politics!), it buttresses the ICC’s complementarity framework. Victims are rendered as potential consumers of policies formulated to advance their interests – interests represented by the survey. Crucially, the survey presents this work as a way of recasting political debate as matters of expert methodology - thus they may often say that rather than bickering between different elite players, we should just “ask the people”.

**Self-Referrals: Affirming Sovereignty**

In 2004 the Democratic Republic of the Congo (DRC) referred the situation in the DRC to the prosecutor. Later in 2004 the ICC formally opened an investigation and over the next several years it issued arrest warrants for six people in association with crimes in the territory of the DRC. In July 2007, the ICC issued a sealed warrant for the arrest of Germain Katanga; he was charged with three counts of crimes against humanity and six counts of war crimes, including murder, sexual slavery and the inhumane treatment of civilians in and around Bogoro in the Ituri

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24. They see surveys as being able to rise above conflict; If only we get the methodology right, access those who live in remote regions (even in the rainy seasons!), acclimatize researchers so that respondents don’t feel uncomfortable about discussing sensitive issues with strangers, and (especially if the political context does not fluctuate too much) we would have good input to rationally formulate good policy.
region of north-east DRC. Three months later the government handed Katanga over to the ICC and he was flown to the Hague for trial. The trial began in November 2009 and is ongoing.

Katanga, a former leader of the Patriot resistance Force (FRPI) and a former General in the DRC army, had been in government custody since March 2005 in connection with the killing of nine UN peacekeepers. He was in the Kinshasa Penitentiary and Reeducation Center (CPRK) for two years awaiting charges when the ICC indictments were issued. In February 2009 Katanga filed a motion that invoked Article 17’s complementarity doctrine and challenged ICC jurisdiction. Given that the DRC had already detained him, he argued that the ICC was violating the requirement that the ICC be in fact only a court of last resort, when the state concerned was both unwilling and unable to prosecute. Katanga argued that focus on the nature and scope of the relevant domestic proceedings was significant because even if he was not being investigated for the Bogoro events he was being investigated for other crimes of comparable gravity. Thus he argued that it was clear that the DRC was not unable to prosecute allegations related to the events in Bogoro.

The Katanga case was the first case before the ICC where there was an extended legal challenge on admissibility on the basis of the complementarity doctrine. However, following the argument of the prosecutor and the DRC itself, the trial chamber ruled in June 2009 that the case was admissible because the DRC was not investigating Katanga for crimes committed in Bogoro but for other crimes in Ituri. The court argued that since the DRC had made a self-referral to the ICC and contested Katanga’s inadmissibility charge, it had clearly conveyed that it was unwilling to prosecute Katanga for the Bogoro events. The DRC did want Katanga prosecuted but it wanted him prosecuted by the ICC. Thus the complementarity test’s requirement of an unwilling state was met and the case was admissible and the ICC proceedings could move forward.

Katanga appealed the trial court decision and argued that the trial chamber had mistakenly confused unwillingness and inability and that in fact a state could not voluntarily eschew its jurisdictional obligations to prosecute by deferring to the international criminal court. Thus he

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His codefendant for much of the ICC trial, Mathieu Ngudjolo Chui, was acquitted earlier this month.
argued that the trial chamber should have found the case inadmissible; any other decision would defeat the spirit of complementarity.

In turn the prosecutor responded that if the trial court had made such a finding that it would be interfering with the DRC’s sovereignty – i.e. that it cannot force the DRC to prosecute Katanga for the Bogoro events. The prosecutor referenced Article 17 (1)(a) to argue that the plain meaning of that provision was that the only relevant factor for the admissibility test was if the state was taking action; the argument of the court was in effect that it was not necessary for the court to investigate the state’s mens rea on this. The court is indifferent to a state’s motives if it is not prosecuting and just the fact of non-prosecution can trigger admissibility; however, the court is interested in the state’s motives if the state is in fact prosecuting because then admissibility depends on whether this is a good faith and feasible prosecution effort in relation to the specific case in question. The appeal chamber affirmed this argument and held that the Katanga case was indeed admissible and underscored the prosecutor’s argument that the key factor in determining admissibility with attention to complementarity was the activity, or inactivity, of the State.

What is significant in this episode is not the technical disputes regarding the interpretation of complementarity but rather the ways the exercise of ICC jurisdiction itself becomes evidence of a commitment to sovereignty. An expert study commissioned by the ICC argues that, “Voluntary acceptance of ICC admissibility does not necessarily presuppose or entail a loss of national credibility nor a lack of commitment to the fight against impunity.” Rather, it becomes evidence of a state’s maturity that it is “is prepared to expressly acknowledge that it is not carrying out an investigation or prosecution.” In a sense, the ICC expert paper argues that while the state’s mens rea may not be relevant for the legitimacy of the ICC’s actions, it is relevant in determining that the state is in compliance with its ICC obligations. Moreover, “In the types of situations described here, to decline to exercise jurisdiction in favor of prosecution before the ICC is a step taken to enhance the delivery of effective justice, and is thus consistent

26 Incidentally, in the Saif Gaddafi and Al-Senussi cases, the Libyan government has argued that complementarity does not require that national courts have an exemplary due process record.
27 P. 19 of Xabier Agirre et. al. (2009), The principle of complementarity in practice, the ICC Informal Expert Paper; http://www.icc-cpi.int/iccdocs/doc/doc654724.PDF.
28 P. 19 of Xabier Agirre et. al. (2009),
with both the letter and the spirit of the Rome Statute and other international obligations with respect to core crimes. This is distinguishable from a failure to prosecute out of apathy or a desire to protect perpetrators, which may properly be criticized as inconsistent with the fight against impunity.”  

Thus the state can comply with its ICC obligations to ensure that certain crimes are prosecuted by choosing to not prosecute. In other words, by an ‘uncontested’ ceding of criminal jurisdiction to the ICC: “The duty to “exercise criminal jurisdiction” should be read in a manner consistent with the customary obligation aut dedere aut judicare, and is therefore satisfied by extradition and surrender, since those are criminal proceedings that result in prosecution.”  

In the model of complementarity represented by the Katanga decision and the ICC expert paper, ICC jurisdiction and national jurisdiction are not in tension. This model of uncontested admissibility ensures that there is always local ownership.

The DRC’s ‘self-referral’ (or what is sometimes referred to as ‘voluntary’ referrals) was itself courted and encouraged by the ICC. The prosecutor, keen to plunge the ICC into its first case, had invested considerable energy soliciting this request and making the argument that Article 14 of the Rome Statute was designed precisely for such a deferral of jurisdiction by state parties to the ICC. Indeed the first three situations in the ICC Docket – Uganda, the DRC and the Central African Republic (CAR) – all entered The Hague through self-referrals by their governments. Rather than ‘solicit’ these self-referrals, the prosecutor could have supported local criminal justice processes in the name of “positive complimentarity” or he could have initiated investigations himself and applied to the pre-trial chamber for permission to launch an investigation. However, he and many others supporters of the ICC, were keen that the first situation that the ICC investigates be one where the state requests the ICC – a case, in other words, that represents local ownership of the ICC.

Significantly, in all these cases, the government’s referral and the ICC’s hospitality towards

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29 P. 19 of Xabier Agirre et. al. (2009),  
30 P. 19 of Xabier Agirre et. al. (2009).  
these requests were not uncontroversial with local human rights groups concerned that these de-facto ICC-government partnerships were whitewashing government records and running interference with other local priorities. In Uganda, as we have already noted, there was concern that ICC action would damage the peace process and further empower Museveni. In the DRC there was similar concern that it was the Kabila government that was empowered by prosecutions targeting his opponents and indeed that it was the international actors implicated in the resource wars who benefited from a de facto narrowing of the lens (via the Lubunga and Katanga cases) to conflicts between the Hema and the Lendu communities; the focus on individual criminal prosecution would distract from action that needed to be taken to address the resource wars and the long term structural issues responsible for the acute poverty in the Ituri region and the DRC more generally. However, the ICC indictments can assure the human rights community that it is doing something about the situation in the DRC even while accountability efforts are being directed at the world of Lubunga and Katanga not the resource wars. Most significantly this can take place through the very discourse of complementarity, in the name of upholding national sovereignty. In fact, questions of sovereignty just become translated into questions of managerial efficiency – the ICC expert paper invokes the language of “burden sharing” and a “division of labor” – where ICC jurisdiction is so complementary to national jurisdiction that it can benignly displace it.

33 Adam Branch who sees a real disjuncture between local priorities on the one hand, and ICC hospitality to government self-referrals on the other, notes, that this hospitality was itself shaped by the ICC’s own insecurities regarding its role – insecurities that led it “casting about for a case to prove its relevance and utility “ Adam Branch (2004), “International justice, Local Injustice”, Dissent.
34 The conflict of the DRC have a material basis in the struggle over resources, in particular minerals such as cassiterite and coltan and the multinational companies that mine these minerals for use in the computers, cell phones and DVD players that we all use. With a death toll that matches the holocaust (some six million deaths over the last dozen years) there are a lot of lives and a lot of dollars at stake.
35 As many have reported, many in the Ituri region were harshly critical of the child soldier charges against Lubunga – partly because Lubunga was not being charged with crimes that were more serious, and partly because many were less critical of his actions viz a viz child soldiers. Indeed many parents had voluntarily given up children as a measure of political solidarity; they had a more complex view of child soldiers, knowing the significance they had had in the ouster of Mobutu. See p. 127-8 of HRW 2008.
36 Timothy Mitchell notes that the “The term ‘democracy’ can have two kinds of meaning. It can refer to ways of making effective claims for a more just and egalitarian common world. Or it can refer to a mode of governing populations that employs popular consent as a means of limiting claims for greater equality and justice by dividing up the common world. Such limits are formed by acknowledging certain areas as matters of public concern subject to popular decision while establishing other fields to be administered under alternative methods of control.” Here, the arena of criminal jurisdiction functions as that other field. Timothy Mitchell (2011). Carbon Democracy: Political Power in the Age of Oil., Verso.
In lieu of a conclusion…

In the spring of 2011, the ICC flew into Libya on the wings of the NATO bombers, inextricably latching itself to military interventions on the one hand, and lending legitimacy to NATO actions on the other. However, the two cases that I discuss here provide different windows into the reach of global governance; they suggest that a top-down or vertical account of imperial power relations does not fully capture the dynamic of how local ownership of the ICC is enacted. The horizontalized habitus of what Kamari Clark has called “tribunalized violence” involves normalizing the legal order represented by ICC justice and the sedimenting of global subjectivities that are framed through the human rights apparatus. The transitional justice field and institutions such as the ICC have been shaped by diverse interests and circumstances; however, the field has cohered into a distinctive project that ends up being compatible with, and even complementary to, the dominant structures and dynamics of global governance. Yet it functions through the performative enactment of local ownership, sovereign rights, civil society participation, and victim consultation. Global governance emerges as not merely a repressive power manifested through the wielding of imperial authority but a productive power whose reach can be appreciated by how the discourse of local ownership doubles back on itself. Local ownership and sovereignty can operate, through mimicry and alterity, to conform to the structures of global governance. In this sense local communities are both author and subject of their own constitution in the legal and normative architecture represented by the International Criminal Court.

37 The Security Council’s March 2011 authorization of military intervention accompanied its referral of the Libyan situation to the ICC just a few weeks earlier. The ICC responded promptly, launched preliminary investigations soon issued indictments against Muammar Gaddafi, Seif Gaddafi and Abdulla Senussi. NATO’s aeriel bombing campaign, even at the expense of extensive civilian casualties, were driven by its two fold goals of regime change and securing of oil field “In this context, the ICC indictments were beneficial to the Security Council and NATO to the extent that they framed the role of the international community as advancing victim interests and narrowed the accountability questions to the responsibilities of the Gaddafi regime. It was not beneficial to Libyan civilian casualties of NATO and it was not beneficial to those interested in a deeper and broader accountability conversation in Libya.” Nesiah (2012), Libya, Impunity and the International Criminal Court, Jadaliyya, 28 June, 2012; http://www.jadaliyya.com/pages/index/6227/libya-impunity-and-the-international-criminal-cour

38 This alliance between transitional justice and global governance is not without consequence. These consequences include displacing distributive justice questions and the prioritization of political closure over political accountability. Moreover, as transitional justice has come to dominate the conceptual and institutional apparatus of human rights field, initiatives to harness human rights to support struggles for more radical socio-political transformation or even basic economic rights are increasingly disempowered. Indeed, to the tighter alliance with institutions such as the Security Council has brought a narrowing of policy agendas, institutional forms, and political vocabularies in ways that have rendered ICC dynamics even more hostile to dissenting and subaltern efforts.