
A Different Kind of Court: Africa's Support for the International Criminal Court, 1993–2003

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Abstract

This article seeks to understand the contemporary crisis in Africa's relationship with the International Criminal Court (ICC) by going back to the Court's founding moment. It investigates African states' participation in the creation of the ICC, asking: Which kind of international criminal court did African countries seek to establish when negotiating the Rome Statute? To understand their vision for the ICC, the article provides an interpretive and systematic analysis of statements by African diplomats on the establishment of the ICC as delivered to the UN General Assembly between 1993 and 2003. Identifying and analysing the most salient themes found in these statements, the article argues that African diplomats sought to establish a court that differed in important respects from the existing ICC. The African diplomatic vision of the ICC centred on particular understandings of universality, participation, complementarity, court independence and sovereign equality. Importantly, the creation of the ICC was never solely about justice; it was also about sovereign inequality and global order. The alternative diplomatic vision for the ICC makes sense of the contemporary critique of the ICC by the African Union and many African countries. This makes the contemporary crisis both intelligible and deep-seated.

Africa's relationship with the International Criminal Court (ICC) has seemingly nose-dived. Since 2009, African state parties have made a number of decisions that have damaged the ICC's project of international justice: deciding to prohibit cooperation

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with the ICC in its cases against Sudanese President Omar al-Bashir and Libyan President Muammar Gaddafi, hosting wanted individuals, threatening to leave the ICC en masse and even voting indicted individuals into the highest office.¹ In 2016, governments in Burundi, South Africa and Gambia announced their decision to withdraw from the Rome Statute, with Burundi's decision taking effect in October 2017.² Although the Court has 33 African states parties, the legitimacy of the ICC has been fundamentally challenged by African states and their regional organization, the African Union (AU).

Scholars and practitioners have proposed different explanations for the current crisis, such as state elites fighting the Court because they want to avoid criminal accountability; governments objecting to the ICC prosecutor's Africa bias or the AU seeking to assert its authority *vis-à-vis* a United Nations (UN) Security Council that ignores its deferral requests.³ To the ICC's first prosecutor, the recent withdrawal announcements even aim to give elites free hand to attack civilians.⁴ These explanations have different and contrasting implications for our understanding of Africa's relationship with the ICC. The focus on impunity suggests that governments are at odds with the fundamental premise of the ICC, an interpretation that begs the question of why they were so keen to ratify the Rome Statute.⁵ In contrast, if the crisis derives from objections to a perceived prosecutorial bias, it may signify a call for a truly impartial Rome system. In this sense, states may be questioning the current practice, rather than the mandate and idea, of the ICC. If Africa's strained relationship with the ICC is instead about the AU and the UN Security Council, it should be understood within a broader context of global order.

To gain a deeper understanding of the relationship between Africa and the ICC, this article goes back to the founding moment of the ICC and asks: which kind of international criminal court did African countries seek to establish when negotiating the Rome Statute? To answer this question, it analyses African states' deliberation in the UN General Assembly about the Court's establishment. It provides the first systematic study of statements by African countries in the negotiations to establish the ICC,

¹ Ssenyonjo, 'The Rise of the African Union Opposition to the International Criminal Court's Investigations and Prosecutions of African Leaders', 13 *International Criminal Law Review (ICLR)* (2013) 385; Vilmer, 'The African Union and the International Criminal Court: Counteracting the Crisis', 92 *International Affairs* (2016) 1319.

² 'Gambia Is Latest African Nation to Quit International Criminal Court', *The Guardian* (26 October 2016), available at www.theguardian.com/world/2016/oct/26/gambia-becomes-latest-african-nation-to-quit-international-criminal-court.

³ Mills, "'Bashir Is Dividing Us": Africa and the International Criminal Court', 34 *Human Rights Quarterly* (2012) 404; Reinold, 'Constitutionalization? Whose Constitutionalization? Africa's Ambivalent Engagement with the International Criminal Court', 10 *International Journal of Constitutional Law* (2012) 1076; Schabas, 'The Banality of International Justice', 11 *Journal of International Criminal Justice* (2013) 545; Scheffer, 'How to Move beyond South Africa's Notice of Withdrawal from the ICC', *Justice Security* (24 October 2016), available at www.justsecurity.org/33778/move-south-africas-notice-withdrawal-icc/; Vilmer, *supra* note 1.

⁴ Moreno-Ocampo, quoted in 'Gambia Is Latest African Nation', *supra* note 2.

⁵ Rome Statute of the International Criminal Court 1998, 2187 UNTS 90.

identifying and interpreting the most salient African diplomatic concerns about the ICC: universality and participation; complementarity; independence and sovereign equality. From these concerns, it derives the African diplomats' vision of the ICC and relates it to the contemporary African critique of the Court. The article argues that African states sought to establish a global court that differed in important respects from the existing ICC. This makes the ICC's current crisis in Africa both intelligible and deep-seated.

The article is structured in the following way. It first situates the study in the context of scholarship on Africa's relationship with the ICC and summarizes the contemporary African critique of the ICC. It then follows with an introduction of the data and the methods of data collection and analysis, after which the article briefly discusses the international negotiations to create the ICC in the 1990s and early 2000s. The rest of the article presents the research findings by analysing the most salient African state concerns, from universality to sovereign equality. The article formulates the African diplomatic ICC vision and uses these ideas to understand Africa's contemporary critique of the ICC.

1 Africa and the ICC: Towards Nadir?

Most analyses about Africa's relationship with the ICC centre on rupture: African states were initially very supportive of the ICC but then became critical of it. Scholars highlight how African countries 'seemed infected with enthusiasm' for the Court, which was an unexpected development given the nature and frequency of conflict in Africa.⁶ Signifying 'the continent's deep commitment', Senegal was the first country in the world to ratify the Rome Statute, while most African states parties ratified it before 2005.⁷ Moreover, the ICC's first three investigations took place on the basis of an invitation – the Democratic Republic of Congo (DRC), Uganda and the Central African Republic.

A decade after the Rome conference, the relationship between Africa and the ICC 'turned sour'.⁸ As a result, the AU Assembly and Secretariat as well as several countries have taken a number of hostile political decisions directed at the ICC project. The crisis was triggered by the prosecutor's July 2008 indictment of al-Bashir for genocide, war crimes and crimes against humanity and deepened following the cases against members of the Kenyan and Libyan political establishments.⁹ While the Sudanese and Libyan situations were referred to the ICC by the UN Security Council, the investigation

⁶ Schabas, *supra* note 3, at 548; see also Jalloh, 'Regionalizing International Criminal Law?', 9 *ICLR* (2009) 445; M. du Plessis, *The International Criminal Court That Africa Wants* (2010).

⁷ D. Akande, M. du Plessis and C. Jalloh, *An African Expert Study on the African Union Concerns about Article 16 of the Rome Statute of the ICC* (2010), at 7.

⁸ Reinold, *supra* note 3, at 1088.

⁹ Prosecutor's Application for a Warrant of Arrest against Omar Hassan Al Bashir, *Al Bashir* (ICC-02/05-01/09-3), Pre-Trial Chamber I, 4 March 2009; for scholarship on the crisis, see Mills, *supra* note 3; Murithi, 'Between Reactive and Proactive Interventionism: The African Union's Peace and Security Council Engagement in the Horn of Africa', 12 *African Journal of Conflict Resolution* (2012) 87.

of the Kenyan situation was initiated by the prosecutor.¹⁰ In these cases, therefore, ICC involvement was involuntary. The African critique can be summarized under four general points.¹¹

- i. Selective prosecution – so far, the ICC has only prosecuted African individuals. Until January 2016, when it launched an investigation in South Ossetia, Georgia, the ICC had only investigated African situations. Yet atrocities are also committed outside Africa. Given the prosecutor’s discretionary power, African states increasingly perceive the ICC’s pursuit of justice as being at best biased and at worst a ‘race hunt’.¹² They voice ‘suspicion’ about the ICC’s ‘prosecutorial justice’ and a ‘perception of a double standard against African States’.¹³ Claims of Court bias are among the ‘most popular arguments’ in Africa.¹⁴
- ii. Interference with political stabilization efforts – the ICC prosecutions of Sudanese, Libyan and Kenyan actors complicate or undermine processes aimed at finding a negotiated solution or reconciling a divided society.¹⁵ An AU ministerial meeting therefore recommended a revision of the ICC prosecutor’s policies to the effect that she must include ‘factors promoting peace’ in her considerations of whether to open a case.¹⁶
- iii. UN Security Council abuse – several requests to the UN Security Council for a renewable 12-month deferral of prosecution have been ignored or inadequately considered. The request to defer proceedings against al-Bashir was supported by two-thirds of the international community but opposed by a few Western states.¹⁷ At the same time, by referring situations in two non-state parties, the Security Council acted with double standards. African ICC members therefore proposed to amend the Rome Statute to the effect that the Security Council’s deferral powers should fall to the UN General Assembly in situations where it fails to decide on the request by the state concerned within six months.¹⁸

¹⁰ SC Res. 1593, 31 March 2005; SC Res. 1970, 26 February 2011; Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, *Situation in the Republic of Kenya* (ICC-01/09), Pre-Trial Chamber II, 31 March 2010.

¹¹ M. du Plessis, T. Maluwa and A. O’Reilly, *Africa and the International Criminal Court* (2013); du Plessis, *supra* note 6; Reinold, *supra* note 3; Schabas *supra* note 3.

¹² H. Desalegn, quoted in ‘African Union Accuses ICC of “Hunting” Africans’, *British Broadcasting Corporation*, 27 May 2013; Dugard, ‘Palestine and the International Criminal Court: Institutional Failure or Bias?’, 11 *Journal of International Criminal Justice* (2013) 563.

¹³ AU Assembly, Withdrawal Strategy Document, version 2, 12 January 2017, paras 2, 3, available at www.hrw.org/sites/default/files/supporting_resources/icc_withdrawal_strategy_jan._2017.pdf.

¹⁴ Vilmer, *supra* note 1, at 1338.

¹⁵ Decision on the Implementation of the Assembly Decisions on the International Criminal Court, 30 June–1 July 2011, Doc. Assembly/AU/Dec.366(XVII).

¹⁶ Report of the Second Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC), Min/ICC/Legal/Rpt. (II), 6 November 2009, para. 13.

¹⁷ Akande, Plessis and Jalloh, *supra* note 7, at 10.

¹⁸ Report of the Second Ministerial Meeting, *supra* note 16, para. 13.

- iv. Violation of customary head of state immunity – as has been stated by Max du Plessis, Tiyanjana Maluwa, and Annie O'Reilly, '[t]he question of immunities is central to the AU'.¹⁹ By referring and prosecuting heads of non-state parties, the Security Council and the ICC have violated customary international law on the immunity of senior state officials. At the same time, the Rome Statute appears to be internally inconsistent with regard to the immunity status of these officials in non-states parties. The AU Assembly therefore plans to seek an advisory opinion on this issue from the International Court of Justice (ICJ).²⁰

To reform the Rome system and change current practice, the AU Assembly established the Open-Ended Committee of Ministers of Foreign Affairs on the International Criminal Court in June 2015. With a mixed membership of 15 state parties²¹ and 13 non-state parties (including Libya and Sudan), the Open-Ended Committee drafted a strategy paper in early 2017 that outlines legal, institutional and political initiatives to reform the ICC, the Security Council and the Rome Statute or collectively withdraw from the latter.²²

The ICC's African crisis is not limited to relations with the regional organization. Since 2009, al-Bashir has officially visited ICC states parties such as the DRC, Djibouti, Chad, Kenya, Malawi, Nigeria, South Africa and Uganda, although members of the Court are obliged to arrest wanted persons. In 2016, the governments of Burundi, South Africa and Gambia announced their decision to withdraw from the Rome Statute, while Kenya hinted that it may be the next country to exit from the statute.²³ In 2017, Burundi became the first country to leave the ICC. While Botswana consistently defends the Court, most African states parties support AU and state policies that potentially undermine it. For instance, only Botswana, Cote d'Ivoire, Malawi, Nigeria, Senegal, Sierra Leone and Zambia have criticized the withdrawal notifications.

This article seeks to make sense of Africa's seemingly ambiguous ICC project by exploring the initial African diplomatic vision for the Court and revisiting the continent's current critique in light of this vision. It shows that the contemporary crisis does not result from changing attitudes or policy priorities by African governments. Rather, it reflects a dissonance between the ICC's practices and the court that African states sought to create or thought they were creating. The initial support for establishing the ICC stemmed from the vision of a court legitimized by universality, participation, independence, deference to national courts and respect for sovereignty and sovereign equality. As we shall see, these values inform the contemporary critique.

¹⁹ Plessis, Maluwa and Reilly, *supra* note 11, at 5.

²⁰ AU Assembly, Decision on the Progress Report of the Commission on the Implementation of the Assembly Decisions on the International Criminal Court, Doc. Assembly/AU/Dec.397(XVIII), 29–30 January 2012.

²¹ Burundi, Chad, Congo, Cote d'Ivoire, Djibouti, Kenya, Madagascar, Mali, Namibia, Nigeria, Senegal, South Africa, Tanzania, Uganda and Zambia.

²² AU Assembly, *supra* note 13, para. 4.

²³ 'President Uhuru Kenyatta's Speech during 53rd Jamhuri Day Celebrations', *The Star* (12 December 2016).

2 Data and Method of Analysis

African deliberation on an ICC took place in the UN General Assembly's Sixth Committee and in four designated negotiation forums organized by the UN Secretariat: the 1995 Ad Hoc Committee to Establish an ICC, the 1996–1998 Preparatory Committee to Establish an ICC, the 1998 Rome Conference and the post-Rome Conference Preparatory Commission. The negotiations in the designated forums were not recorded as minutes and, therefore, do not lend themselves to country-specific analysis.²⁴ Emic accounts of the negotiations were written mainly by Western lawyers without a specific focus on African, Asian or Middle Eastern concerns.²⁵ The Ad Hoc and Preparatory Committees and the Preparatory Commission reported to the Sixth Committee, which does provide summary minutes that enable research on contributions by specific actors.²⁶ Between 1994 and 2003, the Sixth Committee discussed the creation of the ICC under a specific agenda item entitled The Establishment of the International Criminal Court.²⁷

The analysis focuses on African statements on the establishment of the ICC between 1993 and 2003. In 1993, the International Law Commission (ILC) shared its preliminary draft statute with governments, while the ICC became operational during the 2003 session. The 2003 cut-off date ensures that the empirical material relates to the ICC as an aspirational project. During the period of analysis, therefore, the ICC was a political project without institutional interests of its own; it was subject to different state and organizational interests and ideas but did not have agency. The data for the analysis are all the statements made by African states in the Sixth Committee between 1993 and 2003 in relation to the ICC agenda item, as documented in the summary records. The material contains a total of 148 statements by 34 sub-Saharan and North African countries. These data were triangulated with emic accounts and written comments by individual African states submitted to the ILC and the Ad Hoc Committee.

²⁴ Some discussions in the Committee of the Whole at the 1998 Rome Conference were transcribed into minutes, but the negotiations in the 10 working groups were not.

²⁵ Hall, 'The First Two Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court', 91 *American Journal of International Law (AJIL)* (1997) 177; Hall, 'The Third and Fourth Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court', 92 *AJIL* (1998) 124; Friman, 'The International Criminal Court: Negotiations and Key Issues', 8 *African Security Review (ASR)* (1999) 3; Crawford, 'The ILC Adopts a Statute for an International Criminal Court', 89 *AJIL* (1995) 404; Washburn, 'The Negotiation of the Rome Statute for International Criminal Court and International Lawmaking in the 21st Century', 1999 *Pace International Law Review* (1999) 361; but see Maqungo, 'The Establishment of the International Criminal Court: SADC's Participation in the Negotiations', 9 *ASR* (2000) 42.

²⁶ Other scholars, notably Deitelhoff, also rely on these minutes to understand the negotiations prior to the Rome Conference. Deitelhoff, 'The Discursive Process of Legalization: Charting Islands of Persuasion in the ICC Case', 63 *International Organization (IO)* (2009) 48.

²⁷ In 2003, the item appeared as 'The International Criminal Court'.

The data were analysed using *NVivo11*, a computer program for the systematic coding of large amounts of qualitative data. The research adopted an axial coding strategy with three levels of analysis. First, an open, inductive coding of all of the data identified entities, issues, values and concepts, such as 'Security Council' and 'court independence'. Second, the codes were organized into meaningful hierarchies, typically generating new codes at a higher level of abstraction. This coding was informed by knowledge about African international relations and Rome Statute negotiations. For instance, references to 'national courts' were linked to 'complementarity'. Lastly, the analysis identified the convergence, variation and frequency of references. The coding results are available online.²⁸

The analysis generated qualitative and quantitative data on the content, number and frequency of codes. The relative number of references was understood to indicate an issue's salience. Frequency indicated the level of concern. An issue discussed by many states was interpreted as being of concern to African states. The chosen approach assumes that states address matters of their concern. It enables a view of internationally articulated African contributions to the ICC's founding moment. However, given its reliance on summary records and qualitative coding, the approach does not capture taboos and is blind to insincere statements.²⁹ To compensate for these shortcomings, the secondary and tertiary coding was informed by emic accounts and scholarship in African studies. This article is the first to focus systematically on statements by African countries in the negotiations to establish the ICC. Nicole Deitelhoff, who has coded statements between 1994 and 1998, focuses on the positions of the 'like-minded' negotiation group, which at its peak had 14 African members, and the 'P5' alliance of permanent UN Security Council members.³⁰ She does not present the positions of individual countries or regional communities. Other scholars infer African positions from subsequent ratification patterns of the Rome Statute.³¹

The idea of formulating an African diplomatic ICC vision is controversial because it may be seen to homogenize a diverse continent. Naturally, Africa is not a monolith. There are nevertheless two reasons why it is an analytically useful approach to understanding African state support, as long as the vision refers not to an entire continent but, rather, to a community of practice. First, the community of African diplomats identifies itself as African. Its members organize in the African group at the UN, submit collective statements on particular issues and use their regional organization, the AU, to discuss developments at the UN and, indeed, the ICC. The present study takes this practice seriously, while highlighting the differences among African positions. Second, regional claims can enrich international fields. Since '[African] politics

²⁸ <https://academic.oup.com/ejil/article-lookup/doi/10.1093/ejil/chy040#supplementary-data>.

²⁹ Binder and Heupel, 'The Legitimacy of the UN Security Council: Evidence from Recent General Assembly Debates', 59 *International Studies Quarterly (ISQ)* (2015) 242.

³⁰ Deitelhoff, *supra* note 26.

³¹ Goodliffe *et al.*, 'Dependence Networks and the International Criminal Court', 56 *ISQ* (2012); Powell, 'Two Courts Two Roads: Domestic Rule of Law and Legitimacy of International Courts', 9 *Foreign Policy Analysis* (2013) 349.

is simultaneously global politics’, regional perspectives can illuminate broader global concerns, such as the nature of international justice.³² Importantly, the article does not assume that ordinary people share the diplomatic vision for the ICC or agree with their governments’ contemporary criticism of the ICC.

3 Negotiations on the Establishment of an ICC

States began to informally negotiate the establishment of an ICC in 1993, when the ILC submitted a preliminary draft statute to the UN General Assembly. This draft was modified in 1994, and the changes were intended to meet ‘the political concerns of some of the world’s major powers’.³³ Between 1994 and 2002 when the Rome Statute entered into force, negotiations on the substance and form of the ICC took place in the four dedicated forums outlined above. The Ad Hoc Committee met twice at the UN in New York; the Preparatory Committee met six times, also in New York; the Rome Conference culminated in the adoption of the Rome Statute and the Preparatory Commission dealt with outstanding matters. Additional inter-sessional drafting meetings took place in Italy and the Netherlands.

The Ad Hoc and Preparatory Committees discussed issues and working papers and drafted text rather than performing an article-by-article review of the ILC draft.³⁴ As such, negotiations centred on states’ views on various important aspects of the prospective court. Each negotiation session reported to the UN General Assembly through the Sixth Committee, the members of which were typically legal advisers from government missions to the UN. In the Sixth Committee, states could ‘refine and explain positions that they had taken in the preceding negotiations and give their views on the direction of the next round of negotiations’.³⁵ The dedicated negotiations thus related dynamically to the Sixth Committee.

A African Participation in the Negotiations

African states had discussed the possibility of creating a regional criminal court in the 1970s during the process of codifying the African Charter on Human and Peoples’ Rights.³⁶ This earlier initiative aimed to be able to prosecute the crime of apartheid but was abandoned, pending the ‘international penal tribunal’ envisaged in the Apartheid Convention.³⁷ Twenty years later, African states were initially relatively inactive on the

³² Abrahamsen, ‘Africa and International Relations: Assembling Africa, Studying the World’, 116 *African Affairs* (2016) 125, at 131.

³³ M.C. Bassiouni, ed., *International Criminal Law*, vol. 3, *International Enforcement* (2008), at 123–124.

³⁴ F. Benedetti, K. Bonneau and J. Washburn, *Negotiating the International Criminal Court: New York to Rome* (2013), at 28.

³⁵ *Ibid.*, at 19.

³⁶ Abass, ‘Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges’, 24 *European Journal of International Law* (2013) 933, at 936–937. African Charter on Human and Peoples’ Rights 1981, 1520 UNTS 217.

³⁷ International Convention on the Suppression and Punishment of the Crimes of Apartheid 1973, 1015 UNTS 243, Art. 5.

issue of establishing an ICC. When the ILC circulated the draft Rome Statute in 1994, only Algeria submitted written comments.³⁸ Fanny Benedetti, Karine Bonneau and John Washburn mention six African states that took part in the first session of the Ad Hoc Committee.³⁹ The Preparatory Committee meetings in New York were marked by 'limited participation' by developing states.⁴⁰ The first three meetings were on average attended by 12 African governments.⁴¹ At the last meeting in April 1998, 'for the first time, African countries from all parts of the continent participated actively'.⁴² However, regional activity took place from 1997 onwards in Pretoria and Dakar.⁴³

Between 1993 and 2003, 34 out of 53 African states (that is, 64 per cent of the continent) addressed the issue of the establishment of the ICC in the Sixth Committee. The frequency of their interventions varied, with some countries addressing ICC establishment once, while others spoke of it almost every year.⁴⁴ Countries that have decided to remain non-state parties participated mainly prior to the Rome Conference; this suggests an objection to design decisions consolidated during the conference rather than to the ICC's implementation since 2003. Table 1 summarizes the African participation in the Sixth Committee discussions, including by subsequent non-state parties.

4 African Concerns

Like those of other groupings, African contributions to the ICC negotiations created normative possibilities. Some of these possibilities were codified in 1998, while others remained alternative. Together, they formed an African diplomatic vision for the ICC. The contributions touch upon a large number of issues but generally centre on four clusters of inter-linked themes: participation and universality; court independence and the UN Security Council; complementarity and sovereign equality. African states differed in their view of these themes, with differences cutting across regional and cultural boundaries. For instance, Senegal and Gabon held opposing views on whether to create formal links between the Security Council and the ICC. However, some viewpoints were shared by all African participants, such as the importance of the Court's independence from politics. Table 2 provides an overview of the most prevalent themes.

³⁸ Observations of Governments on the Report of the Working Group on a Draft Statute for an International Criminal Court, Doc. A/CN.4/458, A/CN.4/458/Add.1-8, 14 February 1994.

³⁹ Benedetti, Bonneau and Washburn, *supra* note 34, at 29-31.

⁴⁰ Hall, 'The First Two Sessions', *supra* note 25, at 186.

⁴¹ List of Delegations, Preparatory Committee on the Establishment of an International Criminal Court, Doc. A/AC.249/INF/1, 25 March-12 April 1996; List of Delegations, Preparatory Committee on the Establishment of an International Criminal Court, Doc. A/AC.249/INF/2, 12-30 August 1996; List of Delegations, Preparatory Committee on the Establishment of an International Criminal Court, Doc. A/AC.249/INF/3, 11-21 February 1997.

⁴² Hall, 'The Sixth Session of the UN Preparatory Committee on the Establishment of an International Criminal Court', 92 *AJIL* (1998) 548, at 556.

⁴³ Maqungo, *supra* note 25.

⁴⁴ Among the 34 participating countries, the median participation on the topic of ICC establishment is four UN sessions.

Table 1: African Participation in Sixth Committee Discussions on an ICC, 1993–2003

Year	UN session	Participant countries	Number of countries (non-state parties ^a)
1993	48	Algeria,* Cameroon,* Egypt,* Ethiopia,* Gabon, Guinea, Morocco,* Namibia, Niger, Nigeria, Senegal, Sierra Leone, Sudan,* Tunisia	14 (6)
1994	49	Algeria,* Botswana, Cameroon,* Egypt,* Ethiopia,* Gabon, Ghana, Guinea, Malawi, Mali, Morocco,* Nigeria, Senegal, Sudan,* Tunisia	15 (6)
1995	50	Algeria,* Egypt,* Gabon, Ghana, Lesotho, Mozambique,* Nigeria, Rwanda,* South Africa, Swaziland,* Tanzania, Uganda	12 (5)
1996	51	Algeria,* Angola,* Burkina Faso, Cameroon,* Côte d'Ivoire, Egypt,* Ethiopia,* Ghana, Kenya, Lesotho, Malawi, Mozambique,* Nigeria, South Africa, Sudan,* Swaziland,* Tanzania	17 (8)
1997	52	Algeria,* Côte d'Ivoire, Egypt,* Ethiopia,* Ghana, Lesotho, Malawi, Niger, Senegal, South Africa, Sudan,* Swaziland,* Tanzania, Uganda	14 (5)
1998	53	Burkina Faso, Cameroon,* Côte d'Ivoire, Djibouti, DRC, Egypt,* Ghana, Guinea, Kenya, Lesotho, Malawi, Nigeria, Senegal, Sierra Leone, South Africa, Sudan,* Tanzania, Uganda, Zimbabwe*	19 (4)
1999	54	Burkina Faso, Cameroon,* Egypt,* Ghana, Kenya, Lesotho, Madagascar, Mozambique,* Senegal, Sierra Leone, South Africa, Sudan,* Uganda	13 (4)
2000	55	Angola,* Botswana, Burkina Faso, DRC, Egypt,* Ghana, Guinea, Kenya, Lesotho, Libya,* Nigeria, Sierra Leone, South Africa, Sudan,* Uganda	15 (4)
2001	56	Libya,* Madagascar, Sierra Leone, South Africa.	4 (1)
2002	57	Burkina Faso, Gabon, Ghana, Malawi, Mozambique,* Nigeria, Sierra Leone, South Africa, Swaziland,* Tanzania, Uganda	11 (2)
2003	58	DRC, Gabon, Lesotho, Nigeria, Senegal, Sierra Leone, Tanzania, Uganda	8 (0)

Notes: Asterisk (*) indicates those countries that have never ratified the Rome Statute.

^a As of December 2017. Burundi is considered a state party because it was a state party until October 2017.

Table 2: Themes Addressed by African Countries in the Sixth Committee, 1993–2003

Theme		Number of references	Number of countries
Universality and participation	Universality	62	26
	Participation	77	23
	UN trust funds	31	17
	Geographical representation	19	13
Independence and the role of the UN Security Council	Court independence	63	24
	Opposition to Security Council role	27	10
	Qualified approval of Security Council role	18	10
Complementarity	Complementarity	61	20
Sovereign equality	Sovereign equality and international order	15	9
	Aggression (1993–1997)	37	17

A *Universality and Participation*

To African states parties, ‘universality’ means worldwide membership in the ICC. It signifies both the formal ratification of hard treaty law as well as the softer and less precise ‘acceptance’ of, ‘support’ for, ‘allegiance’ to, ‘consensus’ on and ‘wide use’ of the Court. It is a value on which African states have placed great importance, with 76 per cent highlighting it. Ghana, Sierra Leone, Malawi, Burkina Faso and Lesotho were most concerned about universality, measured by the frequency with which they raised this issue. Universality was semantically linked to participation and geographical representation, reflecting an appreciation of diversity among states. [Figure 1](#) maps African countries by their concern for universality and participation.

Universalizing the ICC meant making it the subject of the widest possible support in a numerical sense; what mattered was the number and geographical representation of states parties. Participation was thus an integral aspect of universality. Malawi summed up the view succinctly: ‘The principle of universality, crucial to the proper functioning of the court, could be achieved only with the participation of all the stakeholders at all levels of the process, including the important preparatory phase.’⁴⁵ Egypt similarly stated that ‘to ensure the universality of the court, as many countries as possible, particularly developing countries, must participate in the drafting of the statute’.⁴⁶ For Ghana, the absence of developing countries in the Preparatory Committee ‘would have an adverse effect on the universality of the negotiations’.⁴⁷ Universality was thus understood state-centrally; it meant the involvement by all

⁴⁵ Malawi, in Summary Record of the 27th Meeting, Doc. A/C.6/51/SR.27, 29 October 1996.

⁴⁶ Egypt, in Summary Record of the 28th Meeting, Doc. A/C.6/50/SR.28, 2 November 1995; see also Rwanda, in Summary Record of the 31st Meeting, Doc. A/C.6/50/SR.31, 6 November 1995.

⁴⁷ Ghana, in Summary Record of the 26th Meeting, Doc. A/C.6/51/SR.26, 29 October 1996.

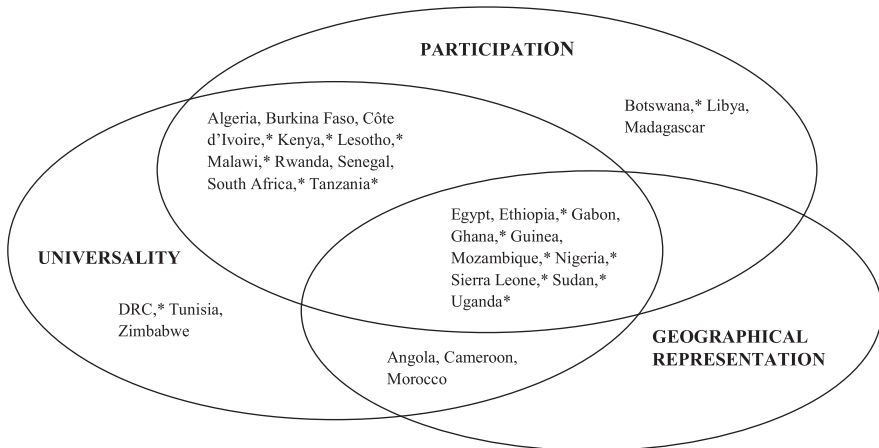


Figure 1: *Deliberation on Universality and Participation*

Note: Asterisk (*) indicates that these countries advocated for establishing and/or contributing to UN trust funds to finance the participation of developing countries. Namibia, which is not depicted, addressed the theme of trust funds but not the other themes.

states in creating and sustaining the ICC, not their internalized values. The notion of universalism for the African delegates reflected that of the UN; it was not a transnational ‘universalism of people’ but, rather, a contractual ‘universalism of nation-states’.⁴⁸ As Tanzania stated in 2002, ‘[t]he political will of States was essential to make the acceptance of the Court universal’.⁴⁹

Signifying the importance of Court universality, African states evaluated process-related or substantive proposals in the light of their impact on universalization. To enhance universality, therefore, Ethiopia, Guinea, Sierra Leone and Tunisia supported making the ICC a UN court,⁵⁰ Mozambique advocated Court association with the UN,⁵¹ Algeria opposed temporal constraints on the negotiations⁵² and Côte d’Ivoire and Ethiopia supported complementarity.⁵³ Later, Ghana highlighted that it had accepted worrying ‘compromise solutions’ during the Rome Conference so that the Court could enjoy the support of the largest possible number of states.⁵⁴

⁴⁸ Mazrui, ‘The United Nations and the Muslim World’, in Adekeye Adebajo (ed.), *From Global Apartheid to Global Village: Africa and the United Nations* (2009) 51, at 51.

⁴⁹ Tanzania, in Summary Record of the 15th Meeting, Doc. A/C.6/57/SR.15, 15 October 2002.

⁵⁰ Ethiopia, in Summary Record of the 21st Meeting, Doc. A/C.6/49/SR.21, 28 October 1994; Guinea, in Summary Record of the 17th Meeting, Doc. A/C.6/49/SR.17, 25 October 1994; Sierra Leone, in Summary Record of the 17th Meeting, Doc. A/C.6/48/SR.17, 25 October 1993; Tunisia, in Summary Record of the 28th Meeting, Doc. A/C.6/48/SR.28, 5 November 1993, and in Summary Record of the 20th Meeting, Doc. A/C.6/49/SR.20, 28 October 1994.

⁵¹ Mozambique, in Summary Record of the 29th Meeting, Doc. A/C.6/51/SR.29, 1 November 1996.

⁵² Algeria, in Summary Record of the 28th Meeting, Doc. A/C.6/51/SR.28, 31 October 1996.

⁵³ Ethiopia and Côte d’Ivoire, in Summary Record of the 29th Meeting, Doc. A/C.6/51/SR.29, 1 November 1996.

⁵⁴ Ghana, in Summary Record of the 11th Meeting, Doc. A/C.6/55/SR.11, 19 October 2000.

The limited participation by developing countries was noted by many African states. Arguing that the obstacle to participation was financial, they successfully advocated the establishment of trust funds to finance the participation of officials from the least developed countries. For Kenya, Lesotho, Malawi, Sierra Leone, South Africa and Uganda, contributions to the UN trust fund would have enhanced universality through participation. As Kenya explained:

Equally important to the success of the Preparatory Commission was the full participation of all its members in its deliberations. It was in the interest of the long-term legitimacy of the Court not only that Governments support the work of the Preparatory Commission but also that different legal systems be taken into account from the outset ... For that reason, it was important to facilitate the participation of developing countries.⁵⁵

Advocacy for financial support was successful insofar as the UN General Assembly established and extended the mandate of a trust fund to facilitate the participation of least developed countries in the negotiations.⁵⁶ In addition, countries called for technical and financial assistance to enable the ratification and domestication of the Rome Statute.

Geographical representation among court officials signified another aspect of universality. Although mentioned less frequently than participation, it was an issue raised by 13 African countries. They argued that to ensure universality, the court should have a balanced and diverse composition, including judges selected on the basis of geographical representation. Although it was left implicit, African states worried about a Western over-representation at the court; as Cameroon warned, 'certain regions' should not be 'overrepresented'.⁵⁷ In 2003, after the appointment of the Argentinian prosecutor, several states advocated for an African deputy prosecutor.

B Independence

Throughout the period under study, court independence was one of the values stressed most frequently; in fact, 70 per cent of African participants raised this issue. Algeria, Egypt, Ethiopia, Ghana, Lesotho, Libya and Sudan were most concerned with the independence of the ICC. African diplomats shared the view that independence was an important characteristic of the future Court, and they associated court independence with freedom or 'immunity' from domestic and/or international political influence and pressure. Sudan provided the historical backdrop to the emphasis on court independence, illustrating the way in which independence was understood in the context of international politics rather than due process and the rule of law:

[T]he experience of mankind in the endeavour to establish the League of Nations and subsequently the United Nations has shown that political considerations come into play in all circumstances and that facts are coloured in order to promote particular interests. The world's less powerful countries and those of lesser political, military and economic influence have thus become wary of the exploitation of global humanitarian principles and objectives to serve the purposes of some parties rather than others.

⁵⁵ Kenya, in Summary Record of the 10th Meeting, Doc. A/C.6/53/SR.10, 11 December 1998.

⁵⁶ GA Res. 51/207, 17 December 1996.

⁵⁷ Cameroon, in Summary Record of the 22nd Meeting, Doc. A/C.6/48/SR.22, 1 November 1993.

Other values mentioned in relation to court independence were impartiality, objectivity, neutrality, effectiveness, transparency and credibility, which were again primarily understood in the context of international relations rather than the rule of law.

States were particularly concerned with the role of the UN Security Council and the independence of the prosecutor and the judges. They advanced or supported various mechanisms for ensuring the latter, such as judicial review of the case selection, prosecutorial *proprio motu* authority, separation between the Office of the Prosecutor and the Court, long-term tenure for judges, geographical representation in the staffing as well as states-party election of the judges, prosecutor and registrar. Positions differed over the extent to which independence could be maintained if the court had formal links to the UN and the Security Council, but all states agreed that it was paramount to get this relationship right in order to ensure court independence.

1 *The Role of the UN Security Council*

On the question of what role, if any, the UN Security Council should have in relation to the ICC, African opinion was divided along the merits of linking the ICC to a supremely political organ. Table 3 provides a summary of their positions and illustrates that most states associated court independence with the role of the Security Council. The ILC drafts proposed to give the Security Council a right to submit cases to the court while also preventing ICC involvement in situations of Security Council action. The ILC felt that ‘in light of its primary responsibility for the maintenance of international peace and security,’ the Security Council should be authorized to invoke the ICC’s judicial mechanism in accordance with the UN Charter. The idea of giving the Security Council power to defer an investigation or prosecution entered the informal negotiations later.

Algeria, Cameroon, Gabon, Libya, Sudan and Tanzania were consistently opposed to the idea of giving any powers to the Security Council and advanced four interrelated reasons for their opposition: it threatened the Court’s independence; conflated the international separation of powers; dramatically expanded the Council’s role and undermined equality before the law. In terms of Court independence, states argued that it would be ‘difficult to reconcile’ the principles of independence and impartiality with ‘the fact that on some occasions, the Court would have to defer to the Security Council’.⁵⁸ Gabon’s representative was ‘astonished to see that the draft statute provided for the establishment of a tribunal whose operation would be dependent on the good will of states and whose freedom would be hampered by those same states and by the Security Council’.⁵⁹

Concerns about the international separation of powers stemmed from the view that the draft statute conflated legislative, executive and judicial roles by collapsing different kinds of international authority that ought to be separate. They opposed the suggestion that investigations of a crime of aggression were dependent on the prior

⁵⁸ Algeria, in Summary Record of the 13th Meeting, Doc. A/C.6/52/SR.13, 23 October 1997.

⁵⁹ Gabon, in Summary Record of the 19th Meeting, Doc. A/C.6/48/SR.19, 27 October 1993.

Table 3: Court Independence and the Role of the UN

	Role of the UN organs				No discussion of UN organs
	Opposition to Security Council role	Qualified approval of Security Council role	Role for the General Assembly		
Concern with court independence	Yes	Algeria	Côte d'Ivoire	Algeria	Angola
		Burkina Faso	Guinea	Ethiopia	Madagascar
		DRC	Lesotho	Guinea	Malawi
		Egypt	Nigeria	Morocco	Mozambique
		Gabon	Senegal	Nigeria	Rwanda
		Libya	Sierra Leone	Sierra Leone	Swaziland
		Sudan			
	Scepticism		Approval but without the veto powers of the Permanent Security Council members		
	Ethiopia		Cameroon		
	Morocco		Approval but against Security Council deferral powers		
		Ghana			
		Uganda			
No	Tanzania	Niger	Niger		

determination by the Security Council that an act of aggression had taken place. This suggestion gave the Council de facto authority to decide the Court's subject matter jurisdiction, creating in the former 'an immense centre of international power' authorized to both legislate and prosecute.⁶⁰ In the eyes of Algeria, such a provision would 'confer judicial powers on a highly political organ'.⁶¹

The idea that the Security Council should be able to refer a situation to the ICC was seen by these states as a problematic expansion of the Council's powers, which de facto rewrote the constitution of international society, the UN Charter.⁶² These powers, moreover, would consolidate sovereign inequality, as discussed below. To protect

⁶⁰ Gabon, in Summary Record of the 19th Meeting, Doc. A/C.6/48/SR.19, 27 October 1993.

⁶¹ Algeria, in Summary Record of the 27th Meeting, Doc. A/C.6/49/SR.27, 4 November 1994.

⁶² Algeria, in Summary Record of the 20th Meeting, Doc. A/C.6/49/SR.20, 28 October 1994.

the Court from ‘political influence’ by the Security Council, or from the ‘direct or indirect influence’ of any UN organ, therefore, this group of countries advocated a total independence from the Council.⁶³ This position reflected that of the Non-Aligned Movement.⁶⁴ After the 1998 Rome Conference, where the Security Council was given referral and deferral powers, they continued to oppose the formal links between the Security Council and the ICC.

Not all states were opposed to Security Council involvement. These states shared the concern with court independence but accepted to let the Council play a role. For instance, Senegal argued that ‘it was inconceivable that the two bodies should function without reference to one another’ since they addressed the same problem of violence and conflict.⁶⁵ Some states agreed to give the Security Council referral powers but opposed granting deferral powers.⁶⁶ Others only conceived of Council referrals in relation to the crime of aggression.⁶⁷ Seven states wanted the UN General Assembly to be at par with the Security Council, arguing that it would be ‘appropriate’ for the General Assembly to have referral powers ‘in view of the representative nature of that organ’.⁶⁸ Niger proposed that referral powers fell to the General Assembly if the Security Council was blocked by a veto, and Cameroon suggested that the Security Council’s ‘permanent members should be prohibited from using the veto ... so as to prevent any selective referrals’.⁶⁹ After the Rome Conference, when many African states signed the Rome Statute, some African representatives continued to call for clarification of the relationship between the ICC and the Security Council.

C Complementarity

Complementarity was another great concern and was addressed by 20 African state representatives from all sub-regions. The notion was introduced into the negotiations from the beginning, as the 1994 ILC draft emphasized that the Court ‘is intended to be complementary to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective’.⁷⁰ The draft proposed a court that deferred more to national sovereignty than was eventually demonstrated in the Rome Statute. Discussions in the Preparatory Committee revealed two different approaches to complementarity. The first stressed the primary right of states to bring criminals to justice, while the second approach proposed that the ICC should act when states

⁶³ Sudan, in Summary Record of the 26th Meeting, Doc. A/C.6/49/SR.26, 3 November 1994, and in Summary Record of the 21st Meeting, Doc. A/C.6/48/SR.21, 29 October 1993.

⁶⁴ Non-Aligned Movement Summit Declaration, Doc. NAC 11/Doc.1/Rev.3, 18–20 October 1995.

⁶⁵ Senegal, in Summary Record of the 22nd Meeting, Doc. A/C.6/48/SR.22, 1 November 1993.

⁶⁶ Ghana, in Summary Record of the 26th Meeting, Doc. A/C.6/51/SR.26, 29 October 1996; Uganda, in Summary Record of the 13th Meeting, Doc. A/C.6/52/SR.13, 23 October 1997.

⁶⁷ E.g., Egypt, in Summary Record of the 20th Meeting, Doc. A/C.6/49/SR.20, 28 October 1994.

⁶⁸ Sierra Leone, in Summary Record of the 17th Meeting, Doc. A/C.6/48/SR.17, 25 October 1993.

⁶⁹ Niger, in Summary Record of the 20th Meeting, Doc. A/C.6/48/SR.20, 28 October 1993; Cameroon, in Summary Record of the 22nd Meeting, Doc. A/C.6/48/SR.22, 1 November 1993.

⁷⁰ Draft Statute for an International Criminal Court 1994, available at <http://legal.un.org/ilc/sessions/46/>, Preamble.

failed to carry out their duty to bring people to justice.⁷¹ Where the first approach valued state consent, the second valued court autonomy. In their speeches to the Sixth Committee, African states articulated a notion of complementarity that fell within the first approach.

African diplomats discussing complementarity focused on defining the relationship between the ICC and national courts. Most of them emphasized state sovereignty and the primacy of national courts, advocating a notion of complementarity that preserved the latter. For instance, Algeria argued that:

national courts must continue to have primary jurisdiction. The international court must have jurisdiction only when national jurisdiction was absent or when it was not in a position to try certain clearly defined exceptional crimes. The principle of complementarity rule out any hierarchy between national jurisdiction and that of the court.⁷²

African states frequently defined complementarity negatively, and their statements signify an ICC that was ‘not ... a substitute’ for national justice systems and should not ‘usurp’, ‘supplant’, ‘substitute’, ‘displace’ or ‘take precedence over’ national courts. Table 4 summarizes the African positions on key aspects of complementarity.

African states did not object to the Rome Statute’s sovereignty costs because they defined complementarity in a manner that upheld state sovereignty. Importantly, they saw the ICC as a Court for positively failed states, not for states with imperfect or politicized justice systems; the ICC was needed not because it was better than national criminal jurisdictions but, rather, because gross human rights violations going unpunished needed to be prevented in situations where there was no viable constitutional order or central authority capable of halting them.⁷³

Côte d’Ivoire and Sudan similarly envisaged Court jurisdiction in situations where ‘national jurisdictions were non-existent or inoperative’ and ‘when the concerned State no longer existed or when its judicial system became ineffective’.⁷⁴ The African states that spoke in the Sixth Committee did not consider themselves in this category of statehood. Moreover, several emphasized the need for state consent to ICC proceedings, such as when ‘national courts confirmed that they were not in a position to exercise [jurisdiction]’.⁷⁵ In 2003, the DRC welcomed the new preliminary examination of atrocities in the province of Ituri, adding tellingly that ‘mindful of the principle of complementarity, it reserved the right to refer cases to the national courts’.⁷⁶

In contrast to today’s admissibility proceedings, Algeria argued that the ICC ‘would not have jurisdiction in matters concerning the quality, nature, legitimacy or efficacy of national courts’.⁷⁷ Ethiopia and Ghana similarly rejected giving the ICC ‘appellate’

⁷¹ Hall, ‘The First Two Sessions’, *supra* note 25, at 181.

⁷² Algeria, in Summary Record of the 28th Meeting, Doc. A/C.6/51/SR.28, 31 October 1996.

⁷³ Ethiopia, in Summary Record of the 13th Meeting, Doc. A/C.6/52/SR.13, 23 February 1998.

⁷⁴ Côte d’Ivoire, in Summary Record of the 29th Meeting, Doc. A/C.6/51/SR.29, 1 November 1996; Sudan, in Summary Record of the 11th Meeting, Doc. A/C.6/52/SR.11, 21 October 1997.

⁷⁵ Egypt, in Summary Record of the 13th Meeting, Doc. A/C.6/52/SR.13, 23 February 1998.

⁷⁶ Democratic Republic of Congo, in Summary Record of the 10th Meeting, Doc. A/C.6/58/SR.10, 20 October 2003.

⁷⁷ Algeria, in Summary Record of the 28th Meeting, Doc. A/C.6/51/SR.28, 31 October 1996.

Table 4: Deliberation on Complementarity

State sovereignty and primacy	ICC jurisdiction vis-à-vis national courts	Admissibility criteria (1993–1997)	State consent
Algeria	Concurrent	Unavailable, non-	Yes
Côte d'Ivoire	Algeria	existent, inoperative	Algeria
Egypt	Rwanda	or ineffective	Botswana
Ethiopia	Complementary,	national courts	DRC
Ghana	supplementary or	Côte d'Ivoire	Egypt
Lesotho	subsidiary	Egypt	Rwanda
Malawi	Egypt	Ghana	No
Nigeria	Ghana	Lesotho	Tanzania (with
Sudan	Guinea	Uganda	guarantees
Tanzania	Nigeria	Unwillingness	protecting
	Neither inherent nor	Côte d'Ivoire	'legitimate'
	supervisory	Tanzania	state interests)
	Ethiopia	State breakdown	Parallel right to
	Ghana	Ethiopia	exercise discretion
	Nigeria	Sudan	Côte d'Ivoire
	Sudan		

Note: The table does not include countries that mentioned, but did not define or discuss, complementarity.

or 'supervisory' functions over national courts.⁷⁸ In the event of jurisdictional conflicts with national courts, the ICC would relinquish its case. In general, the diplomats assumed that, given the national primacy, states would enjoy the benefit of doubt; as Tanzania stated, 'the court would not usurp jurisdiction from a State that might be in difficulty but was willing in principle to proceed with a prosecution'.⁷⁹

D Sovereign Equality

Sovereign equality was the last theme of major concern and one that overlapped with concerns over court independence. Algeria, Guinea and Sudan explicitly based their critique of formal Security Council involvement on issues of sovereign equality. They felt that this would give the permanent and non-permanent members of the Security Council 'an advantage not enjoyed by the other States parties to the statute' and would import the Council's 'substantial inequality' between members and non-members.⁸⁰ They felt that an independent new world court should be free of the 'political apartheid at the UN' institutionalized in the Security Council.⁸¹ The idea of empowering the General Assembly to refer situations to the ICC represented an effort to mould a more egalitarian court.

⁷⁸ Ethiopia and Ghana, in Summary Record of the 13th Meeting, Doc. A/C.6/52/SR.13, 23 October 1997.

⁷⁹ Tanzania, in Summary Record of the 11th Meeting, Doc. A/C.6/52/SR.11, 11 November 1997.

⁸⁰ Sudan, in Summary Record of the 26th Meeting, Doc. A/C.6/49/SR.26, 3 November 1994.

⁸¹ Adebajo, 'Ending Global Apartheid: Africa and the United Nations', in A. Adebajo (ed.), *From Global Apartheid to Global Village: Africa and the United Nations* (2009) 3, at 23.

In the eyes of some African diplomats, the negotiations of the 1990s provided an opportunity to create a new global institution that did not reproduce the structures of sovereign inequality embedded in the UN system. Gabon criticized the preliminary ILC draft for lacking 'principles capable of guiding the international community in the establishment of a new world order. Its narrow scope and lack of vision of the future were regrettable'.⁸² Libya envisaged a court 'that could be relied upon to overcome situations such as political conflict and imbalances of power in the international arena'.⁸³ Senegal articulated the ICC project as one of international order and sovereign equality: 'The small, weak States needed an international criminal court, to the mandatory jurisdiction of which all States, whether small or large, would be subject.'⁸⁴ International criminal law should therefore be subject to both state consent and 'the requirements of international public order'.

Sovereign equality implicitly infused the discussions of the nature, crimes and membership of the proposed Court. From a self-conscious position at the bottom of the international hierarchy, the stress on court objectivity and impartiality did not relate to defendants' rights or due process but, rather, to the fear of political abuse of the Court by more powerful states. For instance, Burkina Faso called on 'the international community' to 'guard against any attempt to politicize the Court or to impose conditions on it that might compromise its objectivity and impartiality'.⁸⁵

The focus on abuse by the powerful was also reflected in concerns about the crime of aggression, over which many African states wanted the ICC to have jurisdiction. Indeed, between 1993 and 1997, aggression was the crime mentioned most frequently by African states, more often than genocide, crimes against humanity, war crimes and apartheid. Many African states held the view that there were four core crimes: the three ICC crimes and 'the "supreme" international crime' of aggression.⁸⁶ Thus, the view that 'most members [in the Preparatory Committee and at the Rome Conference] shared a clear, albeit narrow, understanding' of wanting Court jurisdiction to cover only war crimes, crimes against humanity and genocide did not reflect African deliberation in the Sixth Committee.⁸⁷ Table 5 maps the African states' concern over sovereign equality and international order, indicating whether these concerns were articulated in the context of the Security Council's role or the ICC more generally.

5 The African Diplomatic Vision of the ICC

The four clusters of possibilities and concerns by African diplomats provide the contours of an African diplomatic vision for the ICC. This vision was not coherently formulated in a continental manifesto but, instead, existed as a fuzzy idea about the ideal

⁸² Gabon, in Summary Record of the 19th Meeting, Doc. A/C.6/48/SR.19, 27 October 1993.

⁸³ Libya, in Summary Record of the 25th Meeting, Doc. A/C.6/56/SR.25, 12 November 2001.

⁸⁴ Senegal, in Summary Record of the 25th Meeting, Doc. A/C.6/49/SR.25, 2 November 1994.

⁸⁵ Burkina Faso, in Summary Record of the 15th Meeting, Doc. A/C.6/57/SR.15, 15 October 2002.

⁸⁶ Tanzania, in Summary Record of the 11th Meeting, Doc. A/C.6/52/SR.11, 21 October 1997.

⁸⁷ Benedetti, Bonneau and Washburn, *supra* note 34, at 19.

Table 5: Sovereign Equality and International Order

	Sovereign equality	International order
Security Council role	Algeria Gabon Guinea Sudan	
ICC in general	Djibouti Libya	Algeria Gabon Libya Madagascar Malawi Senegal

court, pieced together from the preceding analysis of what African states chose to say on the topic of establishing the ICC. Although there were differences among the African negotiating positions, as highlighted above, African states agreed on a vision of a globally supported, power-independent court with residual authority, a horizontal, consent-based relationship to national courts and an appreciation of the importance of sovereignty and the challenges of statehood. It embodied and sought to build a fairer international system that could provide a check on the major powers.

To many African diplomats, the Rome Statute would lead not so much to a future, impunity-free world as to a more equal world. Indeed, in contrast to the vision of the ICC by Western states and non-governmental organizations,⁸⁸ impunity featured relatively little in the African discussions of the Sixth Committee. In fact, between 1993 and 2003, 19 African countries made only 28 references to a court associated with anti-impunity. Eighty-two per cent of these references were made in November 1998 or thereafter, suggesting that African diplomats adopted the impunity narrative during and after the Rome Conference. Thus, to the African diplomats, the Court initially did not represent the anti-impunity project with which it was later associated.

The vision for the ICC related to a broader African agenda of restructuring international society. There was an acute awareness that international society was marked by structural inequality as manifested in the continent's under-representation in its executive body and official languages.⁸⁹ As Nelson Mandela told the General Assembly in 1995, the UN 'has to reassess its role, redefine its profile and reshape its structures. It should truly reflect the diversity of our universe and ensure equity among the nations in the exercise of power within the system of international relation [sic], in general, and the Security Council, in particular'.⁹⁰

⁸⁸ Pensky, 'Two Cheers for the Impunity Norm', 42 *Philosophy and Social Criticism* (2016) 487.

⁸⁹ Adebajo, 'Ending Global Apartheid', *supra* note 81, at 7.

⁹⁰ N. Mandela, 'Address by President Nelson Mandela at a Special Commemorative Meeting of the United Nations (UN) General Assembly on the Occasion of the 50th Anniversary of the UN' (1995), available at www.mandela.gov.za/mandela_speeches/1995/951023_unga.htm.

To remedy this structural inequality, African states called upon the UN ‘to facilitate the birth of a new world order of peace, democracy and prosperity for all’.⁹¹ This larger project gave meaning to the new institution of the ICC and produced the vision of a court that was independent of the major powers and built a fairer world. Indeed, the ILC’s preliminary ICC statute coincided with the establishment of the UN’s Open-Ended Working Group on Security Council Reform.⁹² Thus, Gabon criticized the ILC’s draft statute for a lack of vision, Senegal argued that small states needed the ICC and Sudan explained the fear of court capture by powerful states. The position of African states in international society, however, did not provide the only context for the diplomatic vision of the ICC. A second and related aspect concerned the ‘juridical’ nature of African statehood, whereby international recognition, rather than empirical government, would be constitutive of the state.⁹³ The importance of juridical statehood is deep-seated in African international relations. In the 1960s, African countries ceased to be colonies not when they ‘assumed control of their domestic affairs’ but, rather, when they established ‘direct diplomatic relations with other countries abroad’.⁹⁴ Nationalism sought fulfilment by international participation outside Africa, while independence was signified by the move ‘from foreign rule to foreign relations’.⁹⁵

Consent-based international relations and participation in international regimes are essential to juridical statehood because their absence undermines the recognition on which sovereignty is based. When negotiating the creation of the ICC, this notion of statehood informed the notion of complementarity as well as the emphasis on participation. Most African states understood complementarity to mean a horizontal or subsidiary court that did not infringe on sovereignty; only later was the ICC perceived as a source of intervention. In the context of the 148 statements from the African Sixth Committee presently analysed, a warning from Kenya in 1996 stands out for being atypical. Kenya cautioned states not to dispense with their juridical sovereignty:

Whenever established machinery was found to be ill-equipped to deal with new problems, it was necessary to devise arrangements more suited to changing conditions. However, in seeking to modernize traditional norms, Member States should ensure that hard-won international legal and political gains were not sacrificed.⁹⁶

A The ICC Vision and the Contemporary Critique of the Court

The African diplomatic ICC vision makes sense of Africa’s current ICC crisis. This does not mean that African states are disappointed that the Court turned out to be different than they had hoped but, rather, that the vision explains the nature and depth of African

⁹¹ *Ibid.*; see also Landsberg, ‘Africa’s Stake in UN Reform’, in A. Adebajo (ed.), *From Global Apartheid to Global Village: Africa and the United Nations* (2009) 167.

⁹² Question of Equitable Representation on and Increase in the Membership of the Security Council, Doc. A/RES/48/26, 3 December 1993.

⁹³ Jackson, ‘Juridical Statehood in Sub-Saharan Africa’, 46 *Journal of International Affairs* (1992) 1.

⁹⁴ Mazrui, ‘The United Nations and Some African Political Attitudes’, 18 *IO* (1964) 499, at 499.

⁹⁵ *Ibid.*, at 499.

⁹⁶ Kenya, in Summary Record of the 19th Meeting, Doc. A/C.6/51/SR.27, 29 October 1996.

governments' contemporary critique of the ICC. The first point of criticism – the charges of selective prosecution – relates to their concern with making the ICC 'truly universal' and a beneficiary of worldwide support. The ICC will only be 'credible' and authoritative if it is universal. By solely indicting Africans, however, the Court has become biased and partial. Since universality was normatively linked to participation, the reaction to such selectivity has been to consider, and threaten, a mass withdrawal from the Rome Statute.⁹⁷ The prospect of a collective African withdrawal calls attention to the Court's political geography and threatens to align its membership with its politics of selectivity.

The critique of interference in political stabilization efforts relates to the notion of complementarity – in particular, the idea that a complementary ICC jurisdiction would respect sovereignty and defer to 'legitimate state interests'. This consent-based approach to ICC involvement has been challenged by the manner in which the ICC has approached state efforts to resolve conflict. The reaction has been an attempt to carve out a larger space for national stabilization efforts. Where the prosecutor has separated the 'interests of justice' from those of peace,⁹⁸ African states are proposing that she consider factors promoting peace.⁹⁹ The AU has also endorsed the prosecution of atrocities in Kenya, Libya and Sudan in hybrid and regional courts, aiming to re-establish some political control over the justice process during conflict.¹⁰⁰

The contemporary critique of UN Security Council abuse relates to the earlier focus on court independence, sovereign equality and international order. As we have seen, a legitimate court would be independent of more powerful states and deviate from the structures of sovereign inequality. By aligning with the Security Council and exclusively prosecuting individuals from weak states, the Court is reproducing global inequality and hierarchy. The response has been to attempt to relocate deferral authority away from the Security Council to the more egalitarian General Assembly, proposing the amendment to Article 16 in 2010. In this proposal, African state parties revisited their idea in the 1990s of conferring deferral powers on the General Assembly. AU states subsequently emphasized this aspect of world order, and the Article 16 amendment sought to address 'a structurally unequal problem'.¹⁰¹

The charges of violated customary head-of-state immunity also relates to sovereign equality and independence and challenges the underlying notion of juridical statehood. As the AU's Open-Ended Working Group states, it is 'not acceptable' to be legally bound by a Security Council decision 'to a Statute that a country have [sic] not even ratified'.¹⁰² This sentiment underscores the importance attached to state consent and challenges the Security Council's referral powers. The response has been collective resistance in the form of the AU Assembly's non-cooperation resolutions and

⁹⁷ AU Assembly, *supra* note 13. Mass withdrawal by African state parties was informally discussed at African Union summits as early as 2009. See Reinold, *supra* note 3, at 1090.

⁹⁸ International Criminal Court, Policy Paper on the Interests of Justice, September 2007.

⁹⁹ Report of the Second Ministerial Meeting, *supra* note 16.

¹⁰⁰ Reinold, *supra* note 3, at 1098.

¹⁰¹ AU Assembly, *supra* note 13, para. 32.

¹⁰² *Ibid.*, para. 4.

their implementation by states parties as diverse as Chad, the DRC, Djibouti, Kenya, Malawi and South Africa. By not acting on the ICC's requests for arrest, the states have asserted their collective power through the combined ability to prevent prosecution by the ICC. This strategy is a 'weapon of the weak' in the sense that it has exposed the perceived injustice while being unable to remove its causes.¹⁰³ The legal arguments supporting this dissent pit customary international law against the ICC's interpretation of the Rome Statute and display the latter's internal inconsistency.¹⁰⁴

6 Conclusion: A Different Kind of Court

As African states engage in another constitutional moment – that of creating an international criminal jurisdiction for the African Court for Human and Peoples' Rights – it may be useful to recall their contributions to the creation of the ICC. This article has argued that the creation of legal meaning has centred on particular notions of universality, participation, complementarity, independence and sovereign equality. These concepts gave rise to a vision for a globally supported, power-independent ICC with residual authority, a horizontal relationship to national courts and an appreciation of the challenges of statehood. Furthermore, it was hoped that such a court would embody and contribute to a fairer international system and could provide a check on major powers. As the AU Assembly notes in retrospect, states initially saw the ICC as 'a beacon of emancipation' for global order.¹⁰⁵

The envisaged court does not lend itself easily to an assessment of its viability because it has not translated into concrete institutional and legal structures. However, it may be compared with existing institutions and practices of international law; given its independence and the importance of participation, universality and sovereign equality, the envisaged court would be more akin to the ICJ than to the ad hoc criminal tribunals established by the Security Council. In stressing state consent, it would be more 'old-style' than 'new-style'.¹⁰⁶ By virtue of its complementarity and horizontal relationship with governments and national courts, its involvement in situations would be closer to the ICC's consultative approach in Colombia than to its confrontation with Uganda and Sudan.¹⁰⁷

Two insights can be gained from using the African diplomatic vision of the ICC to understand the current crisis in the relationship between the ICC and African states. First, the contemporary African critique of the ICC does not represent a departure from

¹⁰³ J.C. Scott, *Weapons of the Weak: Everyday Forms of Peasant Resistance* (1987).

¹⁰⁴ See, e.g., Malawi's arguments for not arresting al-Bashir in Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, *Al Bashir* (ICC-02/05-01/09), Pre-Trial Chamber I, 12 December 2011, § 8.

¹⁰⁵ AU Assembly, *supra* note 13, para. 1.

¹⁰⁶ K. Alter, *The New Terrain of International Law: Courts, Politics, Rights* (2014).

¹⁰⁷ L.E. Gissel, *The International Criminal Court and Peace Processes in Africa: Judicialising Peace* (2018); Peskin, 'Caution and Confrontation in the International Criminal Court's Pursuit of Accountability in Uganda and Sudan', 31(3) *Human Rights Quarterly* (2009) 655.

Africa's want of an ICC. Rather, it suggests that African states desire a different ICC. From this perspective, the Court's practice deviates too much from their vision of a legitimate ICC. This vision encapsulates the values on which a legitimate Court would be built – values that African elites perceive have been violated as the ICC has carried out its justice. Second, establishing the ICC was never just about justice. It was also about international relations and global order. This explains why the contemporary critique is so focused on institutional bias, double standards, 'race-hunting' and abuse by strong states and so little about atrocity and guilt. It also elucidates why governments 'nationalize' individual responsibility, spending considerable political and financial capital to hire defence lawyers, challenge admissibility, 'shuffle' ministers around the world and mobilize regional political forums. Imposed ICC involvement has become a matter of state because it threatens the recognition that upholds juridical statehood.

In contrast to most scholarship on the ICC's crisis in Africa, the interpretation offered here does not centre on the dichotomy between accountability and impunity; creating the ICC was about other values than accountability, just as the current backlash against the Court is not a quest for impunity. Although this interpretation may seem counter-intuitive – after all, the ICC is a criminal court – it makes sense of the continuing institution building of African states in the realm of international criminal justice. The perspective on international order reconciles AU and African states' ICC critique with the negotiation of the Malabo Protocol, the internationalized trial of Chad's ex-dictator, Hissène Habré, and the plans to establish hybrid tribunals in the Central African Republic and South Sudan.¹⁰⁸

This article has provided the first systematic study of official African deliberation on the establishment of the ICC. It focuses an interpretive lens on the earlier African enthusiasm for the ICC, allowing for the possibility that states had different understandings of what the Court should or would be. By analysing the frequency and qualitative content of African submissions to the General Assembly's Legal Committee on the topic of establishing the ICC, the article investigates the main concerns of African states for building the ICC. From these concerns, it interprets their vision for the ICC and analyses the contemporary African critique of the ICC in light of the values underpinning this vision. The study thereby provides a deeper engagement with the contemporary crisis and the relationship it threatens.

In order to understand the ICC's Africa crisis, William Schabas calls for research into 'why, contrary to predictions at Rome, African states were so keen on the Court'.¹⁰⁹ This article has argued that they were keen to establish a different kind of court. As a consequence, the crisis has no quick fix; efforts to rebuild the ICC's legitimacy in Africa will have to start from discussions about the Court's formal and informal place within the global order and *vis-à-vis* an imperfect, juridical statehood. Such a process of engagement may contribute to a more reflexive international justice that acknowledges the structural inequalities of the current world order.

¹⁰⁸ Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights 2014, available at <https://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights>.

¹⁰⁹ Schabas, *supra* note 3, at 548.