

## **A Different Kind of Court**

Africa's Support for the International Criminal Court, 1993-2003

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

Africa's relationship with the International Criminal Court<sup>1</sup> has seemingly nosedived. Since 2009, African state parties have made a number of decisions that damage the ICC's project of international justice: deciding to prohibit cooperation 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 highest office.<sup>2</sup> In 2016, governments in Burundi, South Africa and the Gambia announced their decision to withdraw from the Rome Statute, with Burundi's decision taking effect in October 2017.<sup>3</sup> Although the Court has 33 African states parties, the legitimacy of the ICC has been fundamentally challenged by African states and their regional organisation, the African Union.<sup>4</sup>

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 UN Security Council that ignores its deferral requests.<sup>5</sup> To the ICC's first prosecutor, the recent withdrawal announcements even aim to give elites free hands to attack civilians.<sup>6</sup> These explanations have different and contrasting implications for our understanding of Africa's

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<sup>1</sup> Hereafter ICC or the Court.

<sup>2</sup> 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* (2013) 385; Vilmer, 'The African Union and the International Criminal Court: Counteracting the Crisis', 92 *International Affairs* (2016), 1319.

<sup>3</sup> 'Gambia Is Latest African Nation to Quit International Criminal Court', *The Guardian* (2016), available at <https://www.theguardian.com/world/2016/oct/26/gambia-becomes-latest-african-nation-to-quit-international-criminal-court> (accessed 3 December 2016).

<sup>4</sup> Hereafter the AU.

<sup>5</sup> 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 *ICON 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* (2016) available at <https://www.justsecurity.org/33778/move-south-africas-notice-withdrawal-icc/> (accessed 7 March 2017); Vilmer, *supra* note 2.

<sup>6</sup> Moreno-Ocampo, quoted in *The Guardian*, *supra* note 3.

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 Statute. 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 question 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 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 Court establishment. It provides the first systematic study of statements by African countries in the negotiations to establish the ICC, 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 African diplomats' ICC vision and relates it to the contemporary African critique of the ICC. The article argues that African states sought to establish a global court that differed in important respects from the ICC that became. This makes the ICC's current crisis in Africa both intelligible and deep-seated.

The article is structured as follows: It first situates the study in the context of scholarship on Africa's relationship with the ICC and summarises the contemporary African critique of the ICC. Then follows 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 then formulates the African diplomatic ICC vision and uses these ideas to understand Africa's contemporary critique of the ICC.

### **Africa and the ICC: Towards Nadir?**

Most analyses about Africa's relationship with the ICC centres 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, an unexpected development given the

nature and frequency of conflict in Africa.<sup>7</sup> 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 the Statute before 2005.<sup>8</sup> 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’.<sup>9</sup> 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 by the cases against members of the Kenyan and Libyan political establishments.<sup>10</sup> While the Sudanese and Libyan situations were referred to the ICC by the UN Security Council, investigation of the Kenyan situation was initiated by the Prosecutor.<sup>11</sup> In these cases, therefore, ICC involvement was involuntary. The African critique can be summarised in four points:<sup>12</sup>

1. **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 justice pursuit as at best biased and at worst a ‘race hunt’.<sup>13</sup> They voice ‘suspicion’ about the ICC’s

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<sup>7</sup> Schabas, *supra* note 5, at 548; see also Jalloh, ‘Regionalizing International Criminal Law?’, 9 *International Criminal Law Review* (2009) 445; du Plessis, *The International Criminal Court That Africa Wants* (Pretoria: Institute for Security Studies, 2010).

<sup>8</sup> Akande, du Plessis, and Jalloh, *An African Expert Study on the African Union Concerns about Article 16 of the Rome Statute of the ICC* (Tshwane: Institute for Security Studies, 2010), at 7.

<sup>9</sup> Reinold, *supra* note 5, at 1088.

<sup>10</sup> ICC-02/05, 4 March 2009; for scholarship on the crisis, see Mills, *supra* note 5; 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.

<sup>11</sup> SC Res. 1593, 31 March 2005; SC Res. 1970, 26 February 2011; and ICC-01/09, 31 March 2010.

<sup>12</sup> Plessis, Maluwa, and O Reilly, *Africa and the International Criminal Court* (London: Chatham House, 2013); Plessis, *supra* note 7; Reinold, *supra* note 5; Schabas *supra* note 5.

<sup>13</sup> Desalegn, quoted in ‘African Union Accuses ICC of “Hunting” Africans’, *BBC*, 27 May 2013; Dugard, ‘Palestine and the International Criminal Court: Institutional Failure or Bias?’, 11 *Journal of International Criminal Justice* (2013) 563.

‘prosecutorial justice’ and a ‘perception of a double standard against African States’.<sup>14</sup> Claims of Court bias are among the ‘most popular arguments’ in Africa.<sup>15</sup>

2. **Interference with political stabilisation 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.<sup>16</sup> 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.<sup>17</sup>
3. **Security Council abuse.** Several requests to the UN Security Council for a renewable 12-month deferral of prosecution have been ignored or inadequately considered by the Council. The request to defer proceedings against al-Bashir was supported by two thirds of the international community, but opposed by a few Western states.<sup>18</sup> At the same time, by referring situations in two non-state parties, the Council acts with double standards. African ICC members therefore proposed to amend the Rome Statute to the effect that the 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.<sup>19</sup>
4. **Violation of customary head of state immunity.** ‘The question of immunities is central to the AU’.<sup>20</sup> By referring and prosecuting heads of non-state parties, the Security Council and the ICC violate 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 planned to seek an advisory opinion on this issue from the International Court of Justice.<sup>21</sup>

To reform the Rome system and change current practice, the AU Assembly in June 2015 established the Open Ended Committee of Ministers of Foreign Affairs on the International

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<sup>14</sup> AU Assembly, *Withdrawal Strategy Document*, version 2, 12 January 2017, available at [https://www.hrw.org/sites/default/files/supporting\\_resources/icc\\_withdrawal\\_strategy\\_jan.\\_2017.pdf](https://www.hrw.org/sites/default/files/supporting_resources/icc_withdrawal_strategy_jan._2017.pdf) (accessed 19 February 2017), para. 2 and 3.

<sup>15</sup> Vilmer, *supra* note 2, at 1338.

<sup>16</sup> Assembly/AU/Dec.366(XVII).

<sup>17</sup> Report of the 2<sup>nd</sup> Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC), Min/ICC/Legal/Rpt. (II), para. 13.

<sup>18</sup> Akande, Plessis, and Jalloh, *supra* note 8, at 10.

<sup>19</sup> Report of the 2<sup>nd</sup> Ministerial Meeting, *supra* note 17, para. 13.

<sup>20</sup> Plessis, Maluwa, and Reilly, *supra* note 12, at 5.

<sup>21</sup> AU Assembly, Decision on the Progress Report of the Commission on the Implementation of the Assembly Decisions on the International Criminal Court. Assembly/AU/Dec.397(XVIII), 29-30 January 2012.

Criminal Court. With a mixed membership of 15 state parties<sup>22</sup> and 13 non-state parties (including Libya and Sudan), the Open Ended Committee in early 2017 drafted a strategy paper which outlines legal, institutional and political initiatives to reform the ICC, the Security Council, and the Statute, or collectively withdraw from the latter.<sup>23</sup>

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 the Gambia announced their decision to withdraw from the Rome Statute, while Kenya hinted it may be the next country to exit the Statute.<sup>24</sup> 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 criticised 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 which African states sought to create or thought they were creating. The initial support for establishing the ICC stemmed from the vision of a court legitimised 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.

## **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 minuted and therefore do not lend themselves to country-specific

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<sup>22</sup> Burundi, Chad, Congo, Cote d'Ivoire, Djibouti, Kenya, Madagascar, Mali, Namibia, Nigeria, Senegal, South Africa, Tanzania, Uganda, and Zambia.

<sup>23</sup> Withdrawal Strategy Document, *supra* note 14, para. 4.

<sup>24</sup> 'President Uhuru Kenyatta's Speech during 53rd Jamhuri Day Celebrations,' *The Star* (12 December 2016).

analysis.<sup>25</sup> Emic accounts of the negotiations were written mainly by Western lawyers without a specific focus on African, Asian or Middle Eastern concerns.<sup>26</sup> The Ad Hoc and Preparatory Committees and Preparatory Commission reported to the Sixth Committee, which does provide summary minutes that enable research on contributions by specific actors.<sup>27</sup> 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.<sup>28</sup>

The analysis focuses on African statements on the establishment of the ICC between 1993 and 2003. 1993 marks the time at which the International Law Commission (ILC) shared its preliminary draft statute with governments, while the 2003 session took place when the ICC had just become operational. 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.

Data for the analysis is all statements 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. This data was triangulated with emic accounts and written comments by individual African states submitted to the ILC and the Ad Hoc Committee.

The data was analysed using *NVivo11*, a computer programme for the systematic coding of large amounts of qualitative data. The research adopted an axial coding strategy with three levels of analysis. Firstly, an open, inductive coding of all 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

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<sup>25</sup> Some discussions in the Committee of the Whole at the 1998 Rome Conference were minuted, but the negotiations in the ten working groups were not.

<sup>26</sup> Hall, 'The First Two Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court', 91 *The American Journal of International Law* (1997) 177; Hall, 'The Third and Fourth Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court', 92 *The American Journal of International Law* (1998) 124; Friman, 'The International Criminal Court: Negotiations and Key Issues', 8 *African Security Review* (1999) 3; Crawford, 'The ILC Adopts a Statute for an International Criminal Court', 89 *The American Journal of International Law* (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 *African Security Review* (2000) 42.

<sup>27</sup> 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* (2009), 48.

<sup>28</sup> In 2003, the item appeared as 'The International Criminal Court.'

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. Coding lists are available online.<sup>29</sup>

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.<sup>30</sup> To compensate for these shortcomings, the secondary and tertiary coding was informed by emic accounts and Africanist scholarship.

This article is the first to focus systematically on statements by African countries in the negotiations to establish the ICC. Deitelhoff, who codes 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 Security Council members.<sup>31</sup> She does not present the positions of individual countries or regional communities. Other scholars infer African positions from subsequent Statute ratification patterns.<sup>32</sup>

The idea of formulating an African diplomatic ICC vision is controversial because it may be seen to homogenise 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 to a community of practice. Firstly, 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 organisation, the AU, to discuss developments at the UN and, indeed, the ICC. The present study takes seriously this practice, while highlighting differences among African positions. Secondly, regional claims can enrich international fields. As ‘[African] politics is simultaneously global

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<sup>29</sup> [Link to online repository.]

<sup>30</sup> Binder and Heupel, ‘The Legitimacy of the UN Security Council: Evidence from Recent General Assembly Debates,’ 59 *International Studies Quarterly* (2015) 242.

<sup>31</sup> Deitelhoff, *supra* note 27.

<sup>32</sup> Goodliffe et al., ‘Dependence Networks and the International Criminal Court,’ 56 *International Studies Quarterly* (2012); Emilia Justyna Powell, ‘Two Courts Two Roads: Domestic Rule of Law and Legitimacy of International Courts,’ 9 *Foreign Policy Analysis* (2013), 349.



politics’, regional perspectives can illuminate broader global concerns, such as the nature of international justice.<sup>33</sup> Importantly, the article does not assume that ordinary people shared the diplomatic vision for the ICC or agree with their governments’ contemporary ICC critique.

### **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 General Assembly. This draft was modified in 1994, the changes intended to meet ‘the political concerns of some of the world’s major powers’.<sup>34</sup> 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 ICC 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 perform an article-by-article review of the ILC draft.<sup>35</sup> As such, negotiations centred on states’ views on various important aspects of the prospective court. Each negotiation session reported to the 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.’<sup>36</sup> The dedicated negotiations thus related dynamically to the Sixth Committee.

### ***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.<sup>37</sup> This earlier initiative aimed to be able to prosecute the crime of apartheid, but was abandoned, pending the ‘international

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<sup>33</sup> Abrahamsen, ‘Africa and International Relations: Assembling Africa, Studying the World’, 116 *African Affairs* (2016) 125, at 131.

<sup>34</sup> Bassiouni, ed., *International Criminal Law Vol. III, International Enforcement* (Leiden: M. Nijhoff Publishers, 2008), at 123–24.

<sup>35</sup> Benedetti, Bonneau, and Washburn, *Negotiating the International Criminal Court: New York to Rome* (Leiden: Brill, 2013), at 28.

<sup>36</sup> *Ibid.*, at 19.

<sup>37</sup> Abass, ‘Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges,’ 24 *The European Journal of International Law* (2013), at 936–937.

penal tribunal’ envisaged in the Apartheid Convention.<sup>38</sup> Twenty years later, they were initially relatively inactive on the issue of establishing an ICC. When the ILC circulated the draft ICC statute in 1994, only Algeria submitted written comments.<sup>39</sup> Benedetti et al. mention six African states that took part in the first session of the Ad Hoc Committee.<sup>40</sup> The Preparatory Committee meetings in New York were marked by ‘limited participation’ by developing states.<sup>41</sup> The first three meetings were on average attended by 12 African governments.<sup>42</sup> At the last meeting, in April 1998, ‘for the first time, African countries from all parts of the continent participated actively.’<sup>43</sup> However, regional activity took place from 1997 onwards, in Pretoria and Dakar.<sup>44</sup>

Between 1993 and 2003, 34 out of 53 African states (i.e., 64 per cent of the continent) addressed the issue of ICC establishment in the Sixth Committee. The frequency of their interventions varied, with some countries addressing ICC establishment once, while others spoke almost every year.<sup>45</sup> 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 summarises the African participation in the Sixth Committee discussions, including by subsequent non-state parties.

**Table 1. African Participation in Sixth Committee Discussions on an ICC, 1993-2003**

Year	UN Session	Participant Countries	No. of Countries (Non-State Parties†)
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*,	17 (8)

<sup>38</sup> International Convention on the Suppression and Punishment of the Crimes of Apartheid, article V.

<sup>39</sup> Observations of Governments on the Report of the Working Group on a Draft Statute for an International Criminal Court. A/CN.4/458 and A/CN.4/458/Add.1-8, 14 February 1994.

<sup>40</sup> Benedetti, Bonneau, and Washburn, *supra* note 35, at 29–31.

<sup>41</sup> Hall, ‘The First Two Sessions’, *supra* note 26, at 186.

<sup>42</sup> A/AC.249/INF/1; A/AC.249/INF/2; A/AC.249/INF/3.

<sup>43</sup> Hall, ‘The Sixth Session of the UN Preparatory Committee on the Establishment of an International Criminal Court,’ 92 *The American Journal of International Law* (1998) 548, at 556.

<sup>44</sup> Maqungo, *supra* note 26.

<sup>45</sup> Amongst the 34 participating countries, the median participation on the topic of ICC establishment is 4 UN sessions.

		Tanzania.	
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: Countries marked by an \* have never ratified the Rome Statute. † as of December 2017. Burundi is considered a State Party because this pertained until October 2017.*

## African Concerns

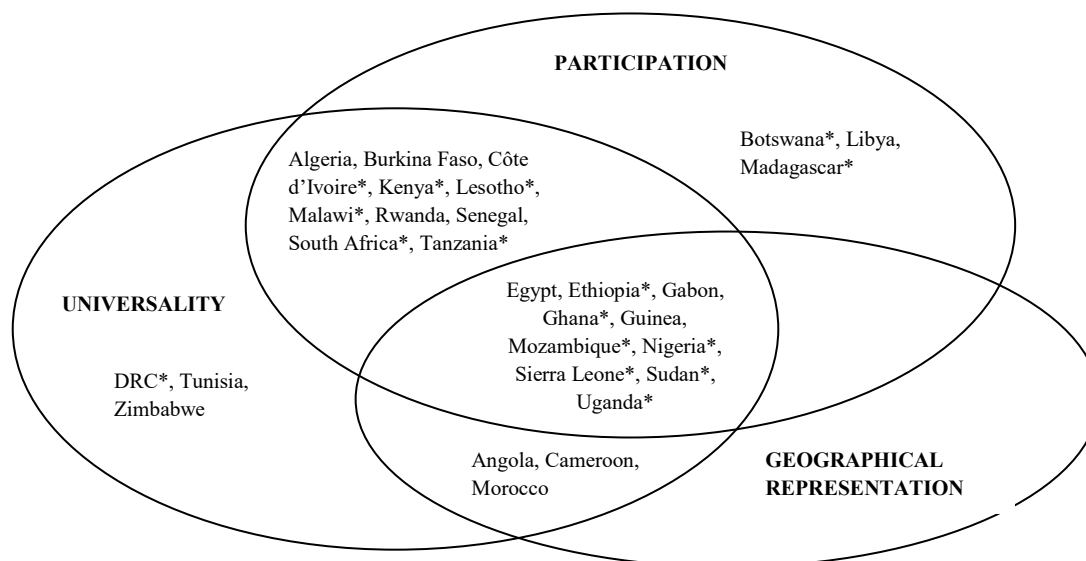
Like those of other groupings, African contributions to the ICC negotiations created normative possibilities. Some of these possibilities were codified in 1998, while others remained alternative. Together, they formed an African diplomatic vision for the ICC. The contributions touch upon a large number of issues, but centre on four clusters of inter-linked themes: participation and universality; court independence and the 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.

**Table 2. Themes Addressed by African Countries in the Sixth Committee, 1993-2003**

	Theme	Number of References	Number of Countries
<b>Universality and Participation</b>	Universality	62	26
	Participation	77	23
	UN trust funds	31	17
	Geographical representation	19	13
<b>Independence and the role of the UN Security Council</b>	Court independence	63	24
	Opposition to Security Council role	23	10
	Qualified approval of Security Council role	22	10
<b>Complementarity</b>	Complementarity	61	20
<b>Sovereign Equality</b>	Sovereign equality and international order	14	9
	Aggression (1993-1997)	22	10

### ***Universality and Participation***

To African states parties, ‘universality’ meant world-wide membership of the ICC. It signified 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 was a value on which African states 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 of their raising 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.



**Figure 1. Deliberation on Universality and Participation**

*Note: Countries marked with an asterisk (\*) advocated for establishing and/or contributing to UN trust funds to finance the participation of developing countries. Namibia, not depicted, addressed the theme of trust funds but not the other themes.*

Universalising 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.<sup>46</sup>

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.’<sup>47</sup> To Ghana, the absence of developing countries in the Preparatory Committee ‘would have an adverse effect on the universality of the negotiations.’<sup>48</sup> Universality was thus understood state-centrally; it meant the involvement by all states in creating and sustaining the ICC, not internalised values. African delegates’ notion of universalism reflected that of the UN: it was not a transnational ‘universalism of people’, but a contractual ‘universalism of nation-states’.<sup>49</sup> As Tanzania stated in 2002: ‘The political will of States was essential to make the acceptance of the Court universal.’<sup>50</sup>

Signifying the importance of Court universality, African states evaluated process-related or substantive proposals in the light of their impact on universalisation. To enhance universality, therefore, Ethiopia, Guinea, Sierra Leone and Tunisia supported making the ICC a UN court<sup>51</sup>, Mozambique advocated Court association with the UN<sup>52</sup>, Algeria opposed temporal constraints on the negotiations<sup>53</sup>, and Côte d’Ivoire and Ethiopia supported complementarity<sup>54</sup>. 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.<sup>55</sup>

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<sup>46</sup> Malawi in A/C.6/51/SR.27, 29 October 1996.

<sup>47</sup> Egypt in A/C.6/50/SR.28, 2 November 1995. See also Rwanda in A/C.6/50/SR.31, 6 November 1995.

<sup>48</sup> Ghana in A/C.6/51/SR.26, 29 October 1996.

<sup>49</sup> Mazrui, ‘The United Nations and the Muslim World,’ in *From Global Apartheid to Global Village: Africa and the United Nations*, ed. Adekeye Adebajo (Scottsville: University of Kwazulu-Natal Press (2009) 51, at 51.

<sup>50</sup> Tanzania in A/C.6/57/SR.15, 15 October 2002.

<sup>51</sup> Ethiopia in A/C.6/49/SR.21, 28 October 1994; Guinea in A/C.6/49/SR.17, 25 October 1994; Sierra Leone in A/C.6/48/SR.17, 25 October 1993; Tunisia in A/C.6/48/SR.28, 5 November 1993, and A/C.6/49/SR.20, 28 October 1994.

<sup>52</sup> Mozambique in A/C.6/51/SR.29, 1 November 1996.

<sup>53</sup> Algeria in A/C.6/51/SR.28, 31 October 1996.

<sup>54</sup> Ethiopia and Côte d’Ivoire in A/C.6/51/SR.29, 1 November 1996.

<sup>55</sup> Ghana in 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. To Kenya, Lesotho, Malawi, Sierra Leone, South Africa and Uganda, contributions to the UN trust fund would enhance universality through participation. 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.<sup>56</sup>

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 the least developed countries in the negotiations.<sup>57</sup> In addition, countries called for technical and financial assistance to enable the ratification and domestication of the 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 overrepresentation at the court; as Cameroon warned, ‘certain regions’ should not be ‘overrepresented.’<sup>58</sup> In 2003, after the appointment of the Argentinian prosecutor, several states advocated for an African deputy prosecutor.

### ***Independence***

Throughout the period under study, court independence was one of the values stressed most frequently and by 70 per cent of African participants. 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

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<sup>56</sup> Kenya in A/C.6/53/SR.10, 11 December 1998.

<sup>57</sup> GA Res 51/207, 17 December 1996.

<sup>58</sup> Cameroon in A/C.6/48/SR.22, 1 November 1993.

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:

the 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.

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

States were particularly concerned with the role of the 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.

#### *The Role of the UN Security Council*

On the question of what role, if any, the 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 4 provides a summary of their positions and illustrates that most states associated court independence with the role of 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 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'.<sup>59</sup> 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.<sup>60</sup>

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 which ought to be separate. They opposed the suggestion that investigations of a crime of aggression were dependent on the prior determination by the 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' authorised to both legislate and prosecute.<sup>61</sup> In the eyes of Algeria, such a provision would 'confer judicial powers on a highly political organ.'<sup>62</sup>

The idea, agreed in Rome, that the 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.<sup>63</sup> These powers, moreover, would consolidate sovereign inequality, as discussed below. To protect the Court from 'political influence' by the Council or from the 'direct or indirect influence' of any UN organ, therefore, this group of countries advocated a total independence from the Council.<sup>64</sup> This position reflected that of the Non-Aligned Movement.<sup>65</sup> After the 1998 Rome Conference, where the Council was given referral and deferral powers, they continued to oppose the formal links between the Security Council and the ICC.

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<sup>59</sup> Algeria in A/C.6/52/SR.13, 23 October 1997.

<sup>60</sup> Gabon in A/C.6/48/SR.19, 27 October 1993.

<sup>61</sup> Gabon in A/C.6/48/SR.19, 27 October 1993.

<sup>62</sup> Algeria in A/C.6/49/SR.27, 4 November 1994.

<sup>63</sup> Algeria in A/C.6/49/SR.20, 28 October 1994.

<sup>64</sup> Sudan in A/C.6/49/SR.26, 3 November 1994, and A/C.6/48/SR.21, 29 October 1993.

<sup>65</sup> Non-Aligned Movement Summit Declaration, NAC 11/Doc.1/Rev.3, 18-20 October 1995.



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.<sup>66</sup> Some states agreed to give the Council referral powers, but opposed granting deferral powers.<sup>67</sup> Others only conceived of Council referrals in relation to the crime of aggression.<sup>68</sup>

Seven states wanted the 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.’<sup>69</sup> Niger proposed that referral powers fell to the Assembly if the Council was blocked by a veto and Cameroon suggested that the Council’s ‘permanent members should be prohibited from using the veto ... so as to prevent any selective referrals.’<sup>70</sup> After the Rome Conference, when many African states signed the Statute, some African representatives continued to call for clarification of the relationship between the ICC and the Security Council.

**Table 4. 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	Algeria	Côte d’Ivoire	Algeria	Angola
	Burkina Faso	Guinea	Ethiopia	Madagascar
	DRC	Lesotho	Guinea	Malawi
	Egypt	Niger*	Morocco	Mozambique
	Gabon	Nigeria	Niger	Rwanda
	Libya	Senegal*	Nigeria	Swaziland
	Sudan	Sierra Leone	Sierra Leone	
	<b>Yes</b>			
	<b>Scepticism:</b>	<b>Approval but against SC deferral powers:</b>		
	Ethiopia	Ghana		
No	Morocco	Uganda		
	Tanzania	<b>Approval but without P5 veto powers:</b>		
		Cameroon		
No		Niger		
		Senegal		

<sup>66</sup> Senegal in A/C.6/48/SR.22, 1 November 1993.

<sup>67</sup> Ghana in A/C.6/51/SR.26, 29 October 1996; Uganda in A/C.6/52/SR.13, 23 October 1997.

<sup>68</sup> E.g., Egypt in A/C.6/49/SR.20, 28 October 1994.

<sup>69</sup> Sierra Leone in A/C.6/48/SR.17, 25 October 1993.

<sup>70</sup> Niger in A/C.6/48/SR.20, 28 October 1993; Cameroon in A/C.6/48/SR.22, 1 November 1993.

## ***Complementarity***

Complementarity was another great concern, 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 emphasised 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.’<sup>71</sup> The draft proposed a court that deferred more to national sovereignty than did eventually the Rome Statute. Discussions in the Preparatory Committee revealed two different approaches to complementarity: The first emphasised the primary *right* of states to bring criminals to justice, while the second approach proposed that the ICC should act when states failed to carry out their *duty* to bring people to justice.<sup>72</sup> Where the first 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 emphasised 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.<sup>73</sup>

African states frequently defined complementarity negatively: It signified 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 3 summarises the African positions on key aspects of complementarity.

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<sup>71</sup> Preamble, Draft Statute for an International Criminal Court, 1994.

<sup>72</sup> Hall, ‘The First Two Sessions,’ *supra* note 26, at 181.

<sup>73</sup> Algeria in A/C.6/51/SR.28, 31 October 1996.

**Table 3. Deliberation on Complementarity**

<b>State Sovereignty and Primacy</b>	<b>ICC jurisdiction vis-à-vis national courts</b>	<b>Admissibility Criteria (1993-1997)</b>	<b>State Consent</b>
Algeria	<b>Concurrent:</b>	<b>Unavailable, non-existent, inoperative or ineffective national courts:</b>	<b>Yes:</b>
Côte d'Ivoire	Algeria	Côte d'Ivoire	Algeria
Egypt	Rwanda	Egypt	Botswana
Ethiopia	<b>Complementary, supplementary or subsidiary:</b>	Ghana	DRC
Ghana	Egypt	Lesotho	Egypt
Lesotho	Guinea	Uganda	Rwanda
Malawi	Ghana	<b>Unwillingness:</b>	<b>No:</b>
Nigeria	Nigeria	Côte d'Ivoire	Tanzania (but with guarantees to protect 'legitimate' state interests)
Sudan	<b>Not inherent or supervisory:</b>	Tanzania	
Tanzania	Ethiopia	<b>State breakdown:</b>	<b>Parallel right to exercise discretion:</b>
	Ghana	Ethiopia	Côte d'Ivoire
	Nigeria	Sudan	
	Sudan		

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

African states did not object to the 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 international criminal court was needed not because it was better than national criminal jurisdictions, but in order to prevent gross human rights violations going unpunished in situations where there was no viable constitutional order or central authority capable of halting them.<sup>74</sup>

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.'<sup>75</sup> The African states that spoke in the Sixth Committee did not consider themselves in this category of statehood. Moreover, several emphasised the need for state consent to ICC proceedings, such as when 'national courts confirmed that they were not in a position to exercise [jurisdiction]'.<sup>76</sup> In 2003, the DRC welcomed the new preliminary

<sup>74</sup> Ethiopia in A/C.6/52/SR.13, 23 February 1998.

<sup>75</sup> Côte d'Ivoire in A/C.6/51/SR.29, 1 November 1996; Sudan in A/C.6/52/SR.11, 21 October 1997.

<sup>76</sup> Egypt in A/C.6/52/SR.13, 23 February 1998.

examination of atrocities in Ituri province, adding tellingly that ‘mindful of the principle of complementarity, it reserved the right to refer cases to the national courts.’<sup>77</sup>

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.’<sup>78</sup> Ethiopia and Ghana similarly rejected giving the ICC ‘appellate’ or ‘supervisory’ functions over national courts.<sup>79</sup> 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.’<sup>80</sup>

### ***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.<sup>81</sup> An independent new world court should be free of the ‘political apartheid at the UN’ institutionalised in the Security Council.<sup>82</sup> The idea of empowering the General Assembly to refer situations to the ICC represented an effort to mould a more egalitarian court.

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 criticised 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.’<sup>83</sup> Libya envisaged a court ‘that could be relied upon to overcome situations such as political conflict and imbalances of power in the international arena.’<sup>84</sup> Senegal articulated the ICC project as one of international order and sovereign equality: ‘The small, weak States needed an international criminal court, to the

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<sup>77</sup> DRC in A/C.6/58/SR.10, 20 October 2003.

<sup>78</sup> Algeria in A/C.6/51/SR.28, 31 October 1996.

<sup>79</sup> Ethiopia and Ghana in A/C.6/52/SR.13, 23 October 1997.

<sup>80</sup> Tanzania in A/C.6/52/SR.11, 11 November 1997.

<sup>81</sup> Sudan in A/C.6/49/SR.26, 3 November 1994.

<sup>82</sup> Adekeye Adebajo, ‘Ending Global Apartheid: Africa and the United Nations’, in *From Global Apartheid to Global Village: Africa and the United Nations*, ed. Adekeye Adebajo (Scottsville: University of Kwazulu-Natal Press, 2009) 3-50, at 23.

<sup>83</sup> Gabon in A/C.6/48/SR.19, 27 October 1993.

<sup>84</sup> Libya in A/C.6/56/SR.25, 12 November 2001.

mandatory jurisdiction of which all States, whether small or large, would be subject.’<sup>85</sup> 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 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.’<sup>86</sup>

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 operated with four core crimes: the three ICC crimes and ‘the “supreme” international crime’ of aggression.<sup>87</sup> 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<sup>88</sup> does not reflect African deliberation in the Sixth Committee. Table 5 maps 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.

**Table 5. Sovereign Equality and International Order**

	<b>Sovereign Equality</b>	<b>International Order</b>
<b>Security Council Role</b>	Algeria Gabon Guinea Sudan	
<b>The ICC in General</b>	Djibouti Libya	Algeria Gabon Libya Madagascar Malawi Senegal

<sup>85</sup> Senegal in A/C.6/49/SR.25, 2 November 1994.

<sup>86</sup> Burkina Faso in A/C.6/57/SR.15, 15 October 2002.

<sup>87</sup> Tanzania in A/C.6/52/SR.11, 21 October 1997.

<sup>88</sup> Benedetti, Bonneau, and Washburn, *supra* note 35, at 19.

## 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 existed as a fuzzy idea about the ideal 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 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 and could provide a check on major powers.

To many African diplomats, the ICC Statute would lead not so much to a future, impunity-free world as to a more equal world. Indeed, in contrast to the Western state and NGO vision of the ICC,<sup>89</sup> impunity featured relatively little in the African Sixth Committee discussions. In fact, between 1993 and 2003, 18 African countries made only 28 references to a court associated with anti-impunity. 82 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 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 underrepresentation in its executive body and official languages.<sup>90</sup> 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.<sup>91</sup>

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<sup>89</sup> Pensky, 'Two Cheers for the Impunity Norm' 42 *Philosophy and Social Criticism* (2016), 487.

<sup>90</sup> Adebajo, *supra* note 82, at 7.

<sup>91</sup> 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, [http://www.mandela.gov.za/mandela\\_speeches/1995/951023\\_unga.htm](http://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.’<sup>92</sup> This larger project gave meaning to the new institution of the ICC and produced the vision of a court that was independent of major powers and built a fairer world. Indeed, the ILC’s preliminary draft ICC statute coincided with the establishment of the UN’s Open-Ended Working Group on Security Council Reform.<sup>93</sup> Thus, Gabon criticised the ILC 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 did not, however, 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 is constitutive of the state.<sup>94</sup> 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.’<sup>95</sup> Nationalism sought fulfilment by international participation outside Africa, while independence was signified by the move ‘from foreign rule to foreign relations’.<sup>96</sup>

Consent-based international relations and participation in international regimes is essential to juridical statehood because their absence undermine 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 African Sixth Committee statements presently analysed, a Kenya warning 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

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<sup>92</sup> *Ibid.* See also Landsberg, ‘Africa’s Stake in UN Reform’ in ‘Ending Global Apartheid: Africa and the United Nations’, *From Global Apartheid to Global Village: Africa and the United Nations*, ed. Adekeye Adebajo (Scottsville: University of Kwazulu-Natal Press, 2009), 167-187.

<sup>93</sup> A/RES/48/26, 3 December 1993.

<sup>94</sup> Robert H. Jackson, “Juridical Statehood in Sub-Saharan Africa,” 46 *Journal of International Affairs* (1992): 1–16.

<sup>95</sup> Mazrui, ‘The United Nations and Some African Political Attitudes’, 18 *International Organization* (1964), at 499.

<sup>96</sup> *Ibid.*, at 499.

should ensure that hard-won international legal and political gains were not sacrificed.<sup>97</sup>

### *The ICC Vision and the Contemporary Court Critique*

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 hoped, but rather that the vision explains the nature and depth of African governments' contemporary critique of the ICC. The first point of critique, the charges of selective prosecution, relate to their concern with making the ICC 'truly universal' and a beneficiary of worldwide support. The ICC would only be 'credible' and authoritative if it was universal. By solely indicting Africans, however, the Court became biased and partial. As universality was normatively linked to participation, the reaction to such selectivity has been to consider and threaten a mass withdrawal from the Rome Statute.<sup>98</sup> 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 stabilisation 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 is challenged by the manner in which the ICC has approached state efforts to stabilise and resolve conflict. The reaction has been an attempt to carve out a larger space for national stabilisation efforts. Where the Prosecutor separated the 'interests of justice' from those of peace,<sup>99</sup> African states proposed that she considers factors promoting peace.<sup>100</sup> 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 justice processes during conflict.<sup>101</sup>

The contemporary critique of Security Council abuse relates to the earlier focus on court independence, sovereign equality and international order. As we saw, a legitimate court would be independent from 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

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<sup>97</sup> Kenya in A/C.6/51/SR.27, 29 October 1996.

<sup>98</sup> Withdrawal Strategy Document, *supra* note 14. Mass withdrawal by African state parties was informally discussed at AU Summits as early as 2009; see Reinold, *supra* note 5, 1090.

<sup>99</sup> International Criminal Court, 'Policy Paper on the Interests of Justice', September 2007.

<sup>100</sup> Report of the 2<sup>nd</sup> Ministerial Meeting, *supra* note 17.

<sup>101</sup> Reinold, *supra* note 5, at 1098.



deferral authority away from the Security Council to the more egalitarian General Assembly, proposing in 2010 the amendment to Article 16. In this proposal, African state parties revisited their 1990s idea of conferring deferral powers on the General Assembly. AU states subsequently emphasised the aspect of world order: the Article 16 amendment would address ‘a structurally unequal problem.’<sup>102</sup>

The charges of violated customary head-of-state immunity relates also 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’.<sup>103</sup> 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 its 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 assert their collective power through the combined ability to prevent prosecution by the ICC. The strategy is a ‘weapon of the weak’<sup>104</sup> in the sense that it exposes the perceived injustice, while being unable to remove its causes. The legal arguments supporting this dissent pit customary international law against the ICC’s interpretation of Rome Statute and display the latter’s internal inconsistency.<sup>105</sup>

### **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 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, the 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 an ICC as ‘a beacon of emancipation’ for global order.<sup>106</sup>

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<sup>102</sup> Withdrawal Strategy Document, *supra* note 14, para. 32.

<sup>103</sup> Withdrawal Strategy Document, *supra* note 14, para. 4.

<sup>104</sup> Scott, *Weapons of the Weak: Everyday Forms of Peasant Resistance* (New Haven, CT: Yale University Press, 1987).

<sup>105</sup> 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’, ICC-02/05-01/09 (12 December 2011), para. 8.

<sup>106</sup> Withdrawal Strategy Document, *supra* note 14, para. 1.

The envisaged court does not lend itself easily to an assessment of its viability because it was 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 International Court of Justice than the ad hoc criminal tribunals established by the Security Council. In stressing state consent, it would be more ‘old-style’ than ‘new-style’.<sup>107</sup> 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 its confrontation with Uganda and Sudan.<sup>108</sup>

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. Firstly, the contemporary African critique of the ICC does not represent a departure from 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 to be violated as the ICC carries out its justice.

Secondly, 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 ‘nationalise’ individual responsibility, spending considerable political and financial capital to hire defence lawyers, challenge admissibility, ‘shuffle’ ministers around the world, and mobilise regional political forums. Imposed ICC involvement becomes 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/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 African states’ continuing institution-building in the realm of international criminal justice. The perspective on international order reconciles AU and African states’ ICC

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<sup>107</sup> Alter, *The New Terrain of International Law: Courts, Politics, Rights* (Princeton: Princeton University Press, 2014).

<sup>108</sup> [author reference]; Peskin, ‘Caution and Confrontation in the International Criminal Court’s Pursuit of Accountability in Uganda and Sudan’, *Human Rights Quarterly* 31(3) (2009), 655-691.

critique with the negotiation of the Malabo Protocol, the internationalised trial of Chad's ex-dictator, Hissène Habré, and the plans to establish hybrid tribunals in the Central African Republic and South Sudan.

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 African states' main concerns for building the ICC. From these concerns, it interprets their ICC vision and analyses the contemporary African critique of the ICC in the 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.'<sup>109</sup> 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 re-build 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 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.

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<sup>109</sup> Schabas, *supra* note 5, at 548.