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Nomos and Narrative in International Criminal Justice

Creating the International Criminal Court

Line Engbo Gissel*

Abstract

This article grounds contemporary contestations over the International Criminal Court (ICC) in the constitutive moment of the 1990s, when the Court was a global idea that took shape around a set of key concepts and related understandings of world order. It studies the positions communicated by 129 states during the negotiations of ICC establishment, applying Robert Cover's narrative law and its pluralist notion of legal meaning to a systematic content analysis. Contrary to the founding 'epic' of ICC creation, which centres on the Like-Minded Group and its Others, the analysis identifies two competing and coherent visions for the ICC: A compulsory and a consensual vision. Both aim to build an effective and independent Court but understand these terms differently and consequently envisage different ICC regimes. The consensual vision has rarely been analysed, but is typically portrayed as the scattered ideas of an undecided majority. Given the Court's profound lack of universality, however, it is useful to revisit the ideas that animated a larger share of international society.

1. Introduction

In a plural world society, international courts are imbued with diverse, complementary, and conflicting meanings. These meanings shape and constrain policy making, giving rise to a situation where a majority of countries – but only a minority of the world's population – are subject to the International Criminal Court (ICC). The lack of universal participation may be brushed aside as the regrettable consequence of the Court's progressivism. Indeed, one of the persistent tropes in the field of international criminal justice is the tension between conservatism and progressivism, statism and cosmopolitanism, nationalism and supra-nationalism, 'Apology' and 'Utopia'.[1] This 'inescapable

* Line Engbo Gissel, Associate Professor at Roskilde University and principal investigator of a research project on the standardisation of transitional justice, funded by the Danish Independent Research Fund (grant no. 1028-00206B). My thanks to Birju Kotecha and Daley J. Birkett for valuable inputs and to the *JICJ* reviewers for useful comments. All errors remain my own. [lgissel@ruc.dk]

[1] P. McAuliffe, 'From Watchdog to Workhorse: Explaining the Emergence of the ICC's Burden-Sharing Policy as an Example of Creeping Cosmopolitanism', 13 *Chinese Journal of International Law* (2014) 259–296; D. Robinson,

dyad' structures discourse, making the ICC perennially open to criticism for being either too aligned with or too distanced from state interests.[2] For instance, African states have questioned the Court's legitimacy and equality before the law due to the 'patterns of only pursuing African cases' and its closeness to the UN Security Council.[3] Whilst the US Trump administration, opposing multilateral overreach, have portrayed the Court as 'ineffective, unaccountable, and, indeed, outright dangerous'.[4] Amidst such conservative-statist charges from both weak and strong states, however, judicial policymaking has taken the Court further in a progressive-cosmopolitan direction.[5] It is a process of court-building that does not require renegotiation of the Rome Statute and engagement with statist others. Yet, it reflects the deeper structural narrative about ICC establishment, its founding 'epic'.

This article grounds familiar contestations and the progressive/conservative trope in the constitutive moment of the 1990s, when the ICC was a global idea that took shape around a set of key concepts and founding narratives. Establishing the ICC was 'a high act of international creativity'.[6] A captivating yet loose idea was fleshed out, becoming many possibilities; alternative provisions and details were negotiated, their implications evaluated. Some ideas lost, while others won. Later, the Rome Statute's entry into force turned ideas into a fully-fledged organisation. The article asks, which ideas and understandings of the prospective ICC did states communicate when negotiating its existence? Which narratives informed their understandings? And which normative universe gave meaning to their ideas and narratives? To understand the visions that shaped ICC establishment, the article mobilises Robert Cover's narrative law.[7] His notion of 'jurisgenesis' is apt for the task because it denotes the creation of legal meaning. Meaning gives law a depth of vision, often in narrative form. It articulates the 'nomos', a social order's normative universe of right and wrong, valid and void. These theoretical concepts are used to analyse the discussions on establishing

'Inescapable Dyads: Why the International Criminal Court Cannot Win', 28 *Leiden Journal of International Law* (2015) 323–47.

[2] Robinson, *supra* note 1.

[3] AU Assembly, 'Withdrawal Strategy Document', Draft 2, 2017; see also P. Brett and L.E. Gissel, *Africa and the Backlash Against International Courts* (Zed Books, 2020).

[4] J. Bolton, speech to the Federalist Society, Washington, DC, 10 September 2018, *Just Security*, available online at https://www.justsecurity.org/60674/national-security-adviser-john-bolton-remarks-international-criminal-court/ (visited 20 May 2021).

[5] M.H. Arsanjani and W.M. Reisman, 'The Law-in-Action of the International Criminal Court', 99 *American Journal of International Law* (*AJIL*) (2005) 385–403; McAuliffe, *supra* note 1; W.A. Schabas, 'Prosecutorial Discretion v. Judicial Activism at the International Criminal Court', 6 *Journal of International Criminal Justice* (2008) 731–61; J. Wessel, 'Judicial Policy-Making at the International Criminal Court: An Institutional Guide to Analyzing International Adjudication', 44 *Columbia Journal of Transnational Law* (2006) 377–452.

[6] F. Benedetti and J.L. Washburn, 'Drafting the International Criminal Court Treaty: Two Years to Rome and an Afterword on the Rome Diplomatic Conference', 5 *Global Governance* (1999) 1-37, at 2.

[7] R. Cover, 'The Supreme Court, 1982 Term—Foreword: Nomos and Narrative', 97 *Harvard Law Review* (1983) 4–68.

an ICC in the General Assembly's committee on international law, the Sixth Committee. This committee was the 'scene of the main General Assembly debate' and the forum that 'created and supervised directly and exclusively' the negotiations in the Ad Hoc and Preparatory Committees.[8] Enabled by the summaries of all statements in this General Assembly committee, the article provides an interpretive analysis of states' meanings, narratives, and visions for the prospective Court.

The article argues that ICC establishment was marked by two competing visions for the ICC. Each vision referred to a 'nomos', a normative universe of right and wrong, valid and void, in international order. The 'epic' of ICC creation centres around the negotiation, or struggle, between these two visions; it is a story about the work of a progressive 'like-minded' minority to persuade the 'undecided voters' with 'no coherent policy' for an ICC. In fact, it is not clear if there ever were many undecided 'residual' states. To make this argument, the article revisits the dominant Like-Minded Group narrative of ICC creation in the light of findings from the systematic analysis of statements by 129 states debating ICC establishment in the Sixth Committee. By understanding how states in the 1990s envisaged an ICC, it is possible to reflect more deeply about the Court's contemporary relationship with states parties and non-states parties in plural world society.

2. The Creation of Legal Meaning: Narrative and Jurisgenesis

For Cover, legal institutions and prescriptions do not exist apart from the narratives that locate them and give them meaning.[9] With narratives, law becomes a shared world rather than 'merely a system of rules to be observed'.[10] Cover's notion of 'jurisgenerative' agency is a useful theoretical starting point for the empirical analysis of a particular, creative moment in the history of international justice. 'Jurisgenesis' denotes the creation of legal meaning, a process that is performed continuously and, potentially, by all social groups, communities and polities.[11] Legal meaning reflects a group's normative universe of right and wrong, lawful and unlawful, valid and void – its 'nomos'. Legal meaning-making is therefore not only the prerogative of judges and courts, although these institutions imbue their meanings with formal politico-legal authority. When judges rule, they seek to enforce established norms and narratives against the rival visions that inevitably develop among social groups. Over time, jurisprudence and its alternative interpretations change because inherently contentious societies and social groups change their legal meanings. Jurisgenesis is thus an ongoing process. For instance, the meaning of *jus cogens* in international law is not fixed by Article 53 of the

[8] Benedetti and Washburn, *supra* note 6, at 4.
[9] Cover, *supra* note 7, at 4.
[10] Cover, *supra* note 7, at 5.
[11] Cover, *supra* note 7, at 11.

Vienna Convention on the Law of Treaties, but 'is constantly reinterpreted over the years. Norms with a character of *jus cogens* develop and change, and it is a community of international lawyers that shares a certain meaning of *jus cogens* at a certain moment in time.'[12]

A community's nomos gives rise to the narratives that locate and furnish law with meaning. Thus, '[f]or every constitution there is an epic', a framing that gives it meaning.[13] This meaning gives law a depth of vision, making it a 'bridge' or a 'system of tension' that links an actual world with an imagined future: Rules, precepts and principles are developed in the effort to move from a reality to that future.[14] For example, for the epistemic community of international justice, narratives of deterrence and norm internalisation make the Rome Statute meaningful as a link between a world of 'unimaginable atrocities' and an imagined future of peace and security. Legal texts change meaning every time communities make new epics relevant to them; when these texts are unable to assimilate the meanings of new constitutive narratives, the texts themselves are changed, constitutions are amended. Alternatively, communities formulate competing prescriptions to match competing narratives: 'secessionist prescriptive texts', declarations of independence.[15]

In ICL, scholars study narratives and often assume that they inhere or originate in statutes and decisions. Barrie Sander argues that narrative authority in ICL is dispersed and contested in and around international criminal courts, and analyses them in judgements.[16] To Kerstin Carlson, the International Military Tribunal in Nuremberg established a foundational progress narrative to transcend the problem that Nazi crimes emerged not from lawlessness, but from 'a strict and terrible law*ful*ness'.[17] Allowing progress to justify violations of the principle of legality, ICL has become structurally and functionally illiberal[18] and therefore at times 'unpredictable, illegible, and/or unfair'.[19] Similarly, Gerry Simpson suggests that the development of the field is constituted by a narrative of 'unprecedentedness', which provokes 'an absence of restraint – a requirement that the

[12] J. Otten, 'Narratives in International Law', 99 *Kritische Vierteljahresschrift Für Gesetzgebung Und Rechtswisssenschaft / Critical Quarterly for Legislation and Law / Revue Critique Trimestrielle de Jurisprudence et de Législation* (2016) 187-216, at 190.
[13] Cover, *supra* note 7, at 4.
[14] Cover, *supra* note 7, at 9; see also R.M. Cover, 'Violence and the Word', 95 *The Yale Law Journal* (1986) 1601-1629, at 1604.
[15] Cover, *supra* note 7, at 5 note 4.
[16] B. Sander, 'The Method Is the Message: Law, Narrative Authority and Historical Contestation in International Criminal Courts', 19 *Melbourne Journal of International Law* 19 (2018) 299–334.
[17] K.B. Carlson, *Model(Ing) Justice: Perfecting the Promise of International Criminal Law* (Cambridge University Press, 2018), at 19, emphasis in original.
[18] *Ibid*., at 7.
[19] K.B. Carlson, 'International Criminal Law and Its Paradoxes: Implications for Institutions and Practice', 5 *Journal of Law and Courts* (2017) 33–53, at 49.

existing order be abolished'.[20] As the narrative provided a 'juridical and political ground for the invention of the field and its various novel doctrines', it rejected 'the need for the old limitations'.[21] At the same time, however, ICL involves a search for precursors, precedents.[22]

Cover's narrative law reaches beyond constitutions and judicial decisions to interpret the normative social orders that inspire, legitimise or contest them and which the decisions, in turn, reinforce or undermine. But can it be applied to international society? Richard Mullender argues that Cover 'plainly intend[ed]' his theory to have 'broad application', although as a constitutional lawyer he often used US constitutional law to illustrate particular points.[23] These points were not particular to US society or even to national social orders; indeed, he examined the way 'any community contains within it multiple communities of normative meaning'.[24] And he theorised law, legal interpretation, and legal meaning per se, formulated in general propositions: 'Law is the projection of an imagined future upon reality'.[25] Applying Cover's theory to international society is useful because it enables the analysis of international law as plural and indeterminate by providing conceptual tools with which to investigate competing visions of international law.[26] They allow for the possibility that different states and groups of states have different visions for the ICC. Moreover, the article reads jurisgenesis linguistically, approaching meaning-making as relationships between 'signs.' Following Saussure, language is understood a system within which signifiers derive their meaning from their relationship to other signifiers, rather than from any inherent connotation.[27] The meaning of a word thus relates to the meanings of other words within the utterance, the conversation, and the wider discourse. Accordingly, objects of inter-state negotiation may have different meanings in different communities. Although Singaporean, South African and Spanish diplomats used the same signifier, e.g., 'complementarity', it is not assumed *a priori* that they attached the same meaning to it. Indeed, research suggests that negotiators in the 1990s understood complementarity differently than ICC prosecutors and judges in the 2000s.[28] To foreground the level of meaning, the analysis of states' visions for the ICC relied on the qualitative coding of their statements in the General Assembly.

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[20] G. Simpson, 'Unprecedents', in I. Tallgren and T. Skouteris (eds), *The New Histories of International Criminal Law: Retrials* (Oxford University Press, 2019) 12–29, at 13–14.
[21] *Ibid*., at 13–14.
[22] *Ibid*., at 15–16.
[23] R. Mullender, 'Two Nomoi and a Clash of Narratives: The Story of the United Kingdom and the European Union,' *Issues in Legal Scholarship*, Article 3 (2006) 1-61, at 3. Cover, *supra* note 14, illustrates with criminal law.
[24] K.L. Scheppele, 'Legal Theory and Social Theory', 20 *Annual Review of Sociology* (1994) 383-406, at 397.
[25] Cover, *supra* note 14, at 1604.
[26] See also Mullender, *supra* note 23.
[27] F. de Saussure and J. Culler, *Course in General Linguistics* (rev. ed.) (Peter Owen, 1974).
[28] Arsanjani and Reisman, *supra* note 5; A.K.A Greenawalt, 'Complementarity in Crisis: Uganda, Alternative Justice, and the International Criminal Court', 50 *Virginia Journal of International Law* (2009) 107-162, at 107.

3. Data and Method of Analysis

International deliberation on an ICC took place in the UN General Assembly's committee for international law (the Sixth Committee) and in four designated negotiation forums organised 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-Conference Preparatory Commission. The negotiations in the four designated forums were not minuted and therefore cannot be systematically analysed.[29] Emic accounts rarely focus on African, Asian or Middle Eastern concerns and therefore do not provide a global perspective.[30] The negotiations were, however, formally discussed in the General Assembly's Sixth Committee, which provides summary minutes and thereby enables systematic research.[31] In 1993 and 1994, the Sixth Committee discussed the creation of an ICC during their debate of the work of the International Law Commission (ILC), which had been tasked with developing a draft statute.[32] Between 1995 and 2002, the Sixth Committee discussed the creation of the ICC under a designated agenda item, 'The Establishment of the International Criminal Court'.[33] To inform these discussions, the chairpersons of the Ad Hoc and Preparatory Committees and the Preparatory Commission provided accounts of their work and outstanding issues.

The article analyses statements on ICC establishment given in the Sixth Committee between 1993 and 1998. 1993 marks the time at which the ILC shared its preliminary draft statute with governments, while the 1998 session took place after states had adopted the ICC statute at the Rome Conference. The 1998 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: it was subject to different and divergent state interests and ideas but did not have agency and interests of its own. State positions related to the ICC as an idea, not to how it implemented its mandate and carried out justice.

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[29] Summary records of some discussions in the Committee of the Whole at the 1998 Rome Conference exist, but not of the negotiations in the ten working groups.

[30] J. Crawford, 'The ILC Adopts a Statute for an International Criminal Court', 89 *AJIL* (1995) 404–416; C.K. Hall, 'The First Two Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court', 91 *AJIL* (1997) 177–187; J. Washburn, 'The Negotiation of the Rome Statute for International Criminal Court and International Lawmaking in the 21st Century', 11 *Pace International Law Review* (1999) 361-377. But see S. Maqungo, 'The Establishment of the International Criminal Court: SADC's Participation in the Negotiations', 9 *African Security Review* (2000) n.p.

[31] See also N. Deitelhoff, 'The Discursive Process of Legalization: Charting Islands of Persuasion in the ICC Case', 63 *International Organization* (2009) 33-65, at 48.

[32] Agenda items 143 and 137, respectively.

[33] This agenda item was pursuant to GA Res 49/53 (9 December 1994).

Data for the analysis is all statements by states in the General Assembly's Sixth Committee between 1993 and 1998 in relation to the ICC agenda item, as documented in the summary records. These records contain the views of the state representatives who spoke during the Committee meetings, but do not provide verbatim transcription. The material contains a total of 452 statements by 129 countries between 1993 and 1998.[34] It is a conservative count; where states issued collective statements (in the Caribbean Community, Rio Group, European Community/Union, and the groups of Nordic and Pacific countries, respectively) these statements are attributed only to the representative state. The data was triangulated with emic accounts and written comments by states submitted to the ILC.

The data was analysed using *NVivo12*, a software application for systematic, qualitative data analysis. The analysis adopted a semi-inductive, axial coding strategy with four levels of analysis. Firstly, the summary statements were organised by country and regional UN group to enable matrix queries combining topics and countries. Second, an open, inductive coding of all the data identified topics, issues, and values. Third, the analysis organised the codes into meaningful hierarchies, typically generating new codes at a higher level of abstraction.[35] This coding was semi-inductive, informed by existing literature on the negotiations and interpretations of the Rome Statute.[36] Lastly, the codes were analysed to identify the meaning, convergence, variation and frequency of positions.[37]

4. Negotiations on the Establishment of an ICC

States have collectively discussed the idea of an ICC since at least 1920, when the question was posed to League of Nations in the context of establishing the Permanent International Court of Justice.[38] The concrete negotiations that led to the ICC began in 1993, when the ILC submitted a preliminary draft statute to the General Assembly and launched an informal negotiation on ICC establishment. The ILC received this mandate from the General Assembly in 1948, when, in the context of adopting the Genocide Convention, it asked the Commission to 'study the desirability and possibility of

[34] Points of order which protest views by another state (e.g. Greece and Macedonia; Israel and Syria; Kuwait and Iraq) were excluded.
[35] The second and third levels of coding of African statements extended the coding for an earlier article, L.E. Gissel, 'A Different Kind of Court: Africa's Support for the International Criminal Court, 1993–2003', 29 *European Journal of International Law* (2018) 725–748.
[36] See literature used below and in, e.g., P. Brett and L.E. Gissel, 'Explaining African Participation in International Courts', 117 *African Affairs* (2018) 195–216; P. Brett and L.E. Gissel, *supra* note 3; L.E. Gissel, *supra* note 35.
[37] Coding lists are available upon request.
[38] M.A. Caloyanni, 'An International Criminal Court," 14 *Transactions of the Grotius Society* (1928): 69–85; S.A. Williams, 'The Rome Statute on the International Criminal Court - Universal Jurisdiction or State Consent - To Make or Break the Package Deal', 75 *International Law Studies* (1999) 539–561.

establishing an international judicial organ for the trial of persons charged with genocide or other [international] crimes.'[39] This work, on a Draft Code of Crimes against the Peace and Security of Mankind, was suspended by the General Assembly in 1954 due to major powers' unwillingness to codify the crime of aggression. Towards the end of the Cold War, however, the General Assembly reactivated this work and in 1992 tasked the ILC with 'undertaking the project for the elaboration of a draft statute for an international criminal court as a matter of priority as from its next session'.[40] The ILC draft was modified in 1994 in order to meet 'the political concerns of some of the world's major powers' and it decoupled the establishment of an ICC from work on the Draft Code of Crimes.[41] Around the same time, the UN Security Council established a commission of experts to investigate war crimes in the former Yugoslavia and subsequently created the International Criminal Tribunals for the Former Yugoslavia and Rwanda. Although they existed independently of the ILC, the ad hoc tribunals formed the backdrop to the project of ICC creation, signifying renewed political will.

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. The Ad Hoc Committee met twice in 1995 at the UN in New York; the Preparatory Committee met six times between 1996 and 1998, also in New York; the Rome Conference of June-July 1998 culminated in the formal adoption of the Rome Statute; and the 1999-2002 Preparatory Commission dealt with outstanding matters. In addition, inter-sessional drafting meetings took place in The Netherlands and Italy.[42] 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.[43] As such, negotiations centred on states' views on various important aspects of the prospective court. Among the issues tackled were the composition of the court, due process, the crimes, the relationship of non-states parties to the court, and jurisdiction. Complementarity and the role of the Security Council were discussed from the Ad Hoc Committee through to the Rome Conference.[44] Each negotiation session reported on its work to the General Assembly's Sixth Committee, the members of which were typically legal advisers from government missions to the UN. In this Committee, states could 'refine and explain positions that

[39] GA Res 260 B (III), 9 December 1948, para. 3.
[40] GA Res 47/33, 25 November 1992, para. 6.
[41] M.C. Bassiouni and W.A. Schabas, eds., *The Legislative History of the International Criminal Court* Vol. 1, 2nd ed. (Brill Nijhoff, 2016), at 70; see also J. Crawford, 'The ILC's Draft Statute for an International Criminal Tribunal', 88 *AJIL* (1994) 140-152, at 141.
[42] Additional regional meetings complemented the global meetings.
[43] F. Benedetti, K. Bonneau, and J. Washburn, *Negotiating the International Criminal Court: New York to Rome, 1994-1998* (Brill, 2013), at 28.
[44] *Ibid*., at 29; Hall, *supra* note 30.

they had taken in the preceding negotiations and give their views on the direction of the next round of negotiations'.[45] There was thus a dynamic relationship between the Sixth Committee debates and the negotiations.

5. Participation

The Sixth Committee discussions enjoyed global participation, although not all states took part. Around two-thirds of states in the large African and Asia-Pacific Groups participated in the discussions, while participation was higher for states in the groups of Eastern European and Western states. The lower participation figure for Latin American and Caribbean states owes to the collective statements issued by the Caribbean Community and the Rio Group, which are only counted once. European Community members and Nordic countries also issued joint statements, but often added national viewpoints. State participation remained fairly stable, peaking in 1996. With most governments issuing one statement per General Assembly session, the number of statements went from 69 during the 48th session (1993) to 82 in the 51st session (1996) and then down to respectively 76 and 73 in 1997 and 1998. Table 1 provides an overview of participation organised regionally due to the large number of states.

[45] Benedetti, Bonneau, and Washburn, *supra* note 43, at 19.

Table 1. Regional Participation in ICC Discussions in the General Assembly, 1993-1998

UN Regions (*N* states)	**Participating States** (%)	**Statements**			**Active* (State Parties are *Italicised***)**
		N	**Average**	**Median**	
Africa (53)	33 (62%)	96	3	3	Algeria, Cameroon, Egypt, *Ghana*, *Lesotho*, *Malawi*, *Nigeria*, *Senegal*, *South Africa*, Sudan, *Tanzania*.
Asia and Pacific (50)	32 (64%)	104	3,3	2,5	*Bangladesh*, China, India, Indonesia, Iran, *Japan*, Korea, Lebanon, Malaysia, Pakistan, Singapore.
Eastern Europe (21)	19 (90%)	67	3,5	4	Belarus, *Czech Republic*, *Hungary*, *Poland*, Russia, Ukraine.
Latin America and Caribbean (33)	19 (58%)	60	3,2	3	*Argentina*, *Brazil*, *Chile*, *Mexico*, Nicaragua, *Trinidad & Tobago*, *Uruguay*, *Venezuela*.
Western Europe and Others (29)	26 (90%)	125	4,8	5	*Australia*, *Austria*, *Canada*, *France*, *Germany*, *Greece*, *Ireland*, *Italy*, *Netherlands*, *New Zealand*, *Norway*, *UK*, USA.
All (186)	129 (69%)	452	3,6		

*Notes: The number in the first column represents the average number of members between 1993-1998. Although joining the UN in 2002, Switzerland participated as an observer and is included. Turkey and the US are included in WEOG. *) Active participation is interpreted as giving more statements than the regional average. **) State Parties are those registered as such in June 2021. Sources: Regional groups:* un.org/dgacm/en/content/regional-groups*. UN membership 1993-1998:* un.org/en/about-us/growth-in-un-membership*. ICC membership 2021:* asp.icc-cpi.int*. All numbers are calculated by the author.*

As indicated in Table 1, states that have so far decided to not ratify the Rome Statute, including large and/or powerful states such as China, India, Indonesia, Iran, Malaysia, Pakistan, Russia, and USA, participated actively to influence the design of the Court. Other states participated surprisingly little. Armenia participated only once, in 1998, although its constitutive 'epic' involves failed justice for the Armenian genocide.[46] Turkey also contributed once during the period, although it co-sponsored various resolutions. Rwanda and Bosnia and Herzegovina, respectively, which had actual experience of international criminal justice, also made one statement each, in 1995 and 1996, respectively.

6. Jurisgenesis in ICC Creation

What was the legal meaning created by states when debating and founding the ICC? And which narratives informed their understandings? Almost all 129 states expressed a wish to create an 'independent' and 'effective' court, yet they envisaged different kinds of courts as the terms signified different things to different participants. For some states, the Court would be effective if it had a strong jurisdictional basis, such as automatic, inherent, or compulsory jurisdiction, and an independent prosecutor. For other states, however, effectiveness derived from the statute's universality and the Court's global coverage. Here, effectiveness was linked to a more consensual jurisdiction, as compulsory jurisdiction would prevent global ratification. To Romania, for example, 'wide acceptance of the convention… was a prerequisite for the court's effectiveness and normal functioning'.[47] Effectiveness, however, was just one of many values associated with the prospective Court. The analysis of the Sixth Committee debate has identified two overriding visions of the Court. To understand the significance of this finding, it is necessary to take point of departure in the conventional 'epic' that gives meaning to Rome Statute creation. As Cover argues, as we saw, every constitution has an epic: a story about the actions of great men and women in the history of a country which gives meaning to the constitution. The narrative of ICC creation in the history of international society centres on the so-called Like-Minded Group.

A. The Like-minded Group Narrative

Accounts of court establishment are dominated by the narrative of the Like-Minded Group (LMG) about a small group of middle-income powers (incl. Canada, Argentina, Australia and Germany) with

[46] V. Avedian, *Knowledge and Acknowledgement in the Politics of Memory of the Armenian Genocide* (Routledge, 2019); A. Demirdjian, ed., *The Armenian Genocide Legacy* (Palgrave Macmillan, 2016).
[47] Romania in A/C.6/49/SR.20, 1994.

a 'clear general vision of the strong, independent international criminal court they wanted'.[48] They formed a group, acted as a uniform caucus, and undertook concentrated efforts to win majority support for their positions: a court free from Security Council influence and with an independent prosecutor, inherent jurisdiction over all core crimes, the power to decide on the unavailability or unwillingness of national systems, and commanding the full cooperation of states.[49] The LMG aimed to create a permanent ICC as soon as possible, realising that 'if not seized, this opportunity could vanish for another fifty years'.[50] Soon EU states (except the UK and France) joined the group, which then gradually won the support of numerous developing countries.[51] The five permanent members of the UN Security Council (the 'P5') opposed the LMG vision. At the Rome conference, the LMG grew to 40 then 60 members. It was a turning point when the UK joined the LMG, as it then left the P5 negotiation bloc; later France did too. The LMG was the only group with an operational strategy, it prepared carefully for all key meetings, and organised issue-based sub-groups, meetings, and briefings for smaller delegations.[52] The efforts paid off; the Court reflects the LMG vision, although some concessions were given along the way. 'By all accounts' the LMG was 'among the driving forces behind the successful outcome' of the Rome Conference.[53] 'The secret to this group's success… was to gain the support of the undecided voters, ie the large number of developing States and former Soviet republics which pursued no particular policy and decided to join no particular group during the negotiations'.[54]

The narrative entails three constituencies: the LMG, the P5, and the rest: developing and post-Soviet states with 'no particular policy', the 'undecided' majority.[55] Most states in the third category, we are told, 'had no coherent position', supporting the LMG positions on one issue and the P5 position on another.[56] This tripartite structure has informed previous empirical analysis, where statements are coded as like-minded, P5, and 'U' for 'undecided/others'.[57] But were the majority of

[48] Benedetti and Washburn, *supra* note 6, at 18. See also W.A. Schabas, *An Introduction to the International Criminal Court* (Cambridge University Press, 2001).
[49] Benedetti and Washburn, *supra* note 6, at 21.
[50] *Ibid*., at 20.
[51] R. Steinke, *The Politics of International Criminal Justice: German Perspectives from Nuremberg to The Hague* (Hart Publishing, 2012), at 101–2; see also M.L.P. Groenleer and L.G. Van Schaik, 'United We Stand? The European Union's International Actorness in the Cases of the International Criminal Court and the Kyoto Protocol', 45 *Journal of Common Market Studies* (2007) 969-998, at 977.
[52] Benedetti and Washburn, *supra* note 6, at 30.
[53] Bassiouni and Schabas, *supra* note 47, at 82.
[54] Steinke, *supra* note 51, at 105.
[55] Steinke, *supra* note 51, at 105.
[56] Deitelhoff, *supra* note 31, at 50.
[57] *Ibid*., at 48.

states in fact 'undecided voters' with 'no particular policy'? Casting this residual category in opposition to the 'like-minded' implies that states had scattered and heterogeneous views. The present analysis demonstrates, however, that the ICC vision of the 'the rest' was far from undecided and incoherent. In fact, although they were likely less well resourced, coordinated, and determined than the LMG, many states held similar positions and strongly supported a particular regime, although this was a different regime. The remainder of the article explores the kind of ICC envisaged globally, not just by the LMG or the P5.

In the six-year process of discussing the prospective Court, the 129 states covered many issues, which each involved questions and dilemmas: how to formally constitute the Court, which crimes to cover, how to accept jurisdiction, how much consent is needed, which role for the Security Council, how to ensure adherence to the principle of legality, how to protect due process rights, and so on. In the process of moving forward from a loose idea – a court as a 'direct and straightforward response, conceived and promoted at the UN, to obvious and horrible crimes'[58] – to a proposal for a concrete and operationalizable organisation, the debate became less straightforward: states had different visions for an ICC. These visions saw courts that differed in their fundamental features, such as the position to national justice systems, the type of jurisdiction, the role of sovereignty and consent, and the notion of complementarity. The remainder of the article examines each issue in turn.

7. The Court and National Justice Systems

The structural relationship between the Court and national systems was fundamental to the kind of court the ICC would become. The central question 'during all stages of the debate'[59] was whether in an international order formally based on state sovereignty, how much and which form of consent by states was required for them to have accepted the jurisdiction of the court. Would the ICC have automatic jurisdiction over crimes or would state consent be a precondition, and, if so, 'for which crimes, on what basis, and by which State or States?'[60] The 1993 ILC draft (Art. 23) proposed three alternative kinds of acceptance of jurisdiction, where option A required opting in to jurisdiction by declaration along the model of the International Court of Justice (ICJ).[61] Here jurisdiction is not conferred automatically on the Court by the fact of becoming a state party, since a special declaration is needed to that effect. Options B and C provided in different ways for a system whereby a state, by

[58] Benedetti and Washburn, *supra* note 6, at 23.
[59] Williams, *supra* note 38, at 540.
[60] *Ibid*., at 540.
[61] Crawford, *supra* note 41, at 144.; *Yearbook of the International Law Commission 1993*, vol. II, part 2, UN Doc. A/CN.4/SER.A/1993/Add.1 (Part 2), at 107-108.

becoming party to the statute, would automatically confer jurisdiction to the Court over its listed crimes, while also having a right to exclude some crimes from jurisdiction. The 1994 ILC draft provided a version of alternative A, proposing a court not with inherent jurisdiction based on ratification, but requiring a declaration of acceptance of jurisdiction.[62] Put simply, the debate was between voluntary and a form of compulsory jurisdiction.[63] Five years later, the Rome Statute provided for a compulsory regime, but this outcome was far from given.

States wrestled with the question of jurisdiction, conceptualising up to nine different shades or types of jurisdiction for the court: limited, consensual, concurrent, optional, supplementary, complementary, inherent, automatic, compulsory, and universal jurisdiction. Some of these overlapped and others were minimally elaborated; however, they can be understood as articulating the contours of two different visions for the ICC: a consensual vision and a compulsory vision.

A. The Consensual Vision

The consensual vision saw a court relying on state consent and relating horizontally to national justice systems. The Court was understood within the 'traditional *consensual paradigm*, in which express and specific consent is a prerequisite to jurisdiction and adjudication largely takes place with the assent and cooperation of both parties'.[64] The Court's role was to '[fill] lacunae in national systems rather than overriding them', a 'means of supplementing rather than superseding national jurisdictions'.[65] Defined negatively, the court would not 'supplant',[66] 'substitute',[67] 'displace',[68] 'replace or override'[69] national justice systems and was 'not…a supranational body'.[70] Its jurisdiction was described as 'non-automatic', concurrent, complementary, supplementary, and voluntary. For instance, the Philippines argued that the Court's jurisdiction should be 'essentially voluntary and concurrent with that of national courts'.[71]

This vision was advocated by many Asian and African states, some Eastern European and Latin American states, but also P5 states. They wanted to safeguard the primacy of national prosecution and found the proposed inherent jurisdiction incompatible with both state sovereignty

[62] Williams, *supra* note 38, at 542.
[63] C.P.R. Romano, 'The Shift from the Consensual to the Compulsory Paradigm in International Adjudication: Elements for a Theory of Consent', 39 *New York University Journal of International Law and Politics* (2007) 791-872, at 872.
[64] *Ibid*., at 794, emphasis in original.
[65] Indonesia in A/C.6/49/SR.23 1994; see also Singapore in A/C.6/48/SR.21, 1993.
[66] Ghana in A/C.6/50/SR.28, 1995.
[67] Bulgaria in A/C.6/51/SR.29, 1996; Mexico in A/C.6/50/SR.28, 1995.
[68] Nigeria in A/C.6/50/SR.29, 1995.
[69] China in A/C.6/49/SR.18, 1994.
[70] Iran in A/C.6/50/SR.29, 1995.
[71] Philippines in A/C.6/48/SR.18, 1993.

and the idea of complementarity. The Court 'should not have general compulsory criminal jurisdiction, and its jurisdiction should be concurrent with or mutually complementary to national courts'.[72] The contours of this vision were first formulated in response to the ILC's 1993 draft, where consensual states typically preferred Art. 23 option A of the 1993 draft 'which better reflected the consensual basis on which the court's jurisdiction was founded'.[73] They found the 1994 provisions acceptable as statute ratification did not automatically imply acceptance of jurisdiction.[74] As India stated,

> The draft statute had followed a balanced and careful approach and, by focusing on national criminal jurisdiction and requiring the consent of the States actually concerned with the alleged crime, had given priority to the establishment of an international criminal jurisdiction in principle only, leaving the prosecution of the case to the State's own consent regime.[75]

This vision was of a consent-based court and its voluntary jurisdiction was akin to that of the ICJ. 'Consent of States should be the basis for the exercise of jurisdiction by the court. No State should be bound without its consent, including the State or States of which the accused was a national and the State or States in which the alleged crime had been committed'.[76]

Concurrent jurisdiction was legitimised with reference to either the safeguarding of sovereignty (discussed below) or the concern for universality. It was argued that 'optional acceptance by States of the Court's jurisdiction would facilitate the acceptance of the Statute by a larger number of States, which was the main and most important condition to be satisfied'.[77] In fact, these states saw a trade-off between jurisdiction and court universality, where universal ratification was inversely related to automatic, inherent or universal jurisdiction.[78]

B. The Compulsory Vision

[72] China A/C.6/48/SR.19, 1993.
[73] Morocco in A/C.6/48/SR.21, 1993; see also Romania in the same records.
[74] The 1994 draft had inherent jurisdiction over genocide for states parties to the Genocide Convention. Some states in the consensual camp opposed this provision.
[75] India in A/C.6/49/SR.19, 1994.
[76] Indonesia in A/C.6/49/SR.23, 1994.
[77] Japan in A/C.6/48/SR.17, 1993.
[78] Japan, Belarus, Israel, Singapore, Thailand, China, Uganda, India. This trade-off was also articulated by adherents of the alternative vision, such as Canada and Spain.

The alternative vision saw a court with compulsory jurisdiction combined with complementarity provisions that gave states the primacy of prosecution unless they were unable or unwilling. The notion of jurisdiction was described as automatic, inherent, compulsory, preferential, or universal.[79] The vision articulated a '*compulsory paradigm*, in which consent is largely formulaic either because it is implicit in the ratification of treaties… or because it is jurisprudentially bypassed and litigation is often undertaken unilaterally'.[80] It was promoted by states – including, but not limited to, the LMG – which felt that sovereignty was sufficiently protected or 'shielded' by the complementarity principle.

The nature of the compulsory jurisdiction developed gradually from an early focus on inherent jurisdiction for genocide combined with optional jurisdiction for other crimes. In 1993, they favoured option B, where jurisdiction for other crimes was automatically transferred to the Court upon ratification, unless states opted out. Accordingly, they found the 1994 draft 'excessively restrictive'[81], 'a retrograde step'[82], and 'would have welcomed a less modest approach and a court with compulsory and exclusive jurisdiction'.[83] An 'excessive reduction of jurisdiction by the sum of individual States' [opting out] declarations should be avoided'.[84] To Algeria, the court's 'preferential jurisdiction' was 'dependent solely on the good will of States' and this 'called into question [the very usefulness of an international criminal court]'.[85] Senegal agreed: ICL 'could not be entirely subordinate to the consent of States: it was also subject to the requirements of international public order'. Greece argued that not opting in might even 'be tantamount to a reservation eliminating a rule of *jus cogens*'[86].

To create a simpler system, these states began to advocate inherent jurisdiction over a small number of core crimes ('limited jurisdiction'). As Greece argued '[f]rom a legal perspective, there was no reason to differentiate among the crimes constituting the hard core of criminality; the court should have inherent jurisdiction over all the crimes identified in the statute.'[87] Argentina agreed, advocating an automatic acceptance of jurisdiction upon ratification.[88] Denmark argued that by reducing the number of crimes, it would be more 'acceptable' for states to allow the court to decide

[79] Confusingly, Sweden advocated the compulsory vision but termed the prospective Court's jurisdiction 'concurrent'.
[80] Romano, *supra* note 63, at 794-795, emphasis in original.
[81] Germany in A/C.6/49/SR.17, 1994; Italy in A/C.6/49/SR.17, 1994.
[82] Netherlands in A/C.6/49/SR.18, 1994.
[83] Cyprus in A/C.6/49/SR.16, 1994.
[84] Italy in A/C.6/49/SR.17, 1994.
[85] Written comments by Algeria, A/CN.4/458 and Add1-8, 1994, at 25.
[86] Greece in A/C.6/49/SR.17.
[87] Greece in A/C.6/50/SR.26, 1995.
[88] Argentina in A/C.6/50/SR.30, 1995.

on complementarity.[89] In the compulsory vision, limited jurisdiction combined with complementarity was going to be the 'basis for the court's inherent jurisdiction'.[90] Later, this became the Statute's automatic jurisdiction over core crimes granted upon statute ratification.

These states did not see a prospective court moulded on the ICJ. The European states in the group had different experiences. In the aftermath of World War II, they had 'fundamentally broken with the hitherto prevailing consensual paradigm' when establishing the European Court of Justice with compulsory jurisdiction.[91] And in 1994, a year into the ICC debate, they overhauled their regional human rights regime, adopting Protocol 11 to the European Convention on Human Rights which transformed the system from consensual to fully compulsory. Although a criminal court, they likely saw an ICC more like the European Court of Justice than the ICJ.

Although the LMG narrative is built on the idea of a large 'undecided' majority, it is surprisingly difficult to identify states with either no position or a middle position. A state may have omitted a preference for jurisdiction one year but identified it the following year. Bearing in mind that participating states issued an average of 3,6 statements between 1993-1998, the mode of reading all statements by each state does not identify many states without an idea for an ICC. However, a minority of states 'switched' visions, as it were, replacing their advocacy for one vision with ideas from the other vision. For instance, the Republic of Korea did not express a preference for any of the three 1993 options, was satisfied with the 1994 provisions, and in 1997 articulated a compulsory vision. Romania advanced a consensual vision in 1993 and 1994, but supported inherent jurisdiction expanded beyond the crime of genocide in 1996. There are most changes in Eastern Europe, where several consensual visions were replaced with compulsory ones in 1996-1997. These new preferences may owe to persuasion or pressure by the European Union. Table 2 summarises the jurisdictional preferences of states.

[89] Denmark in A/C.6/50/SR.30, 1995.
[90] Sweden in A/C.6/50/SR.26, 1995; see also statements by Denmark, Hungary and Lichtenstein.
[91] Romano, *supra* note 63, at 809.

Table 2. Positions on Acceptance of Jurisdiction, 1993-1998

	Consensual Jurisdiction	Compulsory Jurisdiction
1994-1998	Bahrain, China, Chile, Ghana, India, Indonesia, Iran, Jamaica, Japan, Kazakhstan, Laos, Malaysia, Mexico, Myanmar, Nepal, Nigeria, Pakistan, Singapore, Sri Lanka, Ukraine, USA.	Argentina, Austria Canada, Costa Rica, Cyprus, Czech Republic, Denmark, Hungary, Ireland, Italy, Kuwait, Kyrgyzstan, Latvia, Lichtenstein, Mongolia, Netherlands, New Zealand, Nicaragua Norway, Poland, Romania, Rwanda Senegal Spain Trinidad and Tobago, Uruguay.
	But with inherent jurisdiction over genocide: Brazil, Slovenia, Philippines, Russia, Venezuela.	
1993 ILC Art. 23 options	**Option A:** Bahrain, Belarus, China, Cameroon, France, Japan, India, Israel, Iran, Malta, Morocco, Romania, Slovenia, Sri Lanka, Sudan, Tunisia, UK, US, Venezuela.	**Option B:** Argentina, Austria, Bangladesh, Bulgaria, Chile, Czech Republic, Egypt, Greece, Guinea, Hungary, Italy, Niger, New Zealand, Switzerland, Poland, Slovakia, Spain, Trinidad and Tobago.
Switching	**From consensual to compulsory vision:** Belarus, Korea, New Zealand, Philippines, Romania.	
	From compulsory to consensual vision: Algeria, Bulgaria.	

Notes: Table compiled by the author. Not all 129 states could be mapped, as some (particularly Eastern European and Caribbean states) did not express a view.

8. Sovereignty and Consent

Sovereignty and sovereign equality are constitutive of the state system as a whole[92] and were reproduced by all states, including those advocating a compulsory vision. Nevertheless, the safeguarding of sovereignty and the importance of state consent were strong and fundamental values in the nomos of the consensual group. Within that group, they were particularly, but not exclusively, emphasised by Asian states. As Vietnam stated, sovereignty and sovereign equality 'were accepted as fundamental principles of international law. Any proposal detrimental to State sovereignty would not be accepted'.[93] Singapore 'wished to make a general point which could not be overemphasized. It was necessary to find a middle ground between the real powers to be conferred on the court and

[92] B.R. Roth, *Sovereign Equality and Moral Disagreement: Premises of a Pluralist International Legal Order* (Oxford University Press, 2011).
[93] Vietnam in A/C.6/52/SR.12, 1997.

respect for the principle of State sovereignty'.[94] Japan elaborated:

> Criminal jurisdiction is an essential part of the sovereignty of a State and each country has developed a criminal justice system of its own, with the Constitution as its prop and stay and with its history and culture for a background… Therefore… the Statute may be flexibly constructed, giving each country the extensive right of choice and room for reservation, with a view to ensuring the effective application of the Statute.[95]

Outside Asia, Algeria argued that 'the court could be effective only with… consent', while Mexico saw a situation where 'the consent of the State would be converted into the driving force of the arrangement'.[96] Romania emphasized the state's 'freedom of choice'.[97]

In line with the consensual paradigm, consent was not only granted at the point of ratification. States had to actively transfer jurisdiction to the court, ideally in relation to each situation or case. ICC proceedings should be initiated 'only when permitted to do so by the States that had created it and when national jurisdiction was exhausted.'[98] As Iran argued, acceptance of jurisdiction 'did not necessarily entail the loss of jurisdiction by domestic courts'.[99] The ICJ served as a model for this notion of consent. Others emphasised 'express consent'.[100] The compulsory states, on the other hand, argued that inherent jurisdiction was not inconsistent with complementarity, sovereignty, and consent.[101] They did not neglect the role of consent, but felt that ratification provided for it; consent was approached as 'formulaic'. To Poland, 'if a particular State accepted the statute of the court and became a party to the convention establishing it, there would be no need for any additional consent by that State to the court's jurisdiction'.[102]

A. Complementarity

The two visions entailed different meanings of complementarity. The compulsory vision saw complementarity as a principle that *enabled* inherent jurisdiction while protecting sovereignty. Complementarity signified that the court would only exercise this jurisdiction when states failed to

[94] Singapore A/C.6/51/SR.26, 1996.
[95] Letter from Japan, A/C.6/49/3, 1994, at 11.
[96] Algeria in A/C.6/51/SR.28, 1996; Mexico in A/C.6/48/SR.21, 1993.
[97] Romania in A/C.6/48/SR.29, 1993.
[98] Vietnam in A/C.6/52/SR.12, 1997.
[99] Iran in 49/SR.20, 1994.
[100] India and Myanmar in A/C.6/50/SR.30, 1995.
[101] Hungary in A/C.6/51/SR.28, 1996.
[102] Poland in A/C.6/51/SR.28, 1996.

carry out their duty to bring suspects to justice.[103] For instance, German diplomats argued that German soldiers 'would, in effect, be fully protected from the risk of extradition to The Hague by the principle of complementarity'.[104] To Chile, complementarity implied a 'strong presumption in favour of national jurisdictions', while Poland argued that due to complementarity 'national jurisdictions would retain their primacy in all cases, including crimes of international concern.'[105] Others favoured inherent jurisdiction but stressed that the ICC should not become an appellate body.[106] However, for some states, complementarity meant 'not a subordination' to national courts.[107] The 'court's jurisdiction would not simply be residual to national jurisdictions', nor should it 'become an appeals court for the review of national verdicts'.[108] The compulsory vision, then, allowed for strong or weak complementarity.

The consensual vision, in contrast, saw complementarity as the *opposite* of inherent jurisdiction.[109] As a 'cardinal principle'[110] that secured states the primacy of jurisdiction, complementarity meant 'the primary *right* of states to bring criminals to justice'.[111] Consensual jurisdiction, on this view, followed logically from complementarity. Indonesia envisaged that states 'could either try a case or refer it to the court'[112], while India stressed that complementarity meant 'not a hierarchy' between ICC and national courts'. Accordingly, consensual states argued that states rather than the Court should assess whether justice had been carried out: The ICC should not be able to evaluate and assess the quality or other things of national processes. Most compulsory states did not state their preferences on this question, but some preferred the Court to have priority in deciding whether or not to prosecute; if it decided not to, the case would revert to national courts.[113] Jamaica found in 1997 that the issue of complementarity 'ran through the entire draft and it was pointless, therefore, to attempt to resolve it by concentrating on one set of provisions'.[114]

The consensual group worried that complementarity was creating a set of obligations for states and wanted the statute to contain more specific and clear complementarity provisions.[115] In

[103] Hall, *supra* note 30, at 181.
[104] Steinke, supra note 51, at 112.
[105] Poland in A/C.6/50/SR.27, 1995. See also Brazil in A/C.6/50/SR.28.
[106] Trinidad and Tobago in A/C.6/52/SR.11, 1997.
[107] Argentina in A/C.6/50/SR.30, 1995; Paraguay in A/C.6/52/SR.11, 1997.
[108] Nicaragua in A/C.6/50/SR.31, 1995.
[109] This view was expressed by states such as Indonesia, Malaysia, Nicaragua, Pakistan, Uganda.
[110] Kenya in A/C.6/50/SR.27, 1995.
[111] Hall, *supra* note 30, at 181, emphasis in original.
[112] Indonesia in A/C.6/48/SR.22, 1993.
[113] The Netherlands in A/C.6/49/SR.18, 1994; New Zealand in A/C.6/50/SR.27, 1995.
[114] Jamaica in A/C.6/52/SR.13, 1997.
[115] Nigeria in A/C.6/50/SR.27, 1995; Kenya in A/C.6/50/SR.27, 1995.

the compulsory group, this was exactly some states' view: The Czech Republic argued that while the Court should not be entitled to exercise jurisdiction as long as a national system investigated or prosecuted a case, it 'must have a safeguard against sham national investigations and trials'.[116] For Argentina it was important that the Court was 'not subordinating' to national courts.[117] The debate never arrived at a shared meaning of complementarity and the Statute's complementarity provisions (Art. 17) are, as a result, ambiguous and open to two different interpretations: that they define the 'scope of the Court's own work' or define 'a state's obligations'.[118]

9. Court Independence

Although there were many topics for which preferences and views trailed the two visions, the last topic to consider is that of court independence. The dominant narrative has constructed the LMG as succeeding in creating an independent court. As David Bosco argues, '[t]he court's supporters saw judicial independence as critical to keeping power politics at bay.' Attempts to include privileges for powerful states 'met strong resistance' in a 'context' of the 'dominant presence' of the LMG.[119] When analysing statements systematically, however, it becomes clear that most if not all countries emphasised court independence, although they differed greatly in what they meant. 'Independence' signified both independence from the UN Security Council and major states as well as independence from governments more generally, particularly those implicated in a situation of atrocity. It would be correct to state that the LMG and other states advocating the compulsory vision succeeded in making the Court relatively independent of states, given its inherent jurisdiction over core crimes, the prosecutor's *proprio motu* authority, and the Security Council's right to refer a situation to it. Many states articulating a consensual vision, however, focused on the independence from strong states and, particularly, the UN Security Council. Accordingly, they opposed granting the Council a say over the Court's work. They also did not see any contradiction between a consensual regime and court independence.

The debate focused on different options for Security Council involvement: Giving the Council authority to determine when an act of aggression had taken place, giving it the right to refer a situation to the Court, and giving it deferral authority. The options involved questions of world order, international peace and security, and equality between states. The provisions for Security

[116] Czech Republic in A/C.6/52/SR.13, 1997.
[117] Argentina in A/C.6/51/SR.29, 1996.
[118] Greenawalt, *supra* note 28, at 122.
[119] D. Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* (Oxford University Press, 2013), at 8.

Council involvement in the draft statute would therefore affect the ICC statute's ability to constitute a 'bridge' to the future and shape the nature of this future. The differences in views among and mainly between the adherents of the two visions owed partly to their answers to these larger systemic issues.

In the compulsory group, states did not easily accept Security Council involvement; its provisions were described as 'the thorniest of the articles.'[120] Council involvement in aggression charges, they argued, made the Court dependent on political assessment. But they supported the establishment of the ad hoc tribunals and thereby also the Council's novel interpretation of Chapter VII of the UN Charter.[121] Giving the Council referral powers practically ameliorated its need to establish ad hoc tribunals, which were geographically and temporally limited and expensive. And since the Council had responsibility for peace and security, it was natural that it would be able to refer a situation and determine aggression. These states were less concerned with how the referral provisions would affect third-party states. For instance, the German delegation felt that giving the Council referral rights 'was of little practical significance since all individual State Parties were to be granted the same rights.'[122] Reproducing the inequality and privileges of the UN Charter into the new court did not create a new situation, but tied the ICC into the existing world order structures. Moreover, most adherents of the compulsory vision had not been at the receiving end of Security Council actions.

States articulating the consensual vision emphasized 'how important it was for the Court to be impartial and devoid of political influence of any kind, including by the Security Council'.[123] Ghana opposed the proposed deferral powers.[124] Sri Lanka hinted that Council involvement would affect international society, as it 'would introduce into the statute a substantial inequality between States parties to the statute, between States members of the Security Council and non-members, and between permanent members of the Security Council and other States'.[125] This would call into question 'the entire doctrine of equality before the law in a sphere which ought to be insulated from such extraneous influences'.[126] India criticised the Rome Statute in the 1998 session, arguing that 'the Statute had legitimized the over-stretched interpretation of the powers of the Security Council by

[120] Greece in A/C.6/52/SR.11, 1996.
[121] M. Cullen, 'Separation of Powers in the United Nations System? International Structure and the Rule of Law', 17 *International Organizations Law Review* (2020) 492–530.
[122] Steinke, *supra* note 51, at 102.
[123] Indonesia in A/C.6/53/SR.12, 1998. See also the views of African states in Gissel, *supra* note 35..
[124] Ghana in A/C.6/51/SR.26, 1996.
[125] Sri Lanka in A/C.6/49.SR.21, 1994.
[126] Sri Lanka in A/C.6/50.SR.30, 1995.

subordinating the future Court to the discretion of the five permanent members of the Council'.[127] It wondered whether such a statute could become universal and lamented that 'requests from States which represented the majority of the world's population' was 'brushed aside because they were not politically convenient to those described as the "like-minded"'. Other states, such as Iran and Algeria opposed Council involvement on the basis of the idea of separation of powers. Cuba, which had tried to define international embargos as a crime of extermination, reminded states that the Council was the least representative UN body and not the only body to hold responsibility for the maintenance of peace.[128] Other states argued that the more representative UN General Assembly should be involved together with or in place of the Council.

10. Conclusion

The substantial differences in views regarding the nature of the prospective Court amount to entirely different visions for the ICC. States' statements demonstrate that they differed widely on what a desirable and/or appropriate Court should look like. These meanings are interpreted as sketching and distinguishing a compulsory and a consensual vision for the ICC, each of which articulates a narrative about the proper role of an ICC in national justice systems, the nature of its jurisdiction, the place of sovereignty and consent, the meaning of complementarity, and its relationship to the Security Council. One vision was of a court with compulsory jurisdiction and independence from states. Sovereignty was protected by complementarity and exercised when states met their duty to prosecute atrocity, but it should not prevent individual accountability. Another vision had consensual jurisdiction and relied on state consent and independence from the Security Council. It would be a mistake, however, to understand the differences in terms of a coherent LMG vision for a strong ICC against the scattered, incoherent views of other states. This LMG narrative misrepresents jurisgenesis, the creation of legal meaning, by all those states that opposed the like-minded vision; it is a history written by the victors of the negotiations in Rome.

Although the present systematic and inductive analysis has failed to uphold the LMG narrative, the latter's mythic quality should not surprise us. 'Every prescription is insistent in its demand to be located in discourse – to be supplied with a history and destiny, beginning and end, explanation and purpose', writes Cover.[129] To become meaningful, the Rome Statute needed a history, destiny, explanation, and purpose. The purpose of law's epics is not to represent reality

[127] India in A/C.6/53/SR.11, 1998.
[128] Cuba in A/C.6/48/SR.20, 1993, and A/C.6/53/SR.12, 1998.
[129] R. Cover, *supra* note 7, at 5.

adequately or objectively, but to make the prescriptions meaningful to its dominant constituency, to enable a legal interpretation that reflects the social order. The LMG epic narrates a struggle between progressive-cosmopolitan Court builders and statist conservatives who wanted to create an ICC subservient to states. Some versions even pit the LMG against 'enemies of the Court'.[130] The Statute thereby gains a progressive-cosmopolitan purpose, continuing a narrative from Nuremberg and Versailles.[131]

Reflecting on the Court's universality and the recent challenges to its legitimacy, the regime is unlikely to gain many new parties. Members are largely drawn from African, Caribbean and Pacific regions and Europe, while most non-state parties are Asian, Middle Eastern and/or nuclear states. States have had opportunity to examine the Statute, analyse the Court's interpretations and decisions, and observe or influence the Security Council's politics of justice. Given that many of today's non-state parties advocated a consensual vision in the 1990s, one may ask whether the narrative erasure of the consensual vision incurred any losses or if there are benefits to a more pluralist understanding of ICC establishment. As this article has suggested, the contestations over Court establishment provided for a wider range of concepts and understandings with which to build the international justice architecture and its place in world order. Indeed, the project may be poorer for discarding them as 'incoherent' and 'scattered', their utterers 'undecided' and Other.

[130] M. Glasius, *The International Criminal Court: A Global Civil Society Achievement* (Routledge, 2006), at 25, 26.
[131] K.B. Carlson, supra note 17; C. Gevers, 'The "Africa Blue Books" at Versailles', in I. Tallgren and T. Skouteris (eds), *The New Histories of International Criminal Law: Retrials* (Oxford University Press, 2019) 145–66.