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Weapons of the Weak: The Prosecutor of the ICC's Power to Engage the UN Security Council

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WEAPONS OF THE WEAK: THE PROSECUTOR OF THE ICC’S POWER TO ENGAGE THE UN SECURITY COUNCIL

C. Cora True-Frost∗

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I. INTRODUCTION

In December 2014, the Prosecutor of the International Criminal Court (ICC) made waves among international criminal law scholars and practitioners. In her briefing to the United Nations Security Council (the UN Security Council or Council), Prosecutor Bensouda proclaimed that she would suspend the ten-year-long investigation and five-year-long outstanding warrant against the Sudan’s President Al-Bashir, stating:

[G]iven the Council’s lack of foresight on what should happen in Darfur, I am left with no choice but to put investigative activities in Darfur on hold as I shift resources to other urgent cases, especially those where trial is approaching. It should thus be clear to the Council that unless there is a change of attitude and approach to Darfur in the near future, there will continue to be little or nothing to report to it for the foreseeable future.

It is rare for any Prosecutor to publicly announce that she is no longer actively investigating an open case or seeking jurisdiction over a high-profile indictee, while at the same time leaving charges pending. The Prosecutor of the ICC’s unprecedented confrontation of the Council highlighted a critical juncture in the ongoing relationship between the political and powerful Council and the independent Office of the Prosecutor. Yet, the Prosecutor did not maintain this stance for long. In her June 2015 briefing, the Prosecutor “clarified” these remarks by stating that she is not halting proceedings against Al-Bashir, she is merely devoting more resources to other areas. Her posturing, nonetheless, shines a light on the potential for the ICC to delay or simply say no to the powerful UN Security Council’s referrals in the future, while at the same time demonstrating the limits of this strategy.


2. See U.N. SCOR, 69th Sess., 7337th mtg. at 2-3, U.N. Doc. S/PV.7337 (Dec. 12, 2014) (“It is becoming increasingly difficult for me to appear before the Council to update it when all I am doing is repeating the same things I have said over and over again, most of which are well known to the Council . . . . To date, none of those individuals have been brought to justice, and some of them continue to be implicated in atrocities committed against innocent civilians . . . . I remain open to constructively engage with the Council on the Darfur issue. What is needed is a dramatic shift in the Council’s approach to arresting Darfur suspects.”).

3. Id. at 2.

In its fifteenth year of operations, the ICC continues to be plagued by criticism about its effectiveness. Perceived bias of the ICC, to the extent that Rome Statute States Parties’ protests are sincere, has damaged States Parties’ understandings of the independence and fairness of the ICC. In January 2016, the African Union (AU) recommended that its Open-Ended Committee of African Ministers on the ICC consider a roadmap on possible withdrawal from the ICC. Burundi recently withdrew from the ICC. In addition, as this Article goes to print, Gambia and South Africa have both withdrawn from, and more recently, rejoined the ICC.


spondingly, supporters of the ICC worry about its longevity and many have curtailed their expectations of the ICC’s potential.12 One of the ICC’s many challenges is its relationship with the most powerful organ of the United Nations system, the UN Security Council. The UN Security Council, with its three permanent, veto-wielding members that are not States Parties to the Rome Statute, has not consistently supported the ICC, even after it referred challenging cases to the ICC. These cases are distinguishable from others as they involve States that are not parties to the Rome Statute. The Council’s lack of consistent support for, and importantly, its members’ active undermining of, the ICC’s work has affected the ICC’s capacity to effectively,13 and meaningfully,14 investigate and prosecute Council-referred situations.


13. It is beyond the scope of this Article to fully explore the many possible definitions of effectiveness. This Article’s definition of effectiveness is unpacked further in Part IV. Rather, for purposes of this Article, I adopt an understanding of goal-oriented effectiveness, centering on the goals of the Rome Statute’s mandate holders. These goals are not merely primary norm compliance and dispute resolution, but also regime support, and regime legitimization, with tradeoffs between each and strengths in various areas. For such a definition, see Yuval Shany, Assessing the Effectiveness of International Courts: A Goal-Based Approach, 106 AM. J. INT’L L. 225, 226 (2012) (asking, “Are international courts effective tools for international governance?”). See also James F. Alexander, The International Criminal Court and the Prevention of Atrocities: Predicting the Court’s Impact, 54
The ICC is an independent tribunal, charged by its mandate holders, States Parties, to prosecute “the most serious crimes of concern to the international community as a whole.” Despite the ICC’s formal autonomy, however, its founding treaty, the Rome Statute, permits the powerful and political UN Security Council, inter alia, to refer situations to the ICC, including those in non-State Parties, and to defer the ICC’s ongoing proceedings.

Conventional wisdom would suggest that the relatively powerless ICC should cooperate with the Council, and that the Council should refer cases of massive atrocities, such as the situation in Syria to the ICC. A key concern underpinning this position is that


14. This Article assumes that effectiveness consists of more than just successful prosecutions. As Shany’s conception acknowledges, courts can make meaningful contributions to longer-term, systemic effects on the development and legitimacy of governance, quite apart from the outcomes of specific cases. Shany, supra note 13, at 231-32.

15. International tribunals are those that are created by international law, include independent judicial bodies, and have the authority to apply law to the cases before them. Shany, supra note 13, at 225-26.

16. See Rome Statute, supra note 6, at pmbl.

17. Id. at art. 13(b) (explaining that the Court may exercise its jurisdiction when the Security Council refers a situation to the Court); id. at art. 16 (allowing the Security Council to defer situations for a period of twelve months). Other provisions of the Rome Statute that address the relationship between the U.N. Security Council and the International Criminal Court are: art. 87(7) (allowing the Court to refer requests for cooperation to the Security Council) and art. 115(b) (allowing the United Nations to provide funds to the Court, especially in relation to situations referred by the Security Council). Id. at art. 87(7), 115(b). Article 15 of the Rome Statute will be updated to further clarify the U.N. Security Council’s interaction with the Prosecutor’s investigation of crimes of aggression. Id. at art. 15 (amended by Rome Statute Res. RC/Res.5, at 20 (June 11, 2010)) (noting that after 2017, the Court may exercise jurisdiction over crimes of aggression if referred by the Council).

victims of atrocities will otherwise languish if the Council does not refer, and if the ICC does not pursue Council referrals. Indeed, the concern is that the very purposes of the ICC, including to end impunity and to deter future atrocities, will be undermined if the ICC fails to act against wrongdoers when it has jurisdiction. Yet, despite repeated pressure from many Member States of the General Assembly, as of January 2017, the Council has refused to refer situations to the ICC since its referral of Libya in 2011. It is highly likely, however, that the Council will again use the relatively low-cost tool (for the Council) of referring a situation to the Court in the future.

Particularly in light of recent developments in the Office of the Prosecutor, this Article challenges the conventional wisdom that the Prosecutor should devote resources to investigating and charging in the case of a future Council referral. It contemplates that the interests of justice might lead the Prosecutor to seriously consider declining investigating or prosecuting a Council referral. Further, it explores how the Prosecutor might instead use her “weapons of the weak”—declination coupled with an explanation—to engage the Council earlier and more productively (for the ICC) in the future. Although prosecutors in common law systems often exercise discretion without explanation, the ICC Prosecutor has wisely developed

[https://perma.co/6XQ5-AETB]; Syria and the International Criminal Court Questions and Answers, HUM. RIGHTS WATCH, 1 (Sept. 2013), https://www.hrw.org/sites/default/files/related_material/Q%26A_Syria_ICC_Sept2013_en_0.pdf [https://perma.co/DH8K-Q8RY] ("The Security Council, with what is called an 'ICC referral,' could give the court jurisdiction stretching back to the day the Rome Statute entered into force, on July 1, 2002. . . . The Security Council, however, has failed to act on other key occasions when there was strong evidence of widespread and serious international crimes and little prospect of local accountability. . . . Human Rights Watch believes that the court should be given jurisdiction, considering the evidence that serious crimes have been committed in Syria, the pervasive climate of impunity there, and the grave nature of many of the abuses."); UN Security Council: Heed Call for Justice in Syria, HUM. RIGHTS WATCH (Jan. 14, 2013, 11:54 AM), https://www.hrw.org/news/2013/01/14/un-security-council-heed-call-justice-syria [https://perma.co/YHW9-XWCC].

19. Indeed, as described further, infra, in Section III.C., in light of the obstacles, recently there has been much discussion about creating ad hoc tribunals. See, e.g., H.R. Res. 269, 114th Cong. (2015) ("Expressing the sense of the House of Representatives regarding the need for investigation and prosecution of war crimes and crimes against humanity, whether committed by officials of the Government of Syria or other parties to the civil war in Syria, and calling on the President to direct the United States representative to the United Nations to use the voice and vote of the United States to immediately promote the establishment of a Syrian war crimes tribunal, and for other purposes.").

20. For the recently adopted strategy, see Int’l Criminal Court, Office of the Prosecutor, Policy Paper on Case Selection and Prioritization (Sept. 15, 2016) [hereinafter Policy Paper on Case Selection], https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf.

a tradition of transparency—explaining the Office’s decisions in an attempt to offset claims of such bias.\textsuperscript{22}

The Prosecutor’s use of her discretion in the interests of justice\textsuperscript{23} to decline future Security Council referrals could affect States Parties’ perceptions of the ICC’s independence,\textsuperscript{24} its normative validity,\textsuperscript{25} and also its effectiveness. Of course, the possibility of declination is by no means a panacea for all of the ICC’s challenges—the impacts of declining a Council referral would be both negative and positive. Concerns that this proposal would raise and limitations to the proposal are addressed below. In light of the challenges that the ICC faces, this Article explains, however, why the Prosecutor


\textsuperscript{25} There are many forms of legitimacy. Here I refer to sociological legitimacy, or the beliefs of those actors (i.e. States Parties, United Nations members, NGOs, individuals) involved in the process of international criminal law that the legal institution ought to be obeyed. Sociological legitimacy, as contrasted with political philosophical understandings of legitimacy, is not the same as moral legitimacy, nor is it the same as Habermasian legitimacy. According to David Beetham’s noted definition, sociological legitimacy has the following components: 1) legality or rule conformity, 2) normative validity, and 3) appropriate actions. DAVID BEEHAM, \textit{The Legitimation of Power} 271 (Peter Jones & Albert Weale eds., 1st ed. 1991). “Rules . . . are well grounded in normative beliefs accepted by the population(s) . . . .” \textit{Id.} at xiii. “[T]he starting point for [analysis of] social scientific [legitimacy] . . . is to understand these principles of legitimacy and the practices which support it in their own terms, not those we ourselves may endorse.” \textit{Id.} at xi; see also IAN HURD, \textit{After Anarchy: Legitimacy and Power in the United Nations Security Council} 7 (2007) (‘Legitimacy,’ as I use the term, refers to an actor’s normative belief that a rule or institution ought to be obeyed.”).
should consider the option to decline entirely to investigate or prosecute Council referrals and to issue an explanation for doing so.\(^{26}\)

This inquiry fills a gap in the literature about prosecutorial discretion at the international level by focusing specifically on the relationship between the Prosecutor and the Council; a relationship that has broader implications for both institutions, as well as for the goals of international criminal justice generally.\(^{27}\) Professor Ohlin has argued that the Prosecutor must investigate referrals from the UN Security Council, as she is effectively mandated to investigate as a part of a “security” court in the case of referrals.\(^{28}\) Other scholars understand it to be within the Prosecutor’s legal power to decline Council referrals, but it is less clear why, when, and how she might do so.\(^{29}\)

Regarding the relationship between the Prosecutor and the Council, I have argued elsewhere that the first ICC Prosecutor treated the Council as an institutional ally while seeking to preserve his independent judgment.\(^{30}\) He sought to work with the Council to achieve his mandate, but endeavored to (at least formally) maintain his independence and discretion.\(^{31}\) For the current

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\(^{26}\) The Prosecutor uses preliminary examinations as a device to monitor progress in different situations, and would still preliminarily examine a Council-referred situation. There are, of course, a number of trade-offs that she will need to consider in deciding when to decline a Council referral. In a separate draft, I consider those trade-offs.


\(^{28}\) According to some legal scholars such as Professor Ohlin, the Prosecutor had the obligation to investigate and prosecute Council-referred situations. Jens David Ohlin, Peace, Security, and Prosecutorial Discretion, in THE EMERGING PRACTICE OF THE INTERNATIONAL CRIMINAL COURT 185, 186 (Carsten Stahn & Göran Sluiter eds., 2009); see also George P. Fletcher & Jens David Ohlin, The ICC—Two Courts in One?, 4 J. INT’L CRIM. JUST. 428 (2006).

\(^{29}\) See Danner, supra note 27, at 519.

\(^{30}\) See Helfer & Slaughter, supra note 24.

\(^{31}\) See C. Cora True-Frost, The International Civil Servant: How the First Prosecutor Engaged the U.N. Security Council, in THE FIRST GLOBAL PROSECUTOR 251, 251 (Martha Minow et al. eds., 2015) [hereinafter True-Frost, International Civil Servant] (arguing that the first Prosecutor of the International Criminal Court, Luis Moreno Ocampo, “chose to craft himself as an international civil servant, bound to independently apply the law and disregard politics” and “engaged in both regular contact and a markedly less hostile relationship” with the U.N. Security Council). Since his term as Prosecutor has ended, Luis Moreno-Ocampo has been more candid about his views of the Council. Luis Moreno-Ocampo Talks to Richelle Carey, ALJAZEERA AM. (Oct. 23, 2015, 9:00 AM), http://america.aljazeera.com/watch/shows/talk-to-al-jazeera/articles/2015/10/23/luis-moreno-ocampo-talks-to-richelle-carey.html.
Prosecutor to decline a referral and explain that she is doing so because she knows that, for example, the Council will not support its referral of a non-consenting State, or that the ongoing conflict in this non-consenting State will prove too challenging for ICC intervention absent Council support would admittedly be a bold action. Such an action might in turn, however, limit political gamesmanship by the Council, even as it also might open the Prosecutor to claims of bias. Correspondingly, Council members might then be forced either to internalize the cost of Council referrals or to fully cooperate with the ICC on existing Council referrals.32

The ICC’s relationship with the Council has affected a number of areas related to the Court’s general effectiveness, including support for the international criminal law (ICL) norms it promotes, its capacity to resolve international disputes and problems, broader support for the regime of ICL, perceptions of legitimacy of international authority, and its more idiosyncratic goals. While no prosecutorial decision is immune from critique, the Prosecutor’s power to delay or decline a Security Council referral in the interests of justice can be supported by the text of the Rome Statute, case law, and the practice of both the Court and the Council.33

Due to the Court’s limited jurisdiction and relationship with the Council, the Prosecutor must constantly balance selective justice concerns, on the one hand, and effectiveness concerns on the other. Some recent developments in the Office of the Prosecutor (OTP) may help address some effectiveness and fairness issues stemming from, in particular, its relationship with the Council. For example, the Prosecutor recently opened an investigation into the situation in Georgia.34 This proprio motu investigation not only marks the ICC’s first non-African investigation, but it also implicates permanent Council member, Russia. It may thus help to counter the selective justice concern that permanent Council members, which are non-State Parties, will never be accountable for violations of ICL.35

32. See infra Section III.C. While the Prosecutor has previously argued that there is a presumption for prosecution in the interests of justice, for reasons I discuss below, that presumption might be discounted in the case of Council-referrals. This Article does not develop a typology of when the Prosecutor can decline a Council referral; it rather offers a starting point for developing such a typology.

33. See infra Part III.

34. For more information on the Georgia investigation, see Situation in Georgia, INT’L CRIM. COURT, https://www.icc-cpi.int/georgia [https://perma.cc/QB4J-NBGN].

35. No: ICC-01/15, Corrected Version of “Request for Authorisation of an Investigation Pursuant to Article 15”, 16 October 2015, ICC-01/15-4-Corr (Nov. 17, 2015), https://www.icc-cpi.int/iccdocs/doc/doc2160852.pdf (“The Prosecutor hereby requests authorisation from the Pre-Trial Chamber I, pursuant to article 15(3) of the Rome Statute, to proceed with an investigation into the Situation in Georgia covering the period from 1 July 2008 to 10 October 2008, for war crimes and crimes against humanity allegedly committed
addition, in order to increase its effectiveness, the Office of the Prosecutor released a Case Selection Policy in September 2016. Strategic goals for 2016-2018 include ensuring “a basic size which can respond to the demands placed upon the Office so that it may perform its functions with the required quality, effectiveness and efficiency.” The Office is, inter alia, seeking to “align the demands placed upon the Office with the realities of what may be achieved.”

Despite the tension between these goals, the Prosecutor can exercise her discretion to enhance the long-term prospects for the Court. Unlike the Council, the Prosecutor can be held accountable for her decision to decline to investigate or to prosecute—the Pre-Trial Chamber (PTC) may review such a decision. Indeed, in 2015, a majority of the PTC denied the Prosecutor’s decision not to open an investigation in the Mavi Marmara situation, and requested the Prosecutor to reassess the situation’s gravity. The Appeals Chamber of the ICC, however, implicitly endorsed broad prosecutorial discretion when it ruled inadmissible the Prosecutor’s appeal of the PTC’s decision. The Appeals Chamber decision, as well as the fact of the PTC review, support the idea that the Prosecutor of the ICC might use declination to avoid the negative effects of the Council’s lack of support, while at the same time optimizing as much of the potential for productive collaboration with the Council as possible.

in and around South Ossetia.”). The opening of an investigation in the situation in Georgia implicates the interests of Russia, a P5 member, and will raise unprecedented issues for the Court, in particular relating to its relationship with the Security Council.


38. Id. at 7 ¶ 6.

39. See Rome Statute, supra note 6, at art. 53(3)(a)-(b) (“At the request of the State making a referral under article 14 or the Security Council under article 13, paragraph (b), the Pre-Trial Chamber may review a decision of the Prosecutor under paragraph 1 or 2 not to proceed and may request the Prosecutor to reconsider that decision. In addition, the Pre-Trial Chamber may, on its own initiative, review a decision of the Prosecutor not to proceed if it is based solely on paragraph 1 (c) or 2 (c). In such a case, the decision of the Prosecutor shall be effective only if confirmed by the Pre-Trial Chamber.”).

40. Case No. ICC-01/13 OA, Decision on the admissibility of the Prosecutor’s appeal against the “Decision on the request of the Union of the Comoros to review the Prosecutor’s decision not to initiate an investigation,” ¶ 50–65 (Nov. 6, 2015), https://www.icc-cpi.int/iccdocs/doc/doc2152672.pdf [https://perma.cc/WJ8J-P5VT] (“The ultimate decision as to whether to [proceed] is for her.”); Case No. ICC-01/13, Notice of Appeal of “Decision on the request of the Union of the Comoros to review the Prosecutor’s decision not to initiate an investigation” (ICC-01/13-34), (July 27, 2015), http://www.icc-cpi.int/iccdocs/doc/doc2024328.pdf [https://perma.cc/S2TX-FW4A]; Case No. ICC-01/13, Decision on the request of the Union of the Comoros to review the Prosecutor’s decision not to initiate an investigation (July 16, 2015), http://www.icc-cpi.int/iccdocs/doc/doc2015869.pdf.
The effectiveness and unique selective justice concerns that accompany Council referrals arguably all militate in favor of consideration of declination.

Part II of this Article provides an overview of the creation of both the UN Security Council and the ICC, as well as the existing legal frameworks for interaction. Part III elaborates on the possibility that the Prosecutor might use her discretion to manage the ICC’s relationship with the Council. Although the Prosecutor has few tools at her disposal with which to affect the course of the Council’s relationship with the ICC, she might use her “weapon of the weak,” or soft power, to decline a future referral, coupled with an explanation of why the declination is in the interest of justice. This Part also examines the counterarguments and limitations to this possibility.

Part IV sets out a framework for conceptualizing effectiveness and makes the case that Council referrals create unique effectiveness problems for the ICC because Council referrals affect many States’ perceptions of the ICC’s independence. This Part also makes the case that the ICC can be a more procedurally fair and effective source and interpreter of ICL than the Council because of the ICC’s normative specialization, its broad membership of and wide participation, and its institutional accountability and review mechanisms. This distinctive accountability is evident in the Pre-Trial Chamber’s capacity to legally review the Prosecutor’s decisions. Offering the opportunity for the institution to endorse or override the Prosecutor’s judgment distinguishes the ICC from the Council. The Council, by contrast, is held accountable only through politics. Perceptions of fairness in the international community are far from uniform, so what enhances the fairness of the ICC for some States will not do so for all, but the pressing nature of the current critique of the ICC’s “selective justice” requires a change in its future practice—including potentially declining a Council referral of a non-State Party to the Rome Statute.

41. See generally Jenia Iontcheva Turner, Accountability of International Prosecutors, in THE LAW AND PRACTICE OF THE INTERNATIONAL CRIMINAL COURT (Carsten Stahn ed., 2015) (arguing that the ICC should use more than judicial intervention to address prosecutorial misconduct).

42. The Council may request review of the Prosecutor’s decision under art. 53(3)(a), and the PTC can initiate its own review of the Prosecutor’s decision. Rome Statute, supra note 6, at art. 53(3)(b).

43. While it is theoretically possible that the Council could refer a State Party of the ICC, it is more likely that the Prosecutor would initiate a prosecution. Also, while citizens of the P3 might be haled before the ICC if they commit massive atrocities in States Parties’ territories, not until the Court opened an investigation in Georgia was this a practical possibility. This Article focuses on the relationship with the Council as one route to enhance
Part V unpacks a select number of the negative and positive effects of the Prosecutor declining to pursue a Council referral and some preliminary implications of this possibility. Declination would have implications for theoretical debates in international relations and international law scholarship. For example, authority in the international sphere can increasingly be seen as being subject to contestation among and between other international actors. In an unprecedented fashion, declination of Council referrals invites scholars to consider how the most established international organizations and organs of the UN, such as the Council, today must share authority and power with the more specialized international organizations of the twenty-first century, such as the ICC.

As the adolescent ICC continues to grow, the Rome framework may eventually be a corrective to the traditional understanding that the UN Charter is the sole constitutional document of an international system. It may eventually no longer be that the UN Security Council, with its power to bind Member States, sits unquestionably at the apex of an international system. Rather, international organizations may increasingly contest the authority of organs of international organizations as growing fragmentation creates the possibility for multiple seats of authority.

II. THE ICC AND THE UN SECURITY COUNCIL: LEGAL FRAMEWORKS FOR INTERACTION

This Section provides background on the relationship between the UN Security Council, the ICC, and their respective founding documents. States' political interests shaped the drafting of the UN Charter and the Rome Statute, and the resulting legal frameworks accordingly reflect the political power asymmetries of the time. As the founding document of a twenty-first-century tribunal, the Rome Statute enjoyed broad State and NGO participation and support. By contrast, the UN Charter, establishing an international

the Court’s effectiveness. Relatedly, this Article maintains that ICC Prosecutors should define as a priority or operative goal to successfully work with cooperating States Parties to secure jurisdiction and evidence over the accused in mandate holding States. Note, however, that some scholars have argued that the Court’s authority is not affected by the source of its different referrals. Leslie Vinjamuri, The International Criminal Court and the Paradox of Authority, 79 L. & CONTEMP. PROBS. 275, 278 (2016).

44. Paul Schiff Berman, Global Legal Pluralism: A Jurisprudence of Law Beyond Borders (2012) (offering a conceptualization of legal pluralism which “preserve[s] spaces for productive interaction among multiple overlapping legal systems by developing procedural mechanisms, institutions, and practices that aim to manage, without eliminating” difference amongst jurisprudences).

45. Member States are bound and obligated to carry out the decisions of the Security Council acting under Chapter V, Article 25 of the U.N. Charter. U.N. Charter art. 25.
system for the twentieth century, reflects the politics of that time. These asymmetries are especially significant when the ICC receives referrals from what is arguably the UN’s most powerful organ, the Security Council. This interaction between the two bodies affects the ICC’s current capacity to be perceived as an independent source of international criminal law by States Parties.

Examining the processes leading to the establishment of both the United Nations Security Council and the ICC helps us understand one of the ICC’s challenges in supporting international criminal law norms, namely, interacting with the Security Council and its three non-States Parties permanent members. It also offers insight into ways the Prosecutor might manage the relationship between the ICC and the Council in the future, a subject that is developed in Part III of this Article.

A. The Shaping of the UN Charter and the Rome Statute

International law is created through and shaped by a combination of States’ preferences, legal precedent, and also sometimes by the advocacy of norm entrepreneurs. So, too, are international organizations. From among the fifty States that initially ratified the UN Charter, the UN Security Council established the dominance of the five, then so-called Great Powers, in matters of peace and security.\footnote{The original U.N. Charter from 1945 lists the fifty signatories that eventually ratified the charter. See U.N. Charter (1945).} The process codified select pre-existing provisions of international law and created new laws.\footnote{See, e.g., U.N. Charter art. 2, ¶ 4, arts. 25, 75-85.} Even as colonial powers lost their grip on territories and the membership of the UN expanded, the authority of the UN Security Council endured.

The text of the UN Charter still gives the Council unparalleled power to bind Member States.\footnote{U.N. Charter art. 25 (“The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”).} Over time, the Council has used its Chapter VII powers to take action relating to threats to international peace and security, inter alia, to authorize peacemaking, peacebuilding, and peacekeeping missions; establish ad hoc criminal tribunals; and to implement sanctions. The Council’s sanctions have increasingly focused on individuals. In the early 1990s, when the fifty-year old Council established ad hoc tribunals for Yugoslavia and Rwanda, the Council also implicitly endorsed the view that international criminal law is applicable to violations of international peace and security committed by individuals.
When the Rome Statute was adopted in 1998, it built on the foundation established by the UN Security Council’s ad hoc tribunals.\(^{49}\) While power disparities still influenced the content of the Rome Statute,\(^{50}\) an arguably nontrivial difference between these negotiations and those of the UN Charter was that more than three times the number of States involved in the UN Charter negotiations of 1945—160 States—participated in these negotiations, as did numerous representatives of the United Nations and a vast network of NGOs.\(^{51}\) When the Rome Statute was ratified by 120 members in 2002, it ushered in an unprecedented model of international cooperation in international criminal law—one with global reach, but outside the absolute control of the permanent Council members.

Unlike the primarily State-focused model of the UN and its Council organ,\(^{52}\) the ICC’s twenty-first-century model of interna-


\(^{50}\) For a critical and insightful analysis of the ways power disparities influence both the jurisdiction and the optics of the Court, see Kamari Maxine Clarke, Opinion, Treat Greed in Africa as a War Crime, N.Y TIMES (Jan. 29, 2013), http://www.nytimes.com/2013/01/30/opinion/treat-greed-in-africa-as-a-war-crime.html. See generally KAMARI MAXINE CLARKE, FICTIONS OF JUSTICE: THE INTERNATIONAL CRIMINAL COURT AND THE CHALLENGE OF LEGAL PLURALISM IN SUB-SAHARAN AFRICA (2009) ("documenting how human rights values are embedded in a new rule of law regime to produce a new language of international justice").

\(^{51}\) The 1998 Rome Conference was attended by more than 160 governments and 200 NGO’s. History of the ICC, Rome Conference, COALITION FOR THE INT’L CRIM. COURT, http://www.iccnow.org/?mod=rome [https://perma.cc/YM6D-PVAX]. At the end of negotiations, “120 nations voted in favor of the adoption of the Rome Statute of the International Criminal Court,” with only 7 nations voting against the treaty, and 21 countries abstaining from vote. Id. It is beyond the scope of this Article to fully analyze the scope and meaning of these various stakeholders’ participation, but numerous scholars have reported on the various impacts of participants’ contributions. See, e.g., William R. Pace & Mark Thieroff, Participation of Non-Governmental Organizations, in THE INTERNATIONAL CRIMINAL COURT – THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, RESULTS 391-98 (Roy S. Lee ed., 1999); WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 18 (4th ed. 2011); John Washburn, The Negotiation of the Rome Statute for the International Criminal Court and International Lawmaking in the 21st Century, 11 PACE INT’L L. REV. 361, 368 (1999).

\(^{52}\) The UN is primarily State-focused, but its Charter also references human rights norms. U.N. Charter pmbl. ("We the peoples of the United Nations determined . . . to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small . . . ."); U.N. Charter art. 1(3) ("The Purposes of the United Nations are: . . . [t]o achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian charter,
tional organization exerts its power directly on individuals. The preamble of the Rome Statute targets individuals, putting forward a goal “to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes” and “to guarantee lasting respect for and the enforcement of international justice.” The drafters of the Rome Statute devised an ambitious system of complementarity capped by an unprecedented permanent, autonomous and ostensibly apolitical ICC. In the preamble of the ICC, States Parties “[r]ecognize that such grave crimes threaten the peace, security and well-being of the world.” Although the ICC is technically autonomous, its mandate to end impunity for international crimes overlaps significantly with the UN Security Council’s mandate to maintain “international peace and security.”

B. Negotiations About the Relationship Between the ICC and the UN Security Council

The question of how, if at all, the ICC should interact with the UN Security Council was a pivotal one during the formation and the development of the ICC. The 1994 International Law Commission Draft Statute of the ICC initially recommended that the ICC would solely receive cases by either referral from the UN Security Council or self-referral by a State Party, except in cases of genocide. Later, the “like-minded caucus” included more than 60 of the 160 participating States in the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court in Rome in June and July of 1998 (Rome Conference). Its central concern was to ensure that the ICC had an independent prosecutor and that the Security Council could not veto prosecutions, as well as that the ICC would have inherent jurisdiction and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion . . . .”

53. Rome Statute, supra note 6, at pmbl. (“Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes . . . .”).

54. Id. (“Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions”); id. at art. 1 (same); see also id. at arts. 17, 18 (discussing States that are unable or unwilling to proceed in investigations or prosecutions and the effects on the Court’s jurisdiction).

55. Id. at pmbl.

56. See Fletcher & Ohlin, supra note 28, at 431-32.

over genocide, crimes against humanity, and war crimes. Some delegates in Rome noted that giving the Security Council power to refer cases to the ICC would obviate the need for ad hoc tribunals. They emphasized, however, that the ICC's judgments must be independent of political influence.

Indeed, when States came together in Rome in 1998 to create a permanent international criminal tribunal, they also implicitly—and some did so explicitly—rejected the Council's politically-influenced practice of establishing the ad hoc tribunals. They instead aimed to create a comprehensive system of international criminal law and a permanent ICC, ostensibly outside of politics. Broadly endorsing the project of international criminal law, the 160 States attending the Rome negotiations created an international court with broad, but not unlimited, jurisdiction. With many powerful States such as China, the U.S., and Russia, refusing to ratify, the prospects for universal jurisdiction were inherently limited. The system of international justice envisaged by the drafters of the Rome Statute relies on the willingness of States Parties to

58. Schabas, supra note 51, at 19. Schabas notes that in 1997, the likeminded caucus also succeeded in procuring the support of the United Kingdom. See id.

59. 2 United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole, U.N. Doc. A/CONF.183/13 (Vol. II), at 76, ¶ 47 (June 15, 1998 - July 17, 1998) [hereinafter ICC Plenipotentiaries], http://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf (Brazil: “Brazil believed it necessary to remove justification for the creation of new ad hoc tribunals by the Council, which would require a provision such as article 10, paragraph 1, of the draft Statute. The Court should not, however, act as a subsidiary organ of the [Security] Council and must aim for the highest level of judicial independence. Only in exceptional circumstances should [the Court] be prevented by the Council from investigating or prosecuting cases when the Council, acting under Chapter VII of the Charter of the United Nations, took a formal decision to that effect. Even in such cases, however, the Court should not be prevented from exercising its jurisdiction for more than a limited period.”); see also id. at 67, ¶ 38 (United Kingdom and Northern Ireland: “The Security Council should be able to refer to the Court situations in which crimes might have been committed, thus obviating the need for further ad hoc tribunals. The Court’s procedures should be adapted from the principal legal traditions to ensure fair and effective operation, safeguard the rights of the accused and provide adequate protection and assistance to victims in giving evidence.”); id. at 71, ¶ 104 (Observer for the International Law Commission: “Secondly, [The ICC] would be created by treaty, under the control of the States parties to that treaty but in close relation with the United Nations. It would therefore obviate the need for further ad hoc tribunals.”); id. at 68, ¶ 55 (Sweden: “The Security Council, under Chapter VII of the Charter of the United Nations, should indeed be able to refer to the Court situations in which crimes under the Court’s jurisdiction appeared to have been committed but not punished. That would obviate the need to create new ad hoc tribunals.”).

60. Id. at 69, ¶ 70-72 (Lesotho); id. at 94, ¶ 41-42 (Lebanon); id. at 292, ¶ 70 (Ecuador); id. at 347, ¶ 44 (Cameroon); id. at 310, ¶ 82 (Yemen); id. at 196, ¶ 48 (Sri Lanka).

61. It is beyond the scope of this Article to fully develop the ways in which States’ genuine aims, as opposed to their stated aims, have been both successful and unsuccessful. But for excellent discussion of these issues, see generally Clarke, supra note 50.
comply with their obligations. It begins at the domestic level through the principle of complementarity. Only if domestic systems are unwilling or unable to apply criminal law to crimes against humanity, war crimes, genocide, or eventually, aggression, does the ICC become involved.62

During the Rome negotiations, the majority of States were concerned with how to best ensure the independence and impartiality of this permanent tribunal.63 States’ desire to avoid political influence on determinations of legal jurisdiction caused them to depart from the International Law Commission (ILC) Draft Statute recommendation that the Council be the only body to refer matters to the ICC.

The resulting debates revolved around the issues of (1) the appropriate relationship between the Council and the ICC64 and (2) whether there should be an independent prosecutor.65 Not surprisingly, three permanent Council members, the United States,66

62. See Rome Statute, supra note 6, at pmbl. (“[T]he International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions . . . .”); id. at art. 1 (“[The Court] shall be complementary to national criminal jurisdictions.”); id. at art. 17(1)(a-b) (discussing that the case is inadmissible if it “is being investigated or prosecuted by a State which has jurisdiction over it” or “the State has decided not to prosecute the person concerned”); id. at art. 18(2) (“[A] State may inform the Court that it is investigating . . . the Prosecutor shall defer to the State’s investigation of those persons.”); id. at art. 19(2)(b) (discussing that “[c]hallenges to . . . admissibility . . . may be made by: . . . [a] State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted . . . .”).

63. See ICC Plenipotentiaries, supra note 59 (containing various States expressions of their concerns about the independence and impartiality of the ICC).

64. Id. at 65, ¶ 21 (Norway: “Once a situation had been referred, it must be entirely up to the Court to investigate and prosecute individuals on the basis of a truly independent mandate.”); id. at 69, ¶ 72 (Lesotho: “The relationship between the Security Council and the Court raised difficult questions. Although, in theory, no conflict should exist, the Council’s maintenance of peace and security might either complement or frustrate the work of the Court in bringing war criminals to justice and advancing the international rule of law. He opposed any political interference by the Council or States in the affairs of the Court.”).

65. For a critique of the resulting choices, see Greenawalt, supra note 23.

66. Young Sok Kim, The Preconditions to the Exercise of the Jurisdiction of the International Criminal Court: With Focus on Article 12 of the Rome Statute, 8 MICH. ST. J. INT’L. L. & PRAC. 47, 71-72 (1999) (“The first proposal was on Article 7 ( Preconditions to the exercise of jurisdiction). This proposal required the consent of the territorial state and the state of the nationality of the accused/suspect. As such, it required the consent of the state of the nationality of the accused in every case if the Court wished to exercise its jurisdiction. The second proposal of the United States was on Article 7 ter ( acceptance by non-States Parties) and Article 7 bis (acceptance of jurisdiction). Article 7 ter, paragraph 1 of this proposal showed the United States’ concern about the possible exposure of U.S. troops serving in foreign countries to the courts [sic] jurisdiction even if the United States is not a State Party to the Statute. The proposal on ‘possible protocol for opt-in’ permitted a State Party to ‘opt-out’ of crimes against humanity or war crimes or both. Moreover, it provided that the protocol should remain in force thereafter for a period of 10 years and might be prolonged. With regard to the United States’ amendments, Norway, on behalf of the Like-
France, and the United Kingdom, emphasized that there was a necessary relationship between the Council and the ICC. Many States argued that although the Council could refer situations, the Prosecutor’s independence must be respected and maintained, and some States objected to the possibility that the Council could defer or suspend matters. During the Rome negotiations, delegates from Africa—a region with no permanent representation on the Council—frequently noted that the political Council should not have a relationship with this independent, apolitical ICC. Indeed, many States were opposed to the Council having any power to defer or suspend ICC matters for a year. Still, the Rome Statute eventually, or for realists, perhaps inevitably, granted this power to the Council. Regarding the independent prosecutor, the sixty-

Minded Group, put forward a no-action motion. The voting result on the no action motion was 113-17, with 25 abstentions. Thus, the amendments of the United States were rejected by the overwhelming majority.” (footnotes omitted)).

67. See generally ICC Plenipotentiaries, supra note 59 (see, e.g., statements by South Africa and Norway).

68. Id. at 65, ¶ 15 (Lesotho: “The relationship between the Security Council and the Court raised difficult questions. Although, in theory, no conflict should exist, the Council’s maintenance of peace and security might either complement or frustrate the work of the Court in bringing war criminals to justice and advancing the international rule of law.”); id. at 69, ¶ 76 (Egypt: “The International Criminal Court should be independent and should not be influenced by political considerations, and precise limits must be set in its relationship with the Security Council. The role of the Council in referring matters to the Court must be clearly defined, but it was for the Court to decide whether to commence prosecution proceedings or not.”); id. at 77, ¶ 67 (Kenya: “The relationship between the Security Council and the Court needed to be clarified to ensure that the independence and legitimacy of the Court were not undermined. A suitable mechanism for financing the Court had to be set up in order to preserve its independence.”).

69. Since the Council has the power to establish ad hoc tribunals as it has already done, it is perhaps not surprising that States opted to permit the Council to send situations to the Court. Yet, as noted above, diplomats and politicians argue that ad hoc tribunals will be required to fill gaps in the Rome framework. See Mary Fan, Custom, General Principles and the Great Architect Cassese, 10 J. INT’L CRIM. JUST. 1063, 1070 (2012); Pamela J. Stephens, Collective Criminality and Individual Responsibility: The Constraints of Interpretation, 37 FORDHAM INT’L L.J. 501, 537 (2014).

70. See, e.g., ICC Plenipotentiaries, supra note 59, at 122, ¶ 23 (Philippines: “Finally, the Security Council could seek deferral of prosecution for a one-year period, renewable for an apparently unlimited number of times.”); id. at 210, ¶ 93 (Italy: “The issue of the Security Council’s power to block intervention by the Court was a delicate one, and it was important to provide guarantees that the Court’s action would not be indefinitely impeded or gravely prejudiced. Any request for deferral of an investigation should be made only following a formal decision by the Council, and be confined to a specific period of time, with limited possibility of renewal.”); id. at 298, ¶ 63 (Sierra Leone: “[T]he delegation would prefer option 2 for article 10, paragraph 2, if the deferral period was shorter, namely, 6 months rather than 12. . . . His delegation considered that the deferral request should be renewable only twice if it was for a duration of 6 months, or once if it remained at 12.”); id. at 299, ¶ 73 (Azerbaijan: “As far as deferral was concerned, option 1 for article 10, paragraph 2, was not appropriately formulated. A 12-month period seemed too long. Moreover, his delegation did not favour renewal of the request by the Security Council.”); id. at 301, ¶ 115 (Russian Federation: “With regard to deferral, his delegation found it difficult to
three States that lobbied for an independent prosecutor initially
did not include any Security Council members, but eventually
the United Kingdom joined this group. France ultimately
ratified the Rome Statute, thereby accepting the Prosecutor’s
proprio motu powers. 71

C. The Resulting Framework

The Rome Statute anticipates a cooperative relationship be-
tween the Council and the ICC while still asserting the ICC’s
independence. 72 As the tables indicate, the Statute provides
a number of ways the ICC may interact with the Council. 73

71. See SCHABAS, supra note 51, at 15-16, n.54.
72. Numerous Rome Statute provisions aim to protect the independence of the Prose-
cutor and the Judiciary. Rome Statute, supra note 6, at art. 36, ¶ 2 (discussing proposals
for increases of the number of judges; the Presidency may propose an increase, such pro-
posal is then considered and subsequently adopted if approved by a two-thirds vote of the
members of the Assembly of States Parties); id. at art. 40, ¶ 1 (“The judges shall be inde-
pendent in the performance of their functions.”); id. at art. 42, ¶¶ 1, 4 (“The Office of the
Prosecutor shall act independently as a separate organ of the Court.”) Also noting the re-
 sponsibilities and election process of the Prosecutor by secret ballot by an absolute majority
of the Assembly of States Parties); id. at art. 48, ¶¶ 1-2 (The Court enjoys privileges and
immunities necessary for the fulfillment of its purposes in each State Party, as well as the
judges, Prosecutor, Deputy Prosecutors, and Registrar.); id. at art. 36 (describing the
“[q]ualifications, nomination and election of judges”); id. at art. 40 (describing the profes-
 sional and independent nature of judges on the ICC); id. at art. 42 (describing the roles, re-
 sponsibilities, and independent nature of the ICC Prosecutor); id. at art. 48 (describing the
privileges and immunities of the judges, Prosecutor, and registrar within the “territory of
each State Party”).
73. See infra Tables 1 and 2.
### Table 1
The Council’s Rome Statute Powers Vis-à-vis the ICC

<table>
<thead>
<tr>
<th>The Council may...</th>
<th>The ICC...</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Refer</strong> (Art. 13b)</td>
<td>May exercise jurisdiction and may (examine), investigate, and/or prosecute situation, even in a non-State Party (Prosecution)</td>
</tr>
<tr>
<td><strong>(Amendment awaiting activation)</strong> Refer (Art. 15ter)</td>
<td>May exercise jurisdiction without prejudice from other international organs’ determinations regarding aggression (Prosecution)</td>
</tr>
<tr>
<td><strong>Defer</strong> (Art. 16)</td>
<td>Must suspend investigation or prosecution for twelve months; renewable (Prosecution and/or Chambers)</td>
</tr>
<tr>
<td><strong>Request Review</strong> (Art. 53(3)(a))</td>
<td>May review Prosecutor’s decision (Pre-Trial Chamber) [But see: Mavi-Marmara appeal denial: Prosecutor only needs to reconsider her decision in response to PTC’s review]</td>
</tr>
</tbody>
</table>
Table 2
The ICC's Powers, Privileges and Responsibilities vis-à-vis the Council

<table>
<thead>
<tr>
<th>The ICC...</th>
<th>The Council...</th>
</tr>
</thead>
<tbody>
<tr>
<td>Must inform the Council re: Aggression → Art. 15bis (6) (Prosecutor)</td>
<td>?</td>
</tr>
<tr>
<td>May report to the Council Non-cooperative States → Art. 87(7) (Court)</td>
<td>?</td>
</tr>
<tr>
<td>Expenses for ICC shall be provided by . . . Funds provided by the United Nations, subject to the approval of the General Assembly, in particular in relation to the expenses incurred due to referrals by the Security Council Art. 115(b)</td>
<td>?</td>
</tr>
</tbody>
</table>
First, the Council may refer situations—even those of non-States Parties to the Rome Statute, such as in the Sudan and Libya—to the Court.74 In fact, the only other way a situation can come before the ICC is through ex ante State consent—either when the State in question is the territory where the alleged crime occurred, or it is the State of nationality of the accused.75 Second, the Council also may defer proceedings of the ICC for periods of up to a year.76 This provision anticipates the potential conflict between peace and justice, and permits the Council to focus on peace, at least temporarily, over ICC proceedings. Third, the Security Council can request the Pre-Trial Chamber to review the Prosecutor’s decision not to investigate or to prosecute.77 Fourth, in the amended Rome Statute (“Statute”), effective after January 2017, in order for the ICC to exercise jurisdiction over the crime of aggression in a proprio motu or State-referred case, the Prosecutor must inform the Council.78 Should the Council refer a

74. Rome Statute, supra note 6, at art. 13(b) (“A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations . . . .”). The Court would not have had jurisdiction over cases in Sudan and Libya were it not for the UN Security Council’s referrals pursuant to Article 13(b) of the Rome Statute. This Article argues that it is more likely that the Council will refer a situation in a non-State party to the Court than one of a State Party. This is because States can self-refer and the Prosecutor can initiate investigations in her jurisdiction. In addition, the threshold for agreement of Security Council members is high—see failed attempts to refer the situation in Syria to the Court. Press Release, Security Council, Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft Resolution, U.N. Press Release SC/11407 (May 22, 2014), http://www.un.org/press/en/2014/sc11407.doc.htm [https://perma.cc/CZ7V-34XV].

75. Rome Statute, supra note 6, at art. 12, ¶ 2 (a) (requiring as a “[p]recondition[] to the exercise of [the Court’s] jurisdiction,” that “[t]he State [be] the territory of which the conduct in question occurred”); id. at art. 13 (A State may accept the jurisdiction of the Court with respect to the crime in question and shall cooperate without delay). It should be noted that referrals by States Parties mandate holders are not always immune from critique. See, e.g., Press Release, ICC, President of Uganda refers situation concerning the Lord’s Resistance Army (LRA) to the ICC, ICC-20040129-44 (Jan. 29, 2004).

76. Rome Statute, supra note 6, at art. 16 (“No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.”).

77. Id. at art. 53, ¶ 3 (a) (“At the request of the State making a referral under article 14 or the Security Council under article 13, paragraph (b), the Pre-Trial Chamber may review a decision of the Prosecutor under paragraph 1 or 2 not to proceed and may request the Prosecutor to reconsider that decision.”).

78. Id. at art. 15 (The Prosecutor must inform the UN Security Council about the possible act of aggression, whether after State self-referral or a proprio motu determination. The UN Security Council then has six months to determine that an act of aggression has occurred. If the Security Council does not make a determination within the allotted time, the Prosecutor may only proceed if the Pre-Trial Chamber so authorizes. The Court has its own authority to determine whether an act of aggression has occurred.). For an Article providing the United States’ perspective on the current definition of aggression,
situation to the ICC, the ICC will not be prejudiced by the Council’s finding of aggression. Finally, Article 87(7) of the Statute provides, that when the Council has referred a situation to the ICC, the ICC may report to the Council any State that fails to cooperate with subsequent proceedings. Neither the Charter nor the Rome Statute provides the ICC the legal authority to compel action from the Council. In addition, since its founding, the ICC has entered into a Relationship Agreement with the UN to help facilitate cooperation, but this Agreement creates procedures for transmitting information between the ICC and the Security Council without at the same time creating unfailing substantive obligations on the Council.

In short, the negotiation processes and treaties leading to the establishment of these organizations laid the foundations for a complex relationship between the ICC and Council, one that allows for possible conflict between peace and justice goals. The first two Prosecutors have each made choices as they have navigated these developments, trying to shape this relationship to be effective for the ICC in various ways. The time is now ripe for the Prosecutor to consider declining a future UN Security Council referral.

D. The Predictable and the Unexpected

The Council’s first referral to the ICC in 2005 was widely seen as a positive development for the ICC, particularly since three of the Council’s five permanent, veto-wielding members—the United

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arguing that the Court should have a limited role in prosecuting the crime on the basis that “the highly controversial aggression amendments could enter into force on the same basis as the streamlined entry-into-force provisions for amendments ‘which are of an exclusively institutional nature,’ ” see Harold Hongju Koh & Todd F. Buchwald, The Crime of Aggression: The United States Perspective, 109 Am. J. Int’l L. 257, 289 (2015) (arguing that there are potentially negative effects of the aggression amendments that might easily be put into practice and are often highly politicized).

79. Rome Statute, supra note 6, at art. 15, ¶ 4.

80. Id. at art. 87, ¶ 7 (“Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.”).

81. Int’l Criminal Court, Negotiated Draft Relationship Agreement between the International Criminal Court and the United Nations, ICC Doc. ICC-ASP/3/Res.1, at 8 (Sept. 7, 2004). Article 17 pertains to “Cooperation between the Security Council of the United Nations and the Court” and Article 17(1) indicates that in case of a Council referral, the Secretary General shall transmit information from the Court to the Security Council “in accordance with the Statute and the Rules of Procedure and Evidence.” Article 17(3) says that when the Court finds non-cooperation under Article 87(7), “The Security Council, through the Secretary General, shall inform the Court through the Registrar of action, if any, taken by it under the circumstances.”

82. See generally True-Frost, International Civil Servant, supra note 31.
States, Russia, and China— are not States Parties to the Statute, and had been hostile in various ways towards the ICC. The first two referrals to the ICC arguably served to enhance the ICC’s stature in the realm of power and international law and politics.\(^{83}\) The positive value of the Council’s recognition of the ICC through its referrals of situations in Sudan and Libya,\(^{84}\) however, has been counterbalanced by the Council’s many omissions in supporting the Court.\(^{85}\) In light of

83. Many States Parties viewed the Council’s first referral as an endorsement of the Court’s mandate. Press Release, Security Council, Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court, U.N. Press Release SC/8351 (Mar. 31, 2015) (Denmark: “[Denmark’s Representative] was encouraged that the Council had voted to adopt a resolution to bring an internationally recognized follow-up to the crimes in Darfur.” Argentina: “[This] resolution gave strong support to the Court and demonstrated significant progress within the United Nations to ensure the functioning of an international system for human rights, for which the Court was an essential tool.” France: “[France’s Representative] was gratified by the adoption of this historic resolution, by which the Council, for the first time, referred a situation to the ICC.” Greece: “The text strengthened the Council’s authority, as well as that of the International Criminal Court, which would have the possibility of showing its competence.”). Christian Wenaweser (ASP President), in a speech to ICC members in December of 2011, stated, “We as States Parties will have to think about the relationship between the Security Council and the Court. . . . We have had two referrals of situations by the Council, one of them by consensus. This was essential in giving the Court the place it currently has. In the future, we thus no longer have to look at referrals from the point of view of acceptance of the Court—we have achieved that acceptance—but rather from the best interest of international criminal justice. This means in concrete terms a genuine commitment to ensure that justice is done, by providing the necessary diplomatic and financial support.” DAVID BOSCO, ROUGH JUSTICE: THE INTERNATIONAL CRIMINAL COURT IN A WORLD OF POWER POLITICS 172 (2014).

84. The Security Council referred to the Court situations in the non-State Parties Sudan in 2005, and in Libya in 2011. S.C. Res. 1970, ¶¶ 4, 8 (Feb. 26, 2011) (recognizing that the UN shall bear no costs of the referral) (referring situation in Libya to the ICC); S.C. Res. 1593, ¶¶ 1, 7 (Mar. 31, 2005) (recognizing that the UN shall bear no costs of the referral) (referring situation in Sudan to the ICC). These two African States are not States Parties to the Rome Statute and have not directly consented to be subject to the Court’s jurisdiction.

85. Of the thirteen 87(7) non-cooperation findings the Court has transmitted to the Council as of April 2016, the Council has failed to respond to all of them. Prosecutor v. Nourain, Case No. ICC-02/05-03/09, Decision on the Prosecution’s Request for a Finding of Non-Compliance (Nov. 19, 2015); Prosecutor v. Hussein, Case No. ICC-02/05-01/12, Decision on the Prosecutor’s Request for a finding of non-compliance against the Republic of the Sudan (June 26, 2015); Prosecutor v. Al Bashir, Case No. ICC-02-05-01/09, Decision on the Prosecutor’s Request for a Finding of Non-Compliance Against the Republic of the Sudan (Mar. 9, 2015); Prosecutor v. Gaddafi, Case No. ICC-01-01-11/11, Decision on the non-compliance by Libya with requests for cooperation by the Court and referring the matter to the United Nations Security Council (Dec. 10, 2014); Prosecutor v. Kenyatta, Case No. ICC-01-09-02/11, Decision on Prosecution’s application for a finding of non-compliance under Article 87(7) of the Statute (Dec. 3, 2014); Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir’s Arrest and Surrender to the Court (Apr. 9, 2014); Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Decision on the Non-Compliance of the Republic of Chad with the Cooperation Requests Issued by the Court Regarding the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir (Mar. 26, 2013); Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Decision pursuant to article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect
the Council’s failure to support its referrals to the ICC fully, eleven years later, it is far from clear that, on balance, the referrals have enhanced the effectiveness of the ICC or perceptions of its fairness. The Council has clearly refused to support the ICC by, for example, refusing to fund its referrals and restricting funding from the General Assembly to the ICC. It has also failed to sanction ICC indictees in situations it referred. It has neither established a committee to coordinate support for the ICC’s proceedings, nor taken action when


86. For a definition of effectiveness, see Shany, supra note 13, at 230.
the ICC has reported noncompliance by States Parties to the Council.\textsuperscript{88} Council members China, Malawi, and Nigeria, have even actively undermined the ICC by hosting indictee Omar Al-Bashir for visits.\textsuperscript{89}

As of November 2016, the ICC had conducted twenty-three public preliminary examinations—ten of which were ongoing—\textsuperscript{90} initiated ten investigations,\textsuperscript{91} and issued thirty-nine arrest warrants or summons to appear in twenty-three cases.\textsuperscript{92} Of the ten situations that have come before the ICC, six were referred by States Parties, two were initiated by the Prosecutor, and two were referred by the Security Council.\textsuperscript{93} The ICC has had custody over eleven defendants. Of  

\textsuperscript{88} It is interesting to note, but beyond the scope of this Article to investigate further, that the Council also has not sought compliance by States with judgments from the International Court of Justice. \textit{SECURITY COUNCIL REPORT, THE RULE OF LAW: CAN THE SECURITY COUNCIL MAKE BETTER USE OF THE INTERNATIONAL COURT OF JUSTICE?}, (2016), http://www.securitycouncilreport.org/special-research-report/the-rule-of-law-can-the-security-council-make-better-use-of-the-international-court-of-justice.php.


\textsuperscript{92} Leslie Vinjamuri, \textit{The Distant Promise of a Negotiated Justice}, 146 \textit{DAEALUS} 100, 101 (2017).

the current cases, ten are in the pretrial stage, four are in the trial stage, and no appeals are pending before the Appeals Court.\textsuperscript{94} Seven cases are either closed or complete.\textsuperscript{95}

Over the course of its operations, the ICC's relationship with the UN Security Council has combined elements of the predictable and the unexpected. The relationship is arguably not what most States Parties expected it would be when the Rome Statute was drafted. For example, the Relationship Agreement between the United Nations and the ICC and Rome Statute Articles 115 and 87(7) demonstrate an expectation that the United Nations would help fund investigations in situations the Council referred, but the Council has forbidden such support.\textsuperscript{96}


\textsuperscript{96} Int’l Criminal Court, Negotiated Draft Relationship Agreement between the International Criminal Court and the United Nations \textit{supra} note 81, at art. 13, ¶ 2 ICC (“The United Nations and the Court further agree that the costs and expenses resulting from cooperation or the provision of services pursuant to the present Agreement shall be subject to separate arrangements between the United Nations and the Court. The Registrar shall inform the Assembly of the making of such arrangements.”).
That the relationship between the Council and the ICC would be challenging was predictable. The choice of three permanent, veto-wielding members of the Council, the United States, China and Russia, not to join the ICC did not foreshadow an uncomplicated relationship. These three permanent members’ failure to commit to the ICC certainly contributes to the Council’s inconsistent referral practice. Indeed, given the resistance to the ICC of three of the Council’s permanent members, its initial failure to refer any situations to the ICC might well have remained the status quo.

The United States’ legal inability to fund the ICC has also created obstacles in the relationship. Unprecedented developments in the relationship included the United States’ so-called Article 98 agreements between it and Rome Statute Member States, intending to defeat the ability of the ICC to secure jurisdiction over American citizens. Indeed, as a practical matter, in the early days of the Court, it was far from clear that the Council would ever be able to refer to the ICC in its work relating to international peace and security. Rather, the Council’s very first resolutions concerning the ICC were hostile, purporting to defer ICC authority over peacekeepers.

But in 2005, the Council referred the situation in the Sudan to the ICC, with restrictions, and in 2011, it sent the situation in Libya to the ICC. Notwithstanding the emphasis of delegates at the Rome Conference on the need for solid funding and cooperation for the success of the ICC, in both of its referrals, the Security Council purports to prohibit the General Assembly from offering financial support to the ICC, even for expenses relating to the Council’s referrals.

97. The United States and China expressed their opposition to the Court during the vote on the Rome Statute’s adoption. ICC Plenipotentiaries, supra note 59, at ¶¶ 28, 33, 40 (cited in SCHABAS, supra note 51, at 21).


101. Compare S.C. Res. 1970, ¶ 8 (Feb. 26, 2011) (recognizing that the UN shall bear no costs of the referral and referring situation in Libya to the ICC), and S.C. Res. 1593, ¶ 7 (Mar. 31, 2005) (recognizing that the UN shall bear no costs of the referral), with Rome Statute, supra note 6, at art. 115 (anticipating receipt of funding from the General Assembly for
hough the provisions of the Rome Statute anticipated the Council’s support for the ICC’s work in referred matters, politics have affected the Council’s capacity to provide support for its referrals. Indeed, the restrictions on funding are largely due to American domestic opposition to the ICC in the form of the American Servicemembers Protection Act (ASPA). The record and resulting documents of the Rome Conference show that a few delegates there contemplated the Council would prohibit UN-funding as a condition of its referrals.

In addition, for those who hoped that the Council’s referrals would presage its support for the ICC, the Council’s failures to act are particularly disappointing. After the Council’s two referrals, the Council’s continuing failure to refer to the ICC the situation in Syria, where massive crimes are plainly occurring, has exacerbated perceptions of selective justice. The failure highlights the determinative role of politics in Council referrals. Council members failed to help enforce the ICC’s warrants, even in those cases resulting from situations the Council had referred to the ICC.

That permanent Council members, such as China and elected members Chad and Nigeria, would host President Omar Al-Bashir, whom the ICC indicted pursuant to a Council referral, was, for many

“expenses incurred due to referrals by the Security Council”). For support for the claim that the UN Security Council violates international law when it prevents the General Assembly from funding Council’s referrals, see, for example, Luigi Condorelli & Annalisa Ciampi, Comments on the Security Council Referral of the Situation in Darfur to the ICC, 3 J. INT’L CRIM. JUST. 590, 594 (2005) (arguing that the SC’s forbidding funding in connection with the Darfur case is “at odds not only with [its] decision to refer, but also with the duty of good faith negotiations . . . .”); Fletcher & Ohlin, supra note 28, at 430 (arguing that the SC’s referral of the Darfur case violated the “funding scheme” and “the spirit” of art. 115(b) of the Rome Statute); Isanga, supra note 5; W. Michael Reisman, Editorial Comment, On Paying the Piper: Financial Responsibility for Security Council Referrals to the International Criminal Court, 99 AM. J. INT’L L. 615, 616 (2005) (quoting Mahnoush H. Arsanjani, who has written that “the general sentiment among the delegations was that if the Security Council refers a matter to the Court, the United Nations should pay the expenses”).

In the travaux preparatoire, there was a lack of clarity about the funding of the Court. For example, at the meeting held in Cartagena de Indias, members of the Movement of Non-Aligned Countries stressed a need for a “suitable method of funding . . . to ensure respect for the principle of nullum crimen sine lege.” ICC Plenipotentiaries, supra note 59, at 73, ¶ 16. However, the Overseer for the International Court of Jurists felt that the Court should be funded from the U.N. regular budget. Id. at 89-90, ¶ 76. Meanwhile, the United States suggested that the Court should be funded by the States Parties to the Rome Statute. Id. at 246, ¶ 47.

103. See id.; ICC Plenipotentiaries, supra note 59.
States Parties, not expected. The Council has not entered sanctions against those who have been indicted by the ICC following its referrals. Indeed, as of March 2016, no ICC defendant has been sanctioned by the UN Security Council after being indicted by the ICC.

It also failed to issue country-specific resolutions or to sanction individuals in States that have violated their international law obligations by failing to arrest ICC indictees in Council-referred situations. Yet, leaders in violating States are arguably breaking not just the terms of the Rome Statute but also Article 25 of the UN Charter. In June 2015, South Africa joined the list of African

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107. See supra Table 1. “The Council’s Rome Statute Powers Vis-à-vis the ICC.” Of those Council-referred matters: The UN Security Council has sanctioned zero of seven indictees in the situation in the Sudan. The UN Security Council sanctioned three of three indictees in the situation in Libya before the ICC indicted them. Of State-referred matters: Six ICC defendants from Congo were listed by the Security Council before being indicted. There is some overlap between the list of indictees and those on the Council’s targeted sanctions lists, but that overlap has occurred only when the ICC acted after the Council. The Council has not followed the Court’s lead and sanctioned individuals indicted by the Court. It is beyond the scope of this Article to argue whether such a practice would be advisable or not. For purposes of this Article, it is sufficient to note that while the Council sanctioning indictees might raise new issues regarding the independence of the Court and the Council, it is nevertheless one tool the Council could use to support the Court.


109. Under Article 25 of the Charter, Members of the United Nations agree to accept and carry out the decisions of the Security Council. It is beyond the scope of this Article to defend the notion that States that violate the implications of Security Council referrals are violating Article 25 of the UN Charter. For support of this argument, see, for example, Dapo Akande, The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir’s Immunities, 7 J. INT’L CRIM. JUST. 333, 341 (2009) (“[S]ince the jurisdiction and functioning of the Court must take place in accordance with the [Rome] Statute, a decision to confer jurisdiction is a decision to confer it in accordance with the Statute. Thus, all states (including non-parties) are bound to accept that the Court can act in accordance with its Statute [in the case of Council referrals]. In this sense, at least, a non-party to the Statute is bound by the Statute in the case of a [Council] referral—in the sense that it is bound
States flouting the authority of the ICC by inviting Al-Bashir to visit during the African Union Summit. Nonetheless, the Council did not pass a resolution regarding South Africa’s illegal actions, although ten Council members at the time were States Parties of the Rome Statute.\(^{110}\) Not long after South Africa’s highest court ruled, in March 2016, that the government violated its international law obligations by failing to arrest Al-Bashir during a visit,\(^{111}\) the South African government announced its withdrawal from the ICC.\(^{112}\)

In addition, although the ICC has reported to the Council instances of State noncompliance in Council-referred cases, as anticipated by the Rome Statute in Article 87(7), to date, the Council has not responded to these reports.\(^{113}\) Over six years after the ICC’s issuance of two arrest warrants for the President of the Sudan on March 4, 2009, and July 12, 2010, the UN Security Council has still not taken action against non-compliant States.\(^{114}\) Council members fully understand to accept the jurisdiction of the Court and legality of the Court’s operation in accordance with its Statute.”; Phakiso Mochochoko, Open Debate of the United Nations Security Council on “Peace and Justice, with a special focus on the role of the International Criminal Court,” address on behalf of the Prosecutor, at 3 (Oct. 17, 2012), https://www.icc-cpi.int/iccdocs/otp/ENGPmatUNSC_17102012.pdf [https://perma.cc/A39K-69W5] (“Once the Security Council decides to refer a situation to the Prosecutor, the judicial process has been triggered and the matter is fully in the hands of the Prosecutor and the Judges. The only way to stop the procedure is one of legal means, by invoking Article 16 of the Rome Statute. Efforts to interfere with the independent exercise of the Office’s mandate would only serve to undermine the legitimacy and credibility of the judicial process, thus giving credence to allegations of politicization.”).

110. These States were: Chad, Chile, France, Jordan, Lithuania, New Zealand, Nigeria, Spain, the United Kingdom, and Venezuela. See Countries Elected Members of the Security Council, UNITED NATIONS SECURITY COUNCIL, http://www.un.org/en/sc/members/elected.asp [https://perma.cc/R2UQ-9T3L].


114. See Prosecutor v. Harun, ICC-02/05-01/07, Decision informing the United Nations Security Council about the lack of cooperation by the Republic of Sudan (May 25, 2015),
that the ICC does not have the independent ability to investigate situations successfully and to secure custody of its indictees without support from States or the Council.

In short, in many respects, the Council has not acted cooperatively with the ICC; for example, it failed to send strong signals of support to States Parties and UN Member States that they must comply with its decisions. The Council has significant discretion in navigating its relationships with the ICC, the Prosecutor has far less. What might happen, then, if the ICC Prosecutor exercised her relatively limited discretion differently to manage this otherwise challenging relationship?

### III. A WEAPON OF THE (RELATIVELY) WEAK: PROSECUTORIAL DECLINATION

Within the ICC, the Prosecutor has administrative power and discretion regarding numerous issues, including the place and timing of preliminary examinations, investigations, and whom to prosecute.115 Within the limits provided by the legal framework, she can use her soft power and discretion to guide the relationship between the ICC and the Council. Even in the face of many obstacles the Council has created that impinge upon the ICC’s successes, there are possibilities for improving the effectiveness of the relationship. Two provisions of the Rome Statute allow the Prosecutor to use her discretion to determine the admissibility of a case: the provision regarding gravity and the provision regarding the interests of justice. The Prosecutor otherwise has little leverage in dealing with non-State Parties to the Rome Statute. Her biggest sources of leverage are: (1) a supportive Security Council, (2) supportive Rome Statute States Parties, and (3) her soft power to influence States and IOs.

Although the literature on the overlap between international criminal law and politics is extensive,116 and much of it focuses on

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115. See Rome Statute, supra note 6, at art. 13, 15. Indeed, declining to investigate is not the only route the Prosecutor might use to control Court resources. She might prosecute only the lowest ranking individuals.

116. See, e.g., MARK A. DRUMBL, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW (2007) (discussing how international criminals who perpetrate crimes of atrocity should be punished differently from traditional, western-based political concepts of punishment); Tom Ginsburg, The Clash of Commitments at the International Criminal Court, 9 CHI. J. INT’L L. 499 (2009) (discussing the “clash of commitments” in the ICC and the Court’s in-
prosecutorial discretion, few scholars writing about prosecutorial discretion have focused on the question of how the Prosecutor could use her discretion to more effectively manage this critical relationship between the ICC and the Council.\textsuperscript{117} Often scholars have made recommendations hoping to shame or coax support out of the Council, but too often the Council has remained impervious to outside suggestions of reform.\textsuperscript{118} A number of scholars have also considered how the Prosecutor might use her discretion to help the ICC to better achieve its mandate, including, for example, Rebecca Hamilton’s recent article proposing that the Prosecutor might plan to exit some ongoing situations.\textsuperscript{119} A gap in the existing literature\textsuperscript{120} is therefore filled by...
targeting the Council-ICC relationship to consider how using her discretion, the Prosecutor might both increase the ICC’s effectiveness\footnote{121}{For purposes of this Article, I focus on goal-oriented effectiveness, centering on the goals of the mandate holders, which usually include primary norm compliance, dispute resolution, regime support, and regime legitimization. There are tradeoffs between each of these goals. \textit{See} Shany, supra note 13, at 265; \textit{see also} discussion infra Part IV. Within the Court, different mandate holders may also focus on different goals. For an excellent article analyzing some of the difficult tradeoffs involved in case selection, see, Margaret M. deGuzman, \textit{Choosing to Prosecute: Expressive Selection at the International Criminal Court}, 33 \textit{Mich. J. Int’l L.} 265 (2012).} and the meaningfulness of its prosecutions by addressing (some) States Parties’ concerns that the ICC is nothing more than an agent of the Council in dealing with its referrals.

\textbf{A. Prosecutorial Discretion, the ICC and the Council}

In the past, ICC Prosecutors have mostly tried to cooperate with the Council and have mostly refrained from pressuring the Council in an aggressive fashion.\footnote{122}{See generally True-Frost, \textit{International Civil Servant}, supra note 31.} Luis Moreno-Ocampo and Fatou Bensouda, the former and incumbent ICC Prosecutors, for example, have both complied with the Security Council’s resolution-based requests to be updated on the ICC’s progress twice a year, respectively, in the Council-referred situations in the Sudan and in Libya. So, in December 2014, when Prosecutor Bensouda announced she would freeze investigations in the Sudan cases,\footnote{123}{See U.N. SCOR, 69th Sess., supra note 2. The first Prosecutor was elected by the Assembly of State Parties in 2003 and Prosecutor Bensouda was elected in 2011. \textit{Luis Moreno-Ocampo, Getnick & Getnick Counsellors at L.}, \url{http://getnicklaw.com/our-team/luis-moreno-ocampo/} [https://perma.cc/7SWF-V93C]; \textit{Office of the Prosecutor, Int’l Criminal Court}, \url{https://www.icc-cpi.int/about/otp?ln=en} [https://perma.cc/N9B4-DQ5G].} her announcement made headlines. Indeed, President Al-Bashir understandably greeted the Prosecutor’s announcement triumphantly, claiming that the ICC had “failed” in its mission.\footnote{124}{Sudan’s President: ICC ‘Failed’ in Prosecution Effort, VOA News (Dec. 13, 2014, 11:59 AM), \url{https://www.voanews.com/a/icc-suspends-sudan-war-crimes-inquiry/2557685.html} [https://perma.cc/UM7L-L8W8]. The Court has had difficulty with many cases recently, for example, the Prosecutor’s announcement about Al-Bashir came in close succession to her...
The ICC currently is at risk of becoming irrelevant through its slow progress in cases, its inability to secure the support it requires in the States where it is investigating and prosecuting, and its failure to secure referrals of critical situations from the Council.\textsuperscript{125} The Prosecutor’s declining a referral by the Council in the future, along with a statement of the reasons why, might well allow the ICC to preserve valuable resources. The ICC could focus on situations referred by its mandate holders or initiated by the Prosecutor, and might build a more constructive relationship with the Council regarding future referrals.\textsuperscript{126}

As the Assembly of State Parties has recently acknowledged, the Prosecutor’s capacity to control the flow of cases and resources will be critical to the future effectiveness of the ICC.\textsuperscript{127} That so many States Parties are dissatisfied with the ICC’s docket and results matters, not least because the ICC’s capacity to effectuate results still depends on its ability to marshal support from its State Parties. Of course, all “international institutions, their officials and outcomes are accorded legitimacy to the extent that they conform to the legal requirements set out in their founding treaties . . . .”\textsuperscript{128} but for a Court whose enforcement capacity rests entirely with its members, this legitimacy is even more critical.

Under the Rome Statute, the Prosecutor has the legal authority to decline a Council referral in the interests of justice.\textsuperscript{129} The Prosecutor’s 2003 Policy Paper notes, “States and the Office have to evaluate how successful investigations and prosecutions can be in situations where the necessary cooperation is lacking. Cooperation becomes more than ever before a critical success factor if the Office is going to achieve positive results.”\textsuperscript{130} At this adolescent point in the ICC’s in-
stitutional history, the Prosecutor’s reasoned consideration of declination is merited in order “to guarantee lasting respect for and the enforcement of international justice.”131

In making the decision to decline to investigate or to prosecute a Council referral, the Prosecutor would of course be mindful that the decision may be reviewed by the Pre-Trial Chamber.132 Regardless of whether upholding or overturning the Prosecutor’s decision to decline, such review could well add to the legitimacy of the Prosecutor’s decision.133 Still the full legal and practical scope of the Prosecutor’s discretion remains largely unchartered.

B. Mechanisms of Influence: The Power of the Weak

The Prosecutor’s authority and discretion are composed of both soft and hard power. This Section unpacks the theoretical underpinning of the potential power of declination in order to better understand the possibility that the Prosecutor might abstain from acting on a Council referral. By offering an explanation when she does so, she can use her power to persuade. This is her main weapon for possibly increasing the ICC’s effectiveness in cases of Council referrals. It also allows her to focus valuable resources on the Court’s mandate holders.134

Plan 2016, supra note 37, at 13, ¶ 26 (“As already mentioned in the Strategic Plan (June 2012-2015), ‘States and the Office have to evaluate how successful investigations and prosecutions can be conducted in situations where the necessary cooperation is lacking. Cooperation becomes more than ever before a critical success factor if the Office is going to achieve positive results.’”).

131. Rome Statute, supra note 6, at pmbl.

132. Id. at art. 53, ¶ 3.

133. Recently, the Appeals Chamber of the ICC implicitly endorsed broader prosecutorial authority for the OTP. Registered Vessels of Comoros, Greece and Cambodia, Case No. ICC-01/13, Notice of Appeal of “Decision on the request of the Union of the Comoros to review the Prosecutor’s decision not to initiate an investigation,” (July 27, 2015), http://www.icc-cpi.int/iccdocs/doc/doc2024328.pdf [https://perma.cc/KXW4-9RK7]. When, in November 2015, the Appeals Chamber declined the Prosecutor’s appeal, it also indirectly affirmed the Prosecutor’s decision not to investigate the situation of the Mavi Marmara. Registered Vessels of Comoros, Greece and Cambodia, Case No. ICC-01/13 OA, Decision on the Admissibility of the Prosecutor’s Appeal Against the “Decision on the request of the Union of the Comoros to review the Prosecutor’s decision not to initiate an investigation,” (Nov. 6, 2015), https://www.icc-cpi.int/iccdocs/doc/doc2152672.pdf [https://perma.cc/ZNZ7-HC8X]; Situation on the Registered Vessels of Comoros, Greece and Cambodia, Case No. ICC-01/13, Decision on the request of the Union of the Comoros to review the Prosecutor’s decision not to initiate an investigation, (July 16, 2015), http://www.icc-cpi.int/iccdocs/doc/doc2015889.pdf [https://perma.cc/PQ7D-GVE9].

134. ICC States Parties are all mandate holders in the enterprise of international criminal law and bear responsibilities for enforcing the provisions of the Rome Statute in ways that non-State Parties Council members do not. Mandate holders may try to use the Court for their own goals, which may not align well with those of other mandate holders, victims, or the Court overall.
This possible course of action is situated at the intersection of constructivist and rational choice theory—probing as it does the outer limits of norm diffusion. The proposal stems from the concern that the ICC’s capacity to promote and diffuse ICL norms in situations referred by the Council is limited by the Council’s lack of support and enforcement. From a constructivist perspective, State interests can be shaped and norms can be supported and diffused even in the face of tremendous power asymmetries. Over time, States may internalize ICL norms, even in the face of non-enforcement at the international level.

At this point in the Court’s work, ongoing lack of funding, support, and the non-compliance by Council members in these high-profile referred cases, however, exacerbates the negative optics for the Court more than it assists in norm diffusion. Thus, the ICC Prosecutor might prepare to say no to the Council in the interests of justice for a number of reasons—some animated by constructivist concerns, but also some stemming from rational choice approaches.

Rather than taking State self-interest as a given, constructivists are interested in the content of State interests and the social processes through which norms diffuse. Indeed, simple rational calculations of self-interest are not sufficient motivators of States’ behavior—rather a satisfactory account of causal motivators requires consideration of norms and beliefs. Constructivists do not deny that self-interest is causally significant, but argue instead that ideas meaningfully shape States’ perceptions of what is in their self-interest. For these scholars, norms may have a causal power of their own. According to Martha Finnemore’s theory of norm diffusion

135. Norm diffusion is defined as the process by which “collectively held ideas about behavior” are promoted. MARTHA FINNEMORE, NATIONAL INTERESTS IN INTERNATIONAL SOCIETY 22-23 (Peter J. Katzenstein ed., 1996).


139. Id. at 15 (“Socially constructed rules, principles, norms of behavior, and shared beliefs may provide states, individuals, and other actors with understandings of what is important or valuable and what are effective and/or legitimate means of obtaining those valued goods.”).
at the international level, realists' causal arrows can be reversed and international organizations and NGOs can be seen to shape the interests of States.140 Norm-based international legal theorists emphasize the content, or legitimacy, of the international norm and the process of legal interactions that lead to its horizontal or vertical integration.141

For rational choice-based (neo)realist and institutionalist theorists, however, in the anarchic world of international relations,142 States act rationally to maximize self-interest and power.143 For these theorists, norms (such as ICL norms) promoted by international organizations and States, are mere cloaks for the instrumental goals of the most powerful States.144

That the Prosecutor might use her weapon of discretion to decline future Council referrals is a controversial suggestion145 emanating

140. Id. at 13, 22.
141. Thomas Franck's legitimacy theory and Abram and Antonia Chayes's managerial legal process theory are norm-based approaches. ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS 22-25 (1995) (emphasizing intergovernmental cooperation as an effective alternative to coercive enforcement mechanisms in their managerial legal process theory); THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 43-49 (1990) (arguing that compliance with international law will be secured when a legal norm is perceived to be fair and legitimate).
143. See generally Fearon & Wendt, supra note 137, at 61 (arguing that international law emerges from States acting rationally to maximize their interests).
145. She may be playing hardball in using her discretion in this way. Mark Tushnet, Constitutional Hardball, 37 J. MARSHALL L. REV. 523, 523 (2004) (describing legal and political moves "within the bounds of existing constitutional doctrine and practice but that are nonetheless in some tension with existing pre-constitutional understandings").
from an acceptance that, in the context of diffusing international criminal law norms in particular, the ICC would do well to focus on the support of its mandate holders.

In making a declination, the Prosecutor should consider the possible motives of various Council members in making referrals to the ICC. Of course Council members’ motives need not exactly match the goals of the ICC, but any disconnect may indeed be relevant to the Prosecutor’s decision-making. Council referrals arguably allow the Council to engage crises without assuming direct responsibility for the outcomes that follow. Council referrals to the ICC lower the political costs for the Council organ, which might otherwise be accused of inaction—a vast political science literature describes how courts lower the political costs for other actors, even as they might also concurrently raise the costs for the ICC. When the referral appears to be merely a pressure release valve for the Council, the Prosecutor might consider declining.

Regardless of the outcome of a particular ICC referral, in the short-term, the Council organ arguably benefits. United Nations Member States’ arguably perceive the Security Council’s commitment to its collective mandate to preserve international peace and security.

C. Limitations to and Concerns About Prosecutorial Declination of Council Referrals

This Section sets out some basic limitations regarding the idea of declining a Council referral to improve the effectiveness of the Court and addresses some concerns about the idea. As to limitations, first, this Article provides reasons the Prosecutor might understandably decide to decline Council referrals and identifies some of the relevant consequences and implications of such a decision, but it is beyond the scope of this Article to define precisely the situations in which the Prosecutor should say no to the UN Security Council. In addition, it is beyond the scope of this Article to provide the full legal argument justifying the Prosecutor’s declining to investigate or prosecute a Security Council referral in the interests of justice. A preliminary interpretation of the law circumscribing the Prosecutor’s discretion un-

146. While in many cases, it may be difficult to definitively establish what these motivations are, the Council’s open debates usually disclose the official reason for the State’s action in International Criminal Court. See, e.g., Report on Preliminary Examination Activities 2013, supra note 90; Report on Preliminary Examination Activities 2014, supra note 90; Report on Preliminary Examination Activities 2015, supra note 90.

147. See Helfer & Slaughter, supra note 24.

nder Article 51 supports her power to do so.149 The Prosecutor broadening her interpretation of Article 53’s interests of justice standard would leave her open to criticisms of selective justice. Given the constrained jurisdiction of the Court, this criticism is to some degree inescapable. The Prosecutor would need to explain her rationale for declination clearly. Given the evidence surveyed here, the Council’s political processes have arguably not, thus far, been compatible with effective ICC adjudication.

1. The Long-Term Success of the Institution Should Be Valued by the Prosecutor

The Rome Statute’s preamble includes the goal that “serious crimes . . . must not go unpunished,”150 yet as the ICC is necessarily one of limited jurisdiction that is structurally incapable of reaching many crimes, and to the extent that it is constrained by the cooperation of its Member States, its broadest preambular goals are, at present, arguably aspirational. At this point in the ICC’s tenure, it is not clear that the object and purpose of the statute and the interests of victims are served by having the ICC ineffectively plunge into an investigation and prosecution. Rather, this Article assumes that it is in the long-term interests of the global community, including victims of atrocity, for an independent ICC to establish its authority within the scope of its jurisdiction, and not to struggle for survival and political support. Given the many challenges the ICC faces, prosecutorial declination and restraint, even in the face of possible massive atrocities, might well be helpful tools for the longevity of the Court. Although there will be short-term costs to declination, including allowing a situation to go unaddressed by the Court, viewed over the long-term, the goals of the ICC and its mandate holders may be helped by de-
clining a Council referral in the short-term for the reasons laid out above. Declination need not be an irresponsible move for a Prosecutor responding to a Council that has arguably violated the intent of the drafters of the Rome Statute, including for example, by restricting the Court’s ability to secure funding.151

2. Assumptions About Collective Action

This Article’s focus is on improving a critical aspect of the ICC’s long-term effectiveness: its relationship with the Council. This Article assumes that both the Prosecutor’s Office and the Council organ are ultimately invested in their respective institutions’ longevity. Some readers may dispute this methodological assumption, arguing that because the Prosecutor works in an organization with four different organs, including the Assembly of State Parties, and the Council is composed of many Member States, the various parties’ motivations matter. To speak meaningfully about effectiveness, therefore, the interests of the individual players within the organs must be disaggregated. There are multiple interests at stake within each institution and organ, but the reputation of both the UN and the ICC will rise or fall with each one’s ability to accomplish their respective goals.152 While future analysis of micro-level interactions within each of the organs and how they may in turn affect the over-all goals of these institutions might well be helpful to better understanding which referrals to decline, such analysis will likely not vitiate the basic assumption that over-all, members of these collective organs have an interest in their own organs’ continued longevity.

3. Council Referrals May Be Meaningfully Treated as a Distinct Class

Some readers may wonder why this Article treats Council referrals as a unique class of referrals at all.153 Why not broaden this inquiry about the prosecutorial discretion to decline cases, to include

151. The Prosecutor will certainly preliminarily examine the situation. Such an examination may make declining to prosecute even more politically unpalatable, as tremendous crimes might be unearthed. The Prosecutor will need to explain why she is declining, and she will face the possibility that the PTC will reverse her decision and request her to reconsider. Doing so may increase the costs for the Security Council associated with referring a situation to the ICC.

152. See Yuval Shany, Assessing the Effectiveness of International Courts 22 (2014); Anthony Banbury, Opinion, I Love the U.N., but It Is Failing, N.Y. TIMES (Mar. 18, 2016), http://www.nytimes.com/2016/03/20/opinion/sunday/i-love-the-un-but-it-is-failing.html?_r=0.

153. Indeed, Leslie Vinjamuri argues that the ICC has extensive authority without having narrow or intermediate authority in both Security Council and proprio motu referrals alike. See Vinjamuri, supra note 43, at 279.
State self-referrals that the Prosecutor might decline? First, this Article argues that Security Council referrals raise unique effectiveness and legitimacy concerns; as elaborated further below, not least because they simultaneously prohibit funding for the ICC’s work on Council referrals. Unlike States Parties, the Council incurs no actual costs when it refers situations to the ICC, even as it receives the benefit of appearing to have addressed a particular situation. Its referrals of non-consenting States to the ICC also raise concerns about extending the authority of the Court absent enforcement power of a kind not present in State self-referrals. In addition, the Prosecutor already has declined to move beyond a preliminary examination in State self-referrals.154 However, this is not so in the case of the two Council referrals of non-Member States Parties.

Some readers may object that two Council referrals is too small a class from which to generalize about future actions. To this point, it is important to recall that this Article examines the possible wisdom of declination, but does not argue that the Prosecutor should decline every Council referral. In addition, while Libya and the Sudan were indeed distinguishable from each other and other ICC cases in many ways, they do share the Council-driven characteristics mentioned above—they lack funding and the Council has not supported the Court’s actions.

Relatedly, some might argue that the class of independent proprio motu investigations raise more concerns than do Council referrals, initiated as they are by a single person, and not vetted by a multi-member, longstanding international authority with a mandate to preserve international peace and security. The Prosecutor’s unilateral use of discretion can indeed compromise the legitimacy and effectiveness of the ICC in various ways. As mentioned above, however, proprio motu referrals have already received tremendous attention in literature. In addition, the Pre-Trial Chamber’s required approval of prosecutorial-initiated investigations and prosecutions diminishes concerns about a rogue prosecutor.155 But most importantly, the Office of the Prosecutor’s goals (and motives) in opening proprio motu investigations are better aligned with the long-term goals of the ICC than are the goals of the multi-member Security Council organ. The Prosecutor not only has an intimate understanding of the budget of the ICC, but she also has an incentive to use her discretion effectively

154. For example, the Prosecutor has initiated preliminary examinations and continued such examinations for long periods of time without opening an investigation. Report on Preliminary Examination Activities 2015, supra note 90, at 26-51. Indeed, four preliminary examinations have been open for five to eleven years; Colombia has been open since 2004, Afghanistan since 2007, Guinea since 2009, and Nigeria since 2010. Id. at 26, 32, 40.

155. See Danner, supra note 27, at 518.
to maintain her position in a system of justice respected for its fairness and independence by as many mandate holders as possible.\textsuperscript{156}

4. Declination Is Consistent with the Object and Purpose of the Rome Statute

Others may argue that it would be irresponsible for the Prosecutor to decline to investigate a Council referral—that to do so would defeat the object and purpose of the Rome Statute, representing the Prosecutor’s “failure to respect the legal limits set by the mandate providers [which] would undermine the legitimacy of [the ICC] and may lead to a legal or political backlash against them.”\textsuperscript{157} The argument might continue, where the Council succeeds in agreeing that there is a threat to international peace and security, there will likely also be international crimes.\textsuperscript{158} The Prosecutor’s failure to proceed in such a situation could undermine the ICC’s objective. Alternately, the Prosecutor’s expansion of the conception of the interests of justice to decline to prosecute in such a situation will open the Court to even more claims of bias. At the same time, however, and as alluded to the Prosecutor’s Policy on Case Selection, it should be recalled that the ICC is a court of limited resources. It simply cannot prosecute all cases. Discretion in case selection is necessary but also leaves the Prosecutor open to claims of bias. The Prosecutor has made it clear that the Office prefers to prosecute where there is jurisdiction and that her job is to pursue justice. But this does not necessarily preclude her ability to decline a Council referral in the interests of justice—that the ICC will not be able to serve justice in these Council-referred cases absent support from the Council is borne out by the referrals so far.

That the jurisdictional and enforcement constraints within which the Prosecutor must operate make it nearly impossible for the Prosecutor to avoid critiques of bias would not be a full vindication of a strategy of declination of a Council referral. In policy papers, the Office of the Prosecutor (OTP) has already necessarily defined a certain subset of cases that will be priority cases for the Office.\textsuperscript{159} These poli-

\textsuperscript{156} Laurence R. Helfer & Anne-Marie Slaughter, Toward a Theory of Effective Supranational Adjudication, 107 Yale L.J. 273, 370 (1997); Helfer & Slaughter, supra note 24, at 906.

\textsuperscript{157} SHANY, supra note 152, at 7.

\textsuperscript{158} It is important to note that a class of situations exists where there may in fact be a threat to international peace and security, but there may nonetheless not be a cognizable international crime that falls within the ICC’s jurisdiction. But this Article deals with broader cases, those in which there may well be triable offenses present.

\textsuperscript{159} Int’l Crim. Court, Office of the Prosecutor, Policy Paper on Case Selection and Prioritisation, (Sept. 15, 2016), https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf [https://perma.cc/P9C3-FU4Z].
cy papers both help explain and informally limit the prosecutor’s discretion. Thus, in the case of declination, the Prosecutor might also wisely elaborate the ways that another unsupported Council referral will not serve the interests of justice. The OTP’s recent policy paper on case selection, has refined earlier policies in order to help the Office of the Prosecutor achieve success and to conserve resources. If the Prosecutor declines to exercise jurisdiction over a situation in a non-State Party in the interests of justice, it will certainly open the Office to criticism, but will also be consistent with the Office’s recent explicit focus on resources of the ICC and the need to focus on cases where success is possible.

The Prosecutor can use her soft power, the power to explain her discretion to anticipate and respond to criticisms. She can explain that Council-referred cases will likely be nearly impossible to investigate and prosecute—those that are in non-consenting non-States Parties with ongoing conflicts. That rationale and her decision may well be reviewed by the PTC. Not only will her assessment of the likelihood of success in Council referrals likely be important to the PTC, but the Prosecutor’s use of her soft power and her explanation of her reasons for inaction may be central to how successful she is in conveying to the Council the burdens the Council has placed on the ICC. The Prosecutor’s denial in the interests of justice must make it clear that prosecution is necessary (if, indeed, she finds it to be so), but that at present, without a show of more support from the international community, the ICC will not be able to proceed effectively.

Some readers will argue that the interests of justice never permit compromise, and that bad actors should be prosecuted, regardless of the cost to the institution. This consequentialist argument has some foundation in the Rome Statute, but this interpretation focuses on the utilitarian and expressive values of the Court’s prosecutions. As stated above, norms matter within this Article’s framework, but a

160. Strategic Plan 2016, supra note 37, at 16, ¶ 36 (“The Office published its policy paper on preliminary examinations in November 2013. This policy clarifies the process and criteria applied by the Office in accordance with the Rome Statute in deciding on whether or not to open an investigation. Complementary to this policy, the Office is working on a case selection and case prioritisation policy which will clarify how the Office decides which cases to pursue once a situation has been opened for investigation. Two aspects are being considered within this policy: (1) how to identify cases that the Office should pursue, and (2) how to prioritise amongst those cases if the demands placed upon the Office exceed[] the Office’s resources. Subsequently, the Office will define its policy on how it proposes to end its involvement in a situation under investigation, the so-called: ‘exit strategy’ for situations.”).


162. But see, deGuzman, supra note 121, at 296 (“In fact, due to the malleability of the factor-based approach to assessing gravity as well as the ‘interests of justice,’ a claim that the prosecutor adheres to ex ante standards for selection decisions may actually undermine the Court’s efforts to build legitimacy.”).
starting point for this analysis is the reality that the ICC is a court of limited jurisdiction, which requires the ICC necessarily to weigh the likelihood of success of prosecution. Also, to respond to consequentialist concerns, as mentioned above, diplomats and politicians have already increasingly discussed establishing ad hoc tribunals to fill gaps in the Rome Statute framework, so gaps resulting from prosecutorial declination may be filled in other ways.163

At any rate, declination need not mean that crimes go unpunished. International criminal law scholars agree that it is increasingly likely that the Council will establish ad hoc tribunals, or regional tribunals to address some threats to international peace and security, as part of the regime of international criminal law.164 Whether or not the return to ad hoc tribunals is a good development for the international criminal law regime, the Prosecutor may treat the renewed interest in ad hoc tribunals as an opportunity for her to shift the burden to the Council, and to use her discretion to limit the situations the ICC pursues.

5. Effects on Institutional Relations with the UN Security Council

Informed readers might also be concerned that the ICC cannot afford to alienate the Council by declining a referral. After all, many of the successes of the ad hoc tribunals in securing custody over missing defendants were contingent on the behind-the-scenes coercive pressure of key members of the Council. But the Council has simply not been willing to offer support for ICC prosecutions and, as this Article elaborates,165 that failure has been costly for the ICC, which needs to move forward conservatively at this point in its life cycle. A related concern is that an alienated Council would retaliate by delaying different Court proceedings for a year. Indeed, one indirect form of support the Council has provided the Court has been to decline to defer ongoing proceedings when requested to do so by the AU.167 It is certainly a risk, as the Council is a powerful, longstanding organ. But as the Kadi case in the European Union, demonstrates there has been indirect review of Council decisions and processes.168 A retalia-

164. See, e.g., Fan, supra note 69, at 1067-68; Stephens, supra note 69, at 504.
165. See, e.g., infra Table 3.
166. Only narrowly—the vote was close on whether to defer.
167. See ICC Plenipotentiaries, supra note 59, at 67, ¶ 38.
tion from the Council could be costly to the Council, too, however, as past practice has demonstrated that the Council has sometimes adjusted its procedures in response to tremendous backlash from member States.169

6. Effects on Relations with States Parties

The ICC has the greatest geographic and temporal reach of any international criminal tribunal to date, even as the Rome Statute gives it limited jurisdiction.170 There is a concern that a denial by the ICC Prosecutor of a Council referral would cause some Rome Statute States Parties to reconsider their membership in the ICC. At the same time, States Parties ratified the Rome Statute knowing that many powerful States were not joining the Rome Statute framework. Universal membership remains an aspiration, and there are frequent threats of exit, but no State has yet left.

7. Council Referrals Uncoupled by Its Support Test the Limits of the Expressive Value of International Criminal Law

A central theoretical assumption behind the Prosecutor declining a referral is that there are limits to the expressive value of a prosecution at this point in the Court’s life. Some would respond, however, that any Council referral, regardless of its outcomes, has value. Council referrals, the argument would continue, promote and diffuse the norms of international criminal law, and the Prosecutor is therefore duty-bound to investigate and prosecute if there is sufficient evidence. In other words, because the norms of ICL are supported regardless of the immediate outcome of a particular situation, even when the indictee remains at large, there is expressive value in proceeding. As demonstrated in Section IV.B., infra, there is some evidence to support this view, but it is not a settled matter. Earlier in the ICC’s existence, when the prospect of Council enforcement of a referral was still viable, the view that the ICC’s long-term effectiveness was not contingent on its ability to enforce in Council referred-situations was more persuasive.

European Council Regulation implementing targeted sanctions on the grounds that it violated ‘the rights of the defence, in particular the right to be heard, and the right to effective judicial review of those rights.’


170. “South Africa’s governing party, the African National Congress, said in a statement over the weekend that the International Criminal Court was not ‘useful’ to prosecute crimes against humanity because membership is voluntary.” Onishi, supra note 111.
At this point in the ICC's existence, however, the ICC faces numerous challenges. Recognition from the Council is no longer one of them; rather follow-through from all Council members is critical.

8. Declination Could Affect the Deterrence Goals of the Court

Related, a concern is what impact declination would have on deterrence. Whether the ICC actually deters is the subject of an active debate, but there are multiple anecdotal accounts of the deterrence effects of ICC prosecutions on various leaders. The analysis below of the effectiveness of Council referrals to the ICC preliminarily indicates that Council referrals have yielded prosecutions that have been actively undermined by traveling, or at-large, high-profile indictees.

Which is more damaging to the deterrence effect of the Court, frustrated prosecutions or the ICC Prosecutor's declination in similar situations? Although prosecutions need not result in convictions in order to have a deterrent effect, to the extent the Prosecution can either inculcate Council support for its referrals at this phase in the Court's development or avoid the dilemma entirely through declination, this might help ameliorate the issue of at-large defendants in Council-referred matters. The relationship between law and politics is notoriously complicated, but the ICC is an institution of law that is uniquely affected and constrained by the political whims of the Council. This concern is also related to the expressive value of the prosecutions.

What follows is an exploration of how declination might help the effectiveness of the Court.

IV. Using Prosecutorial Discretion Could Improve the Effectiveness of the ICC and Its Relationship with the Council

The multiple contradictions and stalemates of Council ICC-referral practice will likely continue to create difficulties for the ICC to effectively promote criminal law norms; resolve specific cases; and

171. See generally Julian Ku & Jide Nzelibe, Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?, 84 WASH. U. L. REV. 777 (2006) (finding that international criminal tribunals have low deterrent effect because targets of prosecution likely already face informal sanctions such as death, imprisonment, or torture).

172. See Hyeran Jo & Beth A. Simmons, Can the International Criminal Court Deter Atrocity?, 70 INT'L ORG. 443, 449 (2014) (providing the example of two rebel groups in Colombia, and how both “have published internal documents assessing the likelihood of prosecution by the ICC or domestic courts. ICC investigations, indictments, and convictions or those triggered by complementarity are likely to encourage actual or potential perpetrators to reassess the risks of punishment—[often relative to impunity]—and to moderate their behavior”).
to focus on strengthening relationships with mandate holders of the Rome Statute. 173 This Article assumes that in the short-term, the Council is unlikely to alter its ICC-referral practices, the earnest arguments of international law scholars and diplomats notwithstanding. 174 The ICC will almost certainly receive another Council referral in the future, however. In this Section, I analyze the various impacts of the ICC’s relationship with the Council on its own effectiveness, by interrogating multiple related goals. Under this framework, the five “generic” goals of international courts are: (1) norm support, (2) resolving international disputes and problems, (3) regime support, (4) legitimizing public authority, and (5) idiosyncratic goals. 175

Core effectiveness issues in the relationship between the Council and Court are framed here for future analysis; a preliminary analysis of how the Council is assisting the Court in achieving its goals is set forth. The goals analyzed here are inspired by a goal-oriented conceptual framework of effectiveness, which focuses specifically on the normative expectations of the States Parties that formed the tribunal, the mandate holders. 176

This conceptual framework takes us beyond viewing effectiveness of international tribunals merely as successful prosecutions, judgment-compliance, or the effects of the court on State conduct. 177 In-

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173. In March 23, 2006, the Prosecutor stated, “Darfur presents new challenges for the Court. The security situation in Darfur means that . . . . [n]o one can conduct a judicial investigation in Darfur.” SCHABAS, supra note 51, at 49.

174. The Council is not entirely impervious to arguments for change. For example, the Council has reformed many of its procedures in response to judicial and political pressure. See, e.g., True-Frost, Development of Individual Standing, supra note 168, at 1207. The Council was expanded in 1965 from six to ten elected members. Still, in recent years, the Council has remained unresponsive to arguments for reform of the structure of the Council. See sources cited supra note 121.

175. SHANY, supra note 152, at 44. Shany examines alternatives to the goal-oriented approach to measuring effectiveness, including, for example, the open system approach, which he rejects for failing to conduct “a more purposive inquiry into judicial conduct.” Id. at 15. He also rejects the process-oriented model and strategic constituency model because of the multiplicity of constituencies in international courts. Id. at 16. It should be noted that the concept of effectiveness is distinguishable from efficiency or cost-effectiveness. Given the jurisdictional and enforcement constraints the ICC faces, focusing on the expectations of the mandate holders at this point seems wise. An action is effective if it “accomplishes its specific objective aim.” Id. at 14.

176. SHANY, supra note 152, at 7 (“[A]s a matter of good policy, [courts should seek to accommodate] the normative expectations of their mandate holders.”). The goals of a broad and varied range of constituencies of the ICC might also be considered, including NGOs, civil society, victims of crimes, and potential perpetrators of crimes.

177. Id. at 4, 15. In order to measure whether goals have been attained, Shany recommends using operational categories and performance indicators. Id. at 20 (using structural indicators as outcome predictors including: legal powers (determined by jurisdiction, ancillary powers, how binding judicial decisions are, applicable law, etc.); personnel capacity (determined by number of judges, employees, legal-assistance procedures, and actual and perceived quality of personnel); resources (determined by short
stead, this approach to understanding effectiveness also considers the longer-term systemic contribution of courts to development governance. Although this effectiveness framework is primarily descriptive, it also incorporates normative assessment of courts. So, whether a court affected States in a “desirable” way may be considered in assessing effectiveness.\textsuperscript{178}

State parties to the Rome Statute agreed to establish the ICC to work towards the goals of promoting internalization of norms, developing ICL norms, ending impunity, achieving deterrence, resolving disputes by promoting peace and security, promoting victim satisfaction, and establishing a historical record of the atrocities.\textsuperscript{179} The goals of the ICC also include promoting domestic proceedings against violators of ICL and legitimizing the application of ICL by conveying a message of condemnation.\textsuperscript{180} The history of the ICC’s relationship with the Council, detailed above, hints at the mismatch between the goals of the framers of the Rome Statute and the outcomes of the current relationship—this Section enumerates those areas of mismatch. In a system within which the Prosecutor must balance innumerable practical constraints: staffing, resources, and the need for State cooperation in order to enforce; the Prosecutor’s relationship with the Council highlights some of the most prominent international peace and security concerns. The various domains of effectiveness are unpacked here.

\textbf{A. Security Council Involvement with the ICC Somewhat Helps Support International Criminal Law Norms, but Mostly Has Not Helped Resolve International Disputes}

The Security Council’s first referral to the ICC offered its recognition and increased the ICC’s political legitimacy among some States Parties. The Security Council’s referral of the situation in the Sudan contributed to ICL norms, in some ways, as it gave the ICC the op-

\begin{footnotesize}
\begin{enumerate}
\item At the same time, Shany concedes that the leverage of mandate holders controls finances and constrains the independence of the Council. \textit{Id.} at 33.
\item Shany, supra note 13, at 239.
\item \textit{Id.} at 230-36.
\end{enumerate}
\end{footnotesize}
portunity to indict individuals it found most responsible for the grave crimes there.

National-level awareness of the need to hold accountable those responsible for the Darfur atrocities has been facilitated by the Council’s referral and the ICC’s prosecution, arguably going some way towards the people in Sudan’s internalization of ICL norms. In addition, although President Al-Bashir has eluded apprehension by States Parties, his indictment helped encourage the African Union to pressure the Sudan to pursue criminal accountability for atrocities that have occurred in Darfur.181 In addition, since the Security Council referral, the Sudan has set up structures for accountability, though they fall far short of international standards.182 As mentioned above, the Security Council refused the African Union’s requests to defer proceedings against Al-Bashir and in the Kenya situation, although the vote was close.183 As elaborated below, the ICC’s indictment of Al-Bashir has also, however, exacerbated concerns of selective justice, and the Council has in many ways undermined the ICC’s efforts to end impunity, deter atrocity crimes, help States internalize norms, and develop international legal norms through its failure to support the ICC.

The Council’s response to the second referral of Libya in 2011 has been complicated. Depending on how the trial of Al-Senussi proceeds, the referral may help promote norm internalization at the domestic level. The African Court of Human Rights issued an order to Libya to require Gaddafi to see his lawyer in May 2013.184 The National Transitional Council (NTC) has agreed that it is bound under the Council resolution to cooperate with the ICC,185 but it did not surrender indictees to ICC custody, claiming instead that it could try them domestically.186 Although this claim was disputed by the Defense and

181. Id. at 250.
182. Kate Allan, Prosecution and Peace: A Role for Amnesty Before the ICC?, 39 DENV. J. INT’L L. & POL’Y 239, 273 (2011) (“In response to the referral, the Sudanese government created the Darfur Special Criminal Court to prosecute crimes against humanity in June 2005 . . . . [I]t soon became apparent that the Court would not meet the test of genuineness.”).
183. See SCHABAS, supra note 51, at 82-83.
the Office for Victims of the ICC,\textsuperscript{187} Libya was successful in persuading the ICC that the case of Al-Senussi should be tried there, even as it was determined that the case of Gaddafi should proceed before the ICC.\textsuperscript{188}

Instances of the Council’s lack of support for the ICC’s promotion of international criminal law are numerous, however. The Council’s capacity to reach agreement is arguably at its weakest when it is delegating authority to a third-party like the ICC, a court over which it has little control. Although initial Security Council agreement for a referral is difficult to obtain, experience has also proven that the Council’s support for the referrals is rarely substantial. The Council’s first referral to the ICC supported, at least in theory, the application of ICL to massive crimes. Yet in its referrals, the Council famously prohibited the General Assembly and the UN from providing funding to support ICC investigations and prosecutions.\textsuperscript{189} For example, although the PTC of the ICC confirmed the Prosecutor’s arrest warrant for President Omar Al-Bashir in 2009,\textsuperscript{190} the Council has still not added Omar Al-Bashir to its targeted sanctions list. Indeed, as of December 2016, the Council has never sanctioned any ICC indictee.\textsuperscript{191}

The Security Council does not advance ICL when its members host ICC indictees. The ICC has used Article 87(7) to report Rome Statute States Parties that have violated their international criminal law obligations to the Council, hoping for enforcement action, but the Council has not acted in response. It does not advance ICL when the Council does not sanction Rome Statute members that have, for example, invited Al-Bashir to visit.\textsuperscript{192}

Although Libya has amended its domestic law to provide amnesty for atrocities that occurred during the transition,\textsuperscript{193} and the ICC has issued findings of non-cooperation against Libya since it has failed to surrender Gaddafi and documents to the custody of the ICC, the

\begin{itemize}
  \item \textsuperscript{187} Libya and the International Criminal Court: Questions and Answers, supra note 184, at 7-8 (noting that the ICC issued an order requiring OPCD layers to visit Gaddafi while in detention).
  \item \textsuperscript{189} David Kaye et al., The Council and the Court: Improving Security Council Support of the International Criminal Court, INT'L JUST. CLINIC 21 (May 2013).
  \item \textsuperscript{191} See supra Table 1.
  \item \textsuperscript{192} See Rome Statute, supra note 6, at art. 86.
\end{itemize}
Council has not responded. As of March 2016, the Council has not once issued a presidential statement, a Resolution, or a sanction to follow up on these Article 57(7) findings of non-cooperation from the ICC. In short, there is a continuing need for some measure of support from the Council for ICL to back outstanding warrants from Security Council referred cases in order to support international criminal law norms.

<table>
<thead>
<tr>
<th>Mode of Referral</th>
<th>Total Indictees</th>
<th>Total in Custody/ Appeared</th>
<th>Total at Large</th>
<th>Deceased</th>
<th>Proportion in Custody/ Appeared</th>
<th>Proportion at Large</th>
</tr>
</thead>
<tbody>
<tr>
<td>Proprio Motu</td>
<td>7</td>
<td>5</td>
<td>2</td>
<td>0</td>
<td>0.71</td>
<td>0.29</td>
</tr>
<tr>
<td>Security Council</td>
<td>9</td>
<td>2</td>
<td>5</td>
<td>2</td>
<td>0.22</td>
<td>0.56</td>
</tr>
<tr>
<td>State Referral</td>
<td>17</td>
<td>12</td>
<td>3</td>
<td>2</td>
<td>0.71</td>
<td>0.18</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>33</strong></td>
<td><strong>19</strong></td>
<td><strong>10</strong></td>
<td><strong>4</strong></td>
<td><strong>0.544</strong></td>
<td><strong>0.34</strong></td>
</tr>
</tbody>
</table>

As described above, even as Council referrals have helped in a limited way to promote ICL norms, they have also led to much lower rates of custody and trials—whether at the domestic or the international level. The ICC suffers from constrained enforcement and implementation resources. The cases that have emerged from the Council-referred situations of non-State Parties have been among the ICC’s toughest to resolve. As Table 3 demonstrates, the rates of


196. Strategic Plan 2016, supra note 37, at 10, ¶ 17 ("In its 2012-2015 Strategic Plan, the Office committed itself to managing cases developed on the basis of its previous prosecutorial policy to the best of its ability. During this period, the Kenya situation gave rise to particular challenges for the Office. Several factors led the Prosecutor to withdraw the case against Uhuru Kenyatta and Francis Muthaura: the limited availability of evidence due to the specific nature of the case; the Prosecutor’s limited access to evidence due to non-cooperation; and the lack of alternative investigative avenues to substitute for key evidence, which was ultimately eroded and found to be unreliable. The shift in prosecutorial policy heralded in the Office’s Strategic Plan (June 2012-2015), emphasizing the need to be trial-ready as early as possible, building cases upwards where necessary and increased..."
appearance for defendants in the Sudanese and Libyan cases are the lowest of the matters before the ICC. 197 The numbers of outstanding arrest warrants in Council referrals also surpass those of proprio motu and self-referred cases to the ICC. 198 Despite these inherent challenges, Council referrals also lack accompanying funding. In referrals of non-consenting States with active conflicts, unique issues related to the safety of witnesses and investigators arise, and the costs of effective investigations and prosecutions may therefore be higher. In the cases from these referrals, the ICC’s already limited capacity to secure jurisdiction over defendants from these non-States Parties is arguably even more challenged.

Any future United Nations Security Council referrals will likely be of situations in non-State Parties to the Rome Statute. Such referrals are also likely to be of active conflict situations, which can be more difficult for the ICC to safely and reliably investigate and prosecute. 199

Although enforcement in the short-term is not vital to effectiveness of the ICC, Council-referred situations may very well damage perceptions that the ICC is effective. Were the ICC able to work, unsupported—but also unimpeded—by the Council, the prospects for the ICC to effectively build norms and resolve disputes among the community of States Parties might well be greater.


As the Council has not only failed—over and over again—to take action to enforce warrants of the ICC in referred situations, but also has allowed countries that hosted Al-Bashir to do so without consequence, the Council damages the ability of the ICC to support the regime of ICL. When permanent Council member China, and elected Council members, Chad and Nigeria, invited indictee Al-Bashir for State visits, they again deeply disrupted the ability of the ICC to support the regime of ICL. 200 Of course, these instances of lack of support must be weighed against the initial referrals and the times that the Council has indirectly supported the ICC by refusing (narrowly at times) to defer proceedings, but overall, the Security Council has not helped support the ICC’s ICL regime.

reliance on varied forms of evidence, will help avoid the recurrence of such challenging situations.”

197. See supra Table 3.
198. Id.
199. See Strategic Plan 2016, supra note 37, at 14, ¶ 30.
200. See Negotiated Draft Relationship Agreement Between the International Criminal Court and the United Nations, supra note 81.
Unlike many international courts, the ICC is not a subsidiary organ of a formal international organization. Its mandate is not to support the UN system, but to prosecute the most atrocious crimes where there is the greatest risk of impunity from States unable or unwilling to prosecute.\textsuperscript{201} The Assembly of States Parties’ capacity to restrict the ICC’s budget or to alter the provisions of the Rome Statute constrain the ICC’s independence.\textsuperscript{202} Analyzing international courts generally, Helfer and Slaughter reasonably argue that international courts seek to maintain the support of their mandate holders which leads to a certain constrained independence of international courts—this is also true for the ICC—and unsupported Council referrals uniquely test the ICC’s capacity to secure cooperation.

In sum, at this point in time, the Council does not, on balance, help the ICC support the regime of international criminal law, but the Prosecutor might be able to shift the status quo using her weapon of prosecutorial discretion.

V. COUNCIL REFERRALS CREATE UNIQUE LEGITIMACY CHALLENGES FOR THE ICC

Legitimacy is a notoriously broad concept, and one that is extensively intertwined with the concept of effectiveness.\textsuperscript{203} “[T]he building blocks of judicial effectiveness also constitute [those] of judicial legitimacy.”\textsuperscript{204} Indeed, as Professor Beetham notes, “[i]t is now a well-
established fact in social and political science that leaders and authorities are effective to the extent that they are perceived as having legitimate authority and acting in accordance with prevailing norms of appropriate conduct.”

For the ICC, the interrelationship between legitimacy and effectiveness is fundamental—mandate holders’ perceptions of the ICC’s legitimacy affect their willingness to cooperate with the ICC. Reasonable legal arguments for the Prosecutor’s case selection aside, this Article has described how according to many States Parties, the ICC has been selectively enforcing ICL.

Professor Shany argues that one goal of the ICC is to legitimate ICL norms by conveying a message of condemnation and ensuring that its legal proceedings are not only legitimate, but also fair. Judicial systems are generally perceived by States to be more legitimate when they are independent of politics. Yet, by design, the ICC’s dependence on State cooperation renders political concerns necessary to its investigations and enforcement of international criminal law, and so the ICC continues to be bedeviled by allegations of bias. The ICC’s limited jurisdiction and reliance on State cooperation renders it vulnerable to criticisms of politicized case selection, but the ICC is arguably the most vulnerable to criticism of politicized cases when it receives referrals from the political Security Council body, including its three non-States Parties, veto-wielding, permanent members.

The Council’s involvement with the ICC, although legally permitted under the Rome Statute, thus raises unique selective justice legitimacy concerns for an institution that already faces significant challenges. Ten years after the Council’s first referrals, it is less clear whether its referrals have had a legitimacy-enhancing effect as more States, including Council members, continue to flout the ICC’s rulings. For example, the AU’s backlash to the ICC’s indictment of Al-Bashir in the Sudan has arguably negatively affected both the normative validity of the ICC and the willingness of States to “comply poses for which they were established” and according to “procedures accepted as fair.” Id. at 271-72. Finally, international organizations are recognized as legitimate to the extent States comply with their decisions and refrain from “acting in ways which manifestly flout the institution’s rules.” Id. at 272. Source and procedural legitimacy are forms of legitimacy.


206. Shany, supra note 13, at 236-37.


208. See Bosco, supra note 83, at 114 (quoting Christian Wenaweser). One diplomat was noted as stating, “If the Prosecutor cannot start proprio motu investigations due to financial constraints but continues with [Security Council] referrals then the independence of the ICC is at risk.” Id. at 172 (emphasis added).
with decisional outcomes, or refrain from acting in ways which manifestly flout the institution’s rules,” a component of legitimacy which Beetham calls “performative endorsement.”

A. Lack of Consent, Conflicting Obligations, and Perceptions of Bias: The AU

Pointing to the all-African docket, African Union members have claimed that Africa has been disproportionately targeted and have particularly declaimed the ICC’s indictments of sitting heads of state. The Office of the Prosecutor has been the primary target of many of the bias allegations; it is the Prosecutor’s Office that is responsible for taking the first steps to implement the ICC’s mandate. When the ICC indicted the Sudan’s head of state, Omar Al-Bashir, the AU took umbrage with the idea that a State not party to the Rome Statute, could be viewed to have waived sovereign immunity. When the AU later requested the UN Security Council to defer the case against Al-Bashir, the Council indirectly—and perhaps unintentionally—supported the ICC by ignoring this request. The Council’s


213. African Union [AU], Decision on International Jurisdiction, Justice and The International Criminal Court (ICC), at ¶ 3, A.U. Doc. Assembly/AU/Dec.482(XXI) (May 26-27, 2013) (“[The Assembly] DEEPLY REGRETS that the request by the African Union (AU) to the United Nations (UN) Security Council to defer the proceedings initiated against President Omar Al Bashir of The Sudan and Senior Official of Kenya, in accordance with Article 16 of the Rome Statute of the International Criminal Court (ICC) on deferral of cases by the UN Security Council, has not been acted upon; REAFFIRMS that Member States such as the Republic of Chad that had welcomed President Omar Al Bashir of The
unwillingness to defer ICC proceedings against the head of state in the Sudan struck many States Parties, especially members of the AU, as unfair. The legitimacy concerns raised by AU States regarding the ICC targeting Africa are in part attributable to the Prosecutor’s decision to pursue a sitting head of state, but are also related to a core concern inherent in any Security Council referral of a non-State Party, like Libya. Most recently, South Africa formally notified the UN of its intentions to withdraw from the Rome Statute in October 2016, as did Gambia and Burundi.

Aside from possibly self-serving allegations of bias by the AU, what does the relationship between the Council and the ICC have to do with States Parties’ perceptions of the ICC’s legitimacy? From one perspective, the relationship between the ICC and the Council acts as a balance—ensuring that individuals from any UN member State could, in principle if not in fact—face criminal process for their actions creating threats to international peace and security.

From many Rome Statute and non-Rome Statute States’ viewpoints, however, rather than strengthening a growing global perception that international criminal law norms will be fairly applied to hold violators accountable, cases resulting from the Council’s referrals just bolster perceptions of ICC double standards. The concern regarding double standards accompanies any political Security Council action or inaction—Council members have a marked tendency to favor their allies, and it is difficult to reach consensus on action against their allies. The political limitations and strengths of all Council action are indeed inherent in the design of the organ itself. The ICC, however, is a legal institution, unlike the Council, and is accordingly intended to be impartial and neutral. So, too, the enforcement of criminal law is intended to be impartial. The Court’s involvement with the Council, therefore, opens it to unique allegations of bias. If more AU members follow through with their claims that they will withdraw from the ICC and only Latin American, European, and Asian countries remain, the broad legitimacy that Sudan did so in conformity with the decisions of the Assembly and therefore, should not be penalized.


216. The Council lacks representation from Africa, the Middle East, or South America in its permanent membership.

217. See Pizzi, supra note 11.
the ICC has enjoyed in international criminal law matters will be deeply endangered.

Even as it exempts a select group of powerful States—namely, the three permanent Council-Member States (P3)\textsuperscript{218} that have veto authority from the Court’s jurisdiction—the Council’s involvement in the jurisdiction of the ICC also brings non-consenting States within the ICC’s jurisdiction. Legal formalists might point out that the UN Charter applies to all States, so as a matter of international law, all States are already subject to the Council’s political power. A norm-based defense of the Council’s ability to refer non-State Parties is that the Rome Statute broadens the group of States, albeit not to include the P3, to which ICL norms will apply. Council-referrals thus overcome the understandable concern of ICL advocates that consent should not be the sole basis for the application of ICL against wrongdoers. Many ICC mandate holders, though, as well as many members of global civil society, see the Council’s connection to the ICC as enhancing the concern that the ICC—and its Prosecutor—are political tools of the most powerful countries and the lesson that justice will apply to all States except the P3—the United States, Russia, and China.

Indeed, the Council’s role in the ICC was largely a concession to the interests of the United States during the drafting of the Statute.\textsuperscript{219} This matters for many reasons, but especially here, for the costs to legitimacy and the resulting effects on the ICC’s ability to achieve its goals. Some readers may object that the political nature of the Council itself increases the legitimacy of its referrals—and therefore the Prosecutor should be compelled to investigate and prosecute these referrals. After all, in order to refer a situation, the Council must first reach agreement that there is a threat to international peace and security. The Council’s political debates about referring a situation to the ICC strengthen the perception that the situation merits attention. The resolutions accompanying these debates, however, have not seriously considered the ICC’s capacity to manage the resulting cases without accompanying enforcement power from the Council. It would thus appear that the Council’s involvement in the

\textsuperscript{218} Jurisdiction would exist over Council P5 members who have allegedly committed crimes meeting the other standards on the territory of a Member State.

ICC’s caseload does not necessarily increase perceptions of the ICC’s fairness and legitimacy.

B. The Rome System as the Primary Authority in International Criminal Law

Since 2002, the ICC has occupied an unparalleled position—it is the central institution in an international framework of ICL. Even as a relative newcomer to the network of international organizations, the ICC’s endorsement by 123 States, hundreds of NGOs, and widespread initial buy-in is in many respects more inclusive and thorough than was the UN at its founding.

As an international tribunal, the ICC is understood to be more of a rule-bound institution than is the UN, renowned for its political and supra-legal action. The stories of the founding of the two international entities contributed to perceptions of their respective structural and source legitimacy.220 The negotiations leading to the ICC’s establishment are summarized supra in Part II. By contrast, it is well-known that tremendous asymmetries of power gave birth to the UN’s Charter. The Council’s composition has been criticized since the moment of the UN’s conception; the need for Council reform emphasized in many fora.221 When the United States, United Kingdom, and Russia met at Dumbarton Oaks in 1944, their vision of a new world government was one in which they would have sole responsibility to maintain international peace and security.222 The three powers later expanded their inner-circle membership to include China and France, but made it clear to the approximately forty-five States gathered in San Francisco to discuss and ratify the UN Charter in June 1945, that the permanent Council members’ veto power was non-negotiable.223 Just three States in Africa attended this founding conference, as the rest were still under the control of colonial powers. When the five permanent members of the Council made their veto

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220. BEETHAM, supra note 25, at 75 (“These various sources of legitimacy, both external and internal to societies, are rooted in clearly distinguishable types of belief system, each with its own respective interpreters and mode of discourse. Among the most profound social changes are those marked by a shift in these belief systems that determine the source of legitimacy for a society’s rules of power: from religious to secular; from external and universalistic to internal and particularistic; from society as past, to society as its people in the present.”).


223. Id. at 32, 36.
power a prerequisite to establishing the UN Charter, the New York Times noted that the community of States “reluctantly accepted the idea of virtual world dictatorship by the great powers.”

Although the Council has evolved and adapted at the margins, even after decolonization, the end of the Cold War, and many other power shifts, its permanent membership has remained cemented as its core.

The move to apply law to atrocity famously attempts to cabin the politicization of conflict resolution. It is therefore not surprising that during the negotiations to establish the unprecedented ICC, States Parties were concerned about how best to establish and guard the political independence of the ICC. This concern was particularly acute among Southern members. Thus, the relationship between the ICC and the Security Council was a concern related to the independence of the ICC for many States Parties in the negotiations leading to the Rome Statute.

States adopting the Rome Statute agreed to the Rome Statute’s explicit division between those States within the Rome framework and those outside it. However, Council-referrals further affect this division in two ways: first, by sweeping within the ICC’s jurisdiction even States that have neither ratified the Rome Statute nor violated States Parties’ territory, and second, by mostly exempting Council members with veto power from possible ICC jurisdiction. Of course, States Parties knew that some members of the P5 would not join the Rome Statute, so they arguably anticipated this double standard. At the same time, States Parties arguably did not anticipate that the Security Council would agree to refer situations to the Court while simultaneously refusing to provide the resources and support necessary to help the Court proceed in investigating and prosecuting in these non-States Parties’ territories. As the latter part of this Article has argued, the relationship with the Council does not, on balance, strengthen the ICC.

VI. SELECT TRADEOFFS AND IMPLICATIONS OF THE ICC PROSECUTOR DECLINING A FUTURE SECURITY COUNCIL REFERRAL

This Article has investigated why the Prosecutor might wisely consider declining a Council referral in the interests of justice. Making such a declination might increase the capacity of the Court to fo-
cus its resources and to send a message to the Council that it should support the progress of the cases resulting from its referrals.226

Saying no to the Council is no simple matter for the Prosecutor, not least because the PTC will review the decision and the Council has the power to interfere with the Court’s work by deferring its active cases. If the Prosecutor declined to prosecute, it is unclear whether the Council would still reap the benefit of having made a referral and be able to absolve itself of its responsibility for maintaining peace and security. Faced with a refusal from the ICC, might the Council be catalyzed to respond to non-complying States Parties in the ongoing investigations?

Readers might recall the backlash sparked by the International Court of Justice (ICJ)’s refusal to decide the South West Africa cases in 1962 and 1966. African States’ confidence in the ICJ was nearly irrevocably destroyed when the ICJ dismissed, on technical grounds, the South West Africa cases, Ethiopia and Liberia’s challenge to South Africa’s occupation of South West Africa. It was the ICJ’s decision not to decide that created this backlash, and confidence in the ICJ was not restored until 1971 in the Advisory Opinion of the ICJ in the Namibia case.229

Deciding not to prosecute would indeed be a controversial decision for the Prosecutor to make, but the Prosecutor has already twice said yes to the Council when it has made referrals, even when the Council created added constraints within those referrals. The results, as this Article has argued, have been at best mixed, and even unhelpful to the Court. Unlike in the South West Africa cases, the Prosecutor’s decision not to investigate the Council-referred situation in the interests of justice should happen quickly, not over the course of many years, as occurred with the ICJ decision (not to decide).

226. A number of audiences will be affected by Prosecutorial decisions. The Prosecutor’s declination will have effects on: (1) victims in the particular conflict situation; (2) members of the Council, particularly those who are also States Parties; (3) States Parties that previously wanted the Prosecutor to decline to prosecute—such as Uganda; (4) advocates for international criminal justice; (5) future Council or proprio motu referrals in which the Prosecutor does proceed; and (6) the Pre-Trial Chamber.


In addition, parties before the ICJ conceded to submit to its jurisdiction, so its refusal to hear their case creates a unique, unfulfilled mandate. Although the Rome Statute provides the legal power for the Court to investigate and prosecute in Council-referred cases, these cases have been in States that have not consented to the Court’s jurisdiction. In addition, the Council has not supported this power in the ways the Rome Statute contemplated, and the Court is in jeopardy, so ensuring that the Prosecutor can sufficiently investigate is critical. After the disintegration of the last Kenyan cases against Ruto and Sang in April 2016 and the most recent withdrawals of Gambia, South Africa, and Burundi from the ICC, the Prosecutor should attempt to shore up perceptions of the ICC’s fairness and effectiveness, by considering steps to ensure that its next cases are manageable and effectively prosecuted. Specifically, the Prosecutor might seek to distance her Office from claims of selective justice by declining to pursue a future Council referral and submitting that decision to the Pre-Trial Chamber for review.

One additional danger of denying a Council referral in the interests of justice is the possibility of alienating the permanent Council members and States Parties the United Kingdom and France, as well as supporters of the ICC, and States that likely would have worked to galvanize the Council’s political will to refer to the ICC. The United Kingdom and France, along with other European States Parties, are responsible for a significant portion of the ICC’s funding, and may be displeased with prosecutorial declination in the short-term. The biggest funder of enforcement in the ad hoc tribunals was the United States, and the United States has continued to push for ad hoc tribunals, even in the wake of the Rome framework. While a more attenuated possibility, the Prosecutor declining to investigate or to prosecute may well motivate Council members to establish an ad hoc tribunal for situations involving non-State Parties to the Statute, which might in turn ensure that there is prosecution of the crimes. At the dawn of the Rome Statute, supporters of the Court hoped future ad hoc tribunals would not be necessary, but at present, given the politi-
cal impasse of the Council, it appears some gaps in the jurisdiction of the ICC may well be filled in this way.

Were the PTC to endorse the Prosecutor’s decision to decline to prosecute, the relatively low cost to the Council of future referrals might be raised. This might require Council members to consider in advance how they might consistently support the referrals. It is possible that the Council might also, within its existing constraints, be incentivized to find ways to support its existing referrals.

In order for international criminal law norms to be strengthened, the ICC could focus its efforts on situations in States Parties that claim to share a stated legal commitment to international criminal law norms by virtue of their ratification of the Rome Statute, which is not to say that the Prosecutor will not face obstacles in such situations as well. Eventually, the Prosecutor may expand her declination to other forms of referrals.

What are some theoretical implications of prosecutorial declination? Prosecutorial declination belies the view that international law is a system and that the Prosecutor must not use her discretion to decline to investigate or prosecute Council referrals, because the ICC is a security court in such instances. Viewing the prosecutor as empowered to decline Council referrals accepts that seats of authority in the international sphere are increasingly pluralistic. Indeed, it assumes that contests of authority at the international level may contribute to the legitimacy and effectiveness of the ICC. Zeroing in on the possibility of conflicts between Council determinations and ICC decisions provides the underpinnings of an argument for a form of complementarity at the international level, one that places the ICC in a possibly superior position to the Council in regards to international criminal law. Increasing fragmentation at the international level opens space both for contestation of authority and specialization, and opens the possibility of multiple seats of legitimacy. Prosecutorial declination of Council referrals may thus serve as a corrective to the theoretical understanding that the UN Charter is the core

234. Given the political nature of the UN Security Council’s actions, consistent support would still likely be difficult to secure.

235. The United States is forbidden from financially supporting the ICC, so there would need to be broad Council commitment to establishing a special fund for the Court that excerpt the United State’s funds or future United States administrations would need to cultivate a sort of plausible denial about GA funds going to support the ICC, with a particular caveat that those funds do not include the States. American Servicemembers’ Protection Act, 22 U.S.C. § 7401 (2012). For a sample of the many suggestions that have been made to the Council to reform its interactions with the ICC, see True-Frost, International Civil Servant, supra note 31; True-Frost, Development of Individual Standing, supra note 168. Rebecca Hamilton also suggests that notice to exit situations might incentivize Council support. See Hamilton, supra note 119.
constitutional document of an international system, and the UN Security Council, with its power to bind Member States, sits at the apex of this system.

VII. CONCLUSION

The primary goals of this Article have been, first, to explore a path not yet taken by the Prosecutor in the relationship between the ICC and the powerful Security Council as a means for increasing the effectiveness and States Parties’ perceptions of the fairness of the ICC. Given the power of individual Council members, the enforcement power of the Council, and the relative lack of power of the Prosecutor of the ICC, the relationship between the Court and the Council is also useful for interrogating the point at which constructivist approaches can be used to leverage change in a rational-choice-based relationship. While the Prosecutor arguably does not require enforcement mechanisms to promote norms against impunity (indeed, some studies indicate enforcement of human rights norms, for example, may sometimes create backlash), the limits of constructivist approaches to norm diffusion may be reached when there is active undermining of those norms by the same powerful institutions, institutions like the Council, that should be enforcing and applying the norms. This analysis has demonstrated that although the goals of international criminal justice are complex, the relationship with the Council is not only ripe for change, the Prosecutor has some power to alter it.

For States Parties, the Prosecutor has the potential to be a more accountable and normatively valid source of international criminal law norms than is the Council. It may well be that the mandates of both the ICC and the Council will be better served by the Prosecutor declining to prosecute Council-referred cases in the short-term.