CHAPTER 17

The Court Should Avoid all Considerations of Deterrence and Instead Focus on Creating a Credible and Legitimate Normative Environment in Which Serious Crimes are Not Tolerated

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Summary

The prevention of serious international crimes is unquestionably one of the Court’s ancillary objectives. However, this goal should not be confused with the ideas of specific and general deterrence. Specific deterrence is the concept whereby the threat of criminal punishment will discourage a particular potential and actual criminal from committing specific future criminal acts. General deterrence is the idea that the punishment of criminals will deter others from committing crimes. For the Court, the notion of deterrence as a component of the prevention of international crimes would be a misguided goal for several reasons.

First, most clearly, specific and general deterrence are empirically intangible—in the international criminal realm they can neither be proved nor disproved in a methodologically meaningful manner, beyond conjecture. Deterrence, therefore, cannot, and should not, serve as an appreciable objective to be achieved by the Court.

Second, deterrence seems to assume that perpetrators of the most serious crimes can be deterred by the threat of punishment. There are very good reasons to suspect that this is in fact not the case. Many perpetrators are socially and psychologically undeterrable. This does not mean that criminal justice in general and the work of the Court in particular have no preventive impact—only that specific and general deterrence constitute an unsound purpose.

Third, a deterrence perspective is morally flawed because it adopts a rationalistic approach to crime that implicitly signals to potential serious criminals that their acts, however appalling, might somehow be absolved through future punishment—that is, that the crimes they will commit have, in the worst case, a predefined price tag of a prison sentence—permitting them to take the risk of punishment while pursuing their despicable ambitions.

Fourth, specific and general deterrence cannot rest exclusively on the shoulders of a single institution, especially not a judicial one. Prevention should be viewed in a much broader, systemic, and long-term manner, demanding more from nonjudicial institutions.
In situations such as those in Sudan or more recently Libya, where international criminal arrest warrants have been issued to leaders at a time in which they are still actively engaged in alleged crimes, the goal of the Court, as such, cannot seriously be taken to be crime prevention in the sense of specific deterrence. Rather, the chief goal of the Court should remain the rendering of justice and accountability in the name of ending the impunity of perpetrators of international crimes, as a contribution to the buttressing of a durable, consistent, credible, and legitimate normative environment in which serious crimes are not tolerated. This will in turn lead to true crime prevention.

Several recommendations may be made in this respect, but the main advice offered is that the Court and in particular the Office of the Prosecutor (OTP) stay their course, according deterrent effects only secondary attention in their decisions, if at all.

Argument

On June 27, 2011, the Court’s Pre-Trial Chamber I issued arrest warrants for Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi, on charges of murder and persecution as crimes against humanity in Libya. Subsequently, the civil war dragged on in Libya—ostensibly including cases of murder and persecution—for another two months, until Muammar Gaddafi reportedly fled Libya in late August. Did the issuance of arrest warrants by the Court have any palpable effect on Gaddafi’s decision making in the summer of 2011? On one hand, one might argue that the arrest warrant hung heavily over Gaddafi’s head, and that had it not been issued his oppressive regime would have gone on further, and that his criminal acts might have continued, a fortiori. On the other hand, one might claim that the arrest warrant only served to entrench Gaddafi, extending and prolonging the war where a less aggressive prosecutorial approach might have led him to step down peacefully, as Hosni Mubarak did not long before in Egypt.

These are tantalizing questions that, at first glance, might seem crucial for a reasoned assessment of the preventive impact of the Court. They can be analyzed from a variety of theoretical, methodological, and empirical perspectives. They involve intriguing hypotheticals and counterfactuals, so we will never know their true answers, although they provide for fascinating salon talk. However, even if we held concrete answers to them, these are quite simply the wrong questions to ask in the context of a discussion on the crime prevention role of the Court. This is because they misconstrue crime prevention in

1 The Prosecutor v. Muammar Mohammed Abu Minyar Gaddafi et al., ICC-01/11-01/11 Pre-Trial.