Contemporary Issues Facing the International Criminal Court

Edited by

Richard H. Steinberg

BRILL
NIJHOFF

LEIDEN | BOSTON

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

Tomer Broude

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.

 | DOI 10.1163/9789004304451_022

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.[1] 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.

the very narrow sense of precise causes and effects (that is, did the Court's arrest warrant deter Gaddafi from sanctioning serious crimes?), whereas crime prevention should rather be understood as a much broader, systemic and long-term concept (that is, will the operation of the Court, in conjunction with actions taken by states, intergovernmental organizations, and civil society lead, over time, to a global normative environment in which the incidence of serious crimes is reduced?).

Indeed, the Court in general and the OTP in particular would do well to avoid narrow considerations of crime deterrence—as opposed to prevention—in their work, whether in preliminary examinations, investigations, or prosecutions.

The prevention of international crimes is clearly embedded in the goals of the Court, as noted in the fifth preambular paragraph of the Rome Statute.[2] Notably, however, the goal of crime prevention is a secondary or ancillary one for the Court: the prime mandate is putting an end to impunity for the perpetrators of the most serious crimes of concern to the international community. It is the achievement of this goal that is anticipated to "contribute to the prevention of such crimes." The text itself suggests that while the international community certainly declares its will to see the perpetration of serious international crimes prevented, even eradicated, it does not expect the Court to achieve this goal, but only to contribute to it. This is the proper reading of the Court's function in the area of crime prevention.

However, the systemic goal of crime prevention is too often conflated with the tenuous concepts of specific and general deterrence. Specific deterrence is a very narrow, yet intuitively sound idea, whereby the threat of criminal punishment will discourage particular potential and actual criminals from committing specific future criminal acts. General deterrence is the idea that the punishment of criminals will deter others from committing crimes. Theoretically, both concepts are derived from utilitarian rational choice theory, owing much, in the modern form, to the path-breaking work of Nobel Prize laureate Gary Becker. In a nutshell, criminals are assumed to be rational actors, and the decision to commit a crime is considered a rational one, in which the putative criminal weighs the personal benefits of the crime against the risk of being caught and punished.[3] Aggregation of the ideas of specific and general deterrence soon

2 The paragraph reads as follows: "Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes": Rome Statue of the International Criminal Court, Rome, July 17, 1998, in force July 1, 2002, 287 UNTS 3 [hereinafter cited as Rome Statute].

3 See Gary S. Becker, "Crime and Punishment: An Economic Approach," 76 *The Journal of Political Economy* (1968) 169.

leads to a discussion of optimal enforcement: what mix of policing, prosecution, and punishment will lead to the most efficient social outcome?[4] There is some empirical support for the theory of deterrence—in regular, domestic criminal law—but it remains largely controversial, despite its intuitive and theoretical strengths.[5]

The logic behind the discussion of the effects of Gaddafi's arrest warrant on his subsequent behavior is clearly one of specific deterrence. Indeed, most critics of the capacity of the Court to contribute to prevention of serious crimes focus on deterrence, even leading to the conclusion that prosecution can cause—at the level of specific interaction—increased atrocities;[6] a conclusion that is not so curious as it might sound, when one acknowledges the shortsightedness of the analysis it builds upon.

In many respects, however, deterrence—both specific and general—is a red herring, especially in the area of international crimes.

First, methodologically, it is essentially impossible to prove individual instances of successful specific or general deterrence, let alone comprehensively to evaluate its aggregated effects, beyond the occasional anecdotal evidence.[7] As the "Gaddafi scenario" demonstrates, claims of specific deterrence—or exacerbation, on the other hand—appear to be purely conjectural. In contrast, it is very easy to demonstrate instances of the failure of deterrence; essentially, any crime committed despite the direct threat of prosecution and punishment seems to falsify specific deterrence, and even more so general deterrence. Ultimately, this tells us little about the long-term contribution of the Court to crime prevention. Surely, "societies can only hope that punishment will deter the transgressor as well as other potential offenders, but [they] can never assume it."[8] Instead of waiting for clear deterrent effects, and trying

4 See Nuno Garoupa, "The Theory of Optimal Law Enforcement," 11 *Journal of Economic Surveys* (1997) 267.

5 See Raymond Paternoster, "How Much do We Really Know About Criminal Deterrence?," 100 *The Journal of Criminal Law and Criminology* (2010) 765.

6 Julian Ku and Jide Nzelibe, "Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?," 84 *Washington University Law Review* (2006) 4.

7 Such as the observations by Amb. Radhika Coomaraswamy, UN Under-Secretary-General and Special Representative for Children and Armed Conflict, whereby the trial of Thomas Lubanga has brought changes in the treatment of children by combatants in conflict zones. However, Coomaraswamy also sees the deterrent effect of prosecution as general and even aspirational: "I found that fear of the ICC [is] a healthy development in international law... Nobody can measure how many children have been saved because of deterrence. That's not something you can measure, but hopefully that will be the case": see"Judges Urged to Convict Congo Warlord Thomas Lubanga," *The Guardian* (August 25, 2011), available at http://www.theguardian.com/world/2011/aug/25/judges-urged-convict-thomas-lubanga.

8 See Juan E. Méndez, "Accountability for Past Abuses," 19 *Human Rights Quarterly* (1997) 255.

to engineer the Court's work to promote them, it might be better to acknowledge that prosecutions will have an ongoing, abiding, and systemic effect, and even then it is fair to say that "the general deterrent effect of such prosecutions seems likely to be modest and incremental, rather than dramatic and transformative."[9]

Second, deterrence as a goal builds upon fundamentally flawed theoretical conceptualizations and assumptions of the purported "utility functions" of perpetrators of serious crimes. In other words, for various reasons, some—even most—perpetrators of serious crimes might be undeterrable. This does not mean that criminal justice in general and the work of the Court in particular have no preventive impact—only that deterrence is an unsound purpose.

This is far from a new observation. In 1928, debating the potential scope for the establishment of an international criminal court, the esteemed British international jurist, James Leslie Brierly, had this to say:

> [It] is difficult to think of any really valuable service that the [international criminal court] could render, unless we are to believe that it would have a deterrent effect. But to suppose that men who are tempted to commit war crimes during the course of war will be strengthened to resist the temptation by the thought that at some future time they may have to account to an international court is probably to altogether misconceive the motives which affect the mind of the intending war criminal, ranging as these do from a lofty patriotism to the mere satisfaction of lust or cruelty. The nobler class of war criminal would probably regard the possibility of ultimate punishment, if he regarded it at all, as adding the attraction of martyrdom to the compelling sense of patriotic duty; the baser would realize that the prospect was remote in time and the chances of avoiding it high. It is hard to imagine a case in which the deterrent effect during a war of the institution of the court would not be practically negligible.[10]

More than eighty years—and many genocides and war crimes—later, it would be difficult to say that we know much more about the criminal mind of the perpetrator of the most serious international crimes, as far as specific

---

9 David Wippman, "Atrocities, Deterrence, and the Limits of International Justice," 23 *Fordham International Law Journal* (1999) 473, at p. 488. See also Payam Akhavan, "Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?," 95 *American Journal International Law* (2001) 7.

10 J.L. Brierly, "Do We Need an International Criminal Court?," 8 *British Year Book of International Law* (1927) 81, at p. 84.

deterrence is concerned. If anything, we have learned that the psychology of genocidaires, war criminals, and perpetrators of crimes against humanity is a "psychology of evil" that is not fully understood. According to psychologist Ervin Staub,[11] evil grows so perhaps it can be prevented at an early stage of social development, but at a certain point in time—when it is most threatening—it is undeterrable. Perpetrators of international crimes are subject to severe social pressures and impulses that are immediate and available, with which the distant specter of criminal prosecution by an international tribunal in The Hague pales in comparison.[12] We also know that many of the most serious crimes are committed by individuals as "crimes of obedience,"[13] in structures of authority that demand compliance in ways that the jurisdiction of the Court cannot compete with. Indeed, there is an inherent tension between the training of soldiers, however orderly and informed, and the goals of international criminal law: "a significant part of military training is breaking down a recruit's reluctance to commit violent acts."[14] Letting loose this reluctance makes specific deterrence very difficult to achieve.[15]

Third, a narrow deterrence approach to international crime prevention, with its rationalistic-positivist trappings, is to some extent morally flawed. It sends a message to potential perpetrators that the most serious crimes can be committed and will even be tolerated by the international community so long as they are willing to pay the price of prosecution and punishment, instead of heralding the utter immorality of serious crimes. And, as already discussed, potential perpetrators may well consider the price of prosecution a price worth paying—for social, ideological, political, or ego-based reasons—even if it is assured by an effective system of international criminal prosecution.

This is a fundamental criticism that also reiterates that the idea of deterrence cuts across the grain of the ancillary goal of crime prevention as enshrined in the Rome Statute's preamble. The preamble places the abolition

11 Ervin Staub, *The Roots of Evil: The Origins of Genocide and Other Group Violence* (Cambridge: Cambridge University Press, 1989).

12 For an early discussion see Leo Alexander, "War Crimes: Their Social-Psychological Aspects," 105 *American Journal of Psychiatry* (1948) 170.

13 V. Lee Hamilton and Herbert Kelman, *Crimes of Obedience: Toward a Social Psychology of Authority and Responsibility* (New Haven: Yale University Press, 1990).

14 William J. Astore, "Book Review of Hugo Slim, Killing Civilians: Method, Madness, and Morality in War," *Michigan War Studies Review* (20087), available at http://www.miwsr.com/2008/20080504.asp.

15 For similar critiques of the rationality of "extraordinary" international criminals see Mark A. Drumbl, *Atrocity, Punishment and International Law* (Cambridge: Cambridge University Press, 2007), at pp. 17, 166–9.

of impunity as an absolute goal, before crime prevention as such. As we have seen, some of the arguments relating to deterrence would erode the goal of ending impunity, with no tangible advantages.

Fourth, the prism of deterrence places an undue burden on the shoulders of the Court, raising unrealistic and counterproductive expectations. Crime prevention is a far broader concept than deterrence, and much of it depends on processes that are well beyond the mandate of the Court—or of any court, for that matter. Prevention includes not only deterring individual perpetrators, but also education and democratization, breaking down social structures that enable international crimes, early warning and surveillance systems, and, above all, the political will to intervene where necessary to bring ongoing crimes to an end. In some cases, prevention might also need to be balanced against the prospects of peace and security, but these considerations, too, are beyond the reach of the Court.

Moreover, trusting criminal prosecution to deter specific criminals risks reducing the burden that weighs upon states and international organizations actually to intervene and prevent international crimes in action. Returning to the "Gaddafi scenario," it would be absurd to expect the Court's arrest warrant immediately to deter Gaddafi from sanctioning and committing crimes, when his regime and misdeeds had been tolerated by the international community for over forty years; and had the multi-state coalition not intervened militarily as it did, the arrest warrant would mean little. The debate over whether the threat of criminal prosecution may push perpetrators into a corner, entrenching them and causing atrocities to continue, is misconceived because at such a stage of events, the perpetrators are already beyond deterrence. In terms of specific deterrence, it is nearly impossible to detect a causal effect between a criminal indictment and an increase or decrease in criminality, for many reasons—an example would be the arrest warrants issued by the Court with respect to Omar al-Bashir.[16] Did these have the effect of softening his policies in Darfur and Southern Sudan? Or are the arrest warrants worthless pieces of paper? We really cannot tell.

For all these reasons, quite simply, the perspective of deterrence as a measure for the Court's contribution to crime prevention is erroneous. The preventive impact of the OTP and the Court, at all stages of their operation, will be maximized when their main purpose is fulfilled, namely, the rendering of justice and accountability in the name of ending the impunity of perpetrators of

16 *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09, Pre-Trial Chamber I, Warrant of Arrest for Omar Hassan Ahmad Al Bashir, Situation in Darfur, Sudan, March 4, 2009, followed by a second arrest warrant from July 12, 2010.

international crimes. In fact, the Court should avoid decision making that aims or attempts to create specific or general deterrence, which would be akin to navigating with a weathervane rather than with a compass. The Court will only contribute to true crime prevention by the buttressing of a durable, consistent, credible, and legitimate normative environment in which serious crimes are not tolerated.