

THE INTERNATIONAL CRIMINAL COURT AND
CRIME PREVENTION:
BYPRODUCT OR CONSCIOUS GOAL?

*David Bosco**

INTRODUCTION 163

I. DEFINITIONS AND DISTINCTIONS 167

 A. The ICC Structure and Role 167

 B. Deterrence and Prevention 169

 1. *Deterrence* 170

 2. *Prevention* 171

II. PREVENTION AND THE ROME STATUTE 172

III. THE COURT IN OPERATION 175

 A. Preliminary Examination 177

 B. Formal Investigations and Indictments 182

 1. *Abstention as Prevention* 182

 2. *A Deterrence Test? The “Gravity Requirement”* 184

 3. *The Conduct of Investigations* 188

 4. *Choice of Charges* 191

 5. *The Preventive Effect of Indictment* 192

 C. Sentencing 194

 D. Public Outreach 195

CONCLUSION 197

INTRODUCTION

Afghan warlord Abdul Rashid Dostum may be one of the world’s most feared and resilient warlords. As a young man in Soviet-occupied Afghanistan, he rose to command thousands of Soviet-backed troops fighting the *mujahedeen* rebels. Later, after the Soviets withdrew and as Afghanistan descended into chaos, he carved out and ruthlessly controlled a swath of territory in northern Afghanistan, forging and breaking numerous alliances along the way. After a brief period of exile, he returned shortly after the September 11 attacks and again became a critical player in Afghan politics. Frequent allegations of atrocities followed Dostum and his forces, including rumors that his forces executed political opponents and prisoners.¹

* Assistant Professor, American University School of International Service. Former Fulbright Scholar and Senior Editor at Foreign Policy magazine. Former attorney at Cleary, Gottlieb, Steen & Hamilton focused on international arbitration, litigation, and

In the spring of 2002, Dostum reportedly called together all ninety of his senior commanders and required them to listen as an aide read out loud a human rights report detailing abuses they had committed. The warlord reminded his commanders that an international court was about to come into existence and that they could be prosecuted for any future transgressions.² It was precisely this dynamic that advocates of the International Criminal Court (“ICC” or “the court”) predicted would occur around the world. They argued that a permanent court would deter violators in ways that geographically limited *ad hoc* criminal tribunals, such as those in the former Yugoslavia and Rwanda, could not.³ A standing court would present potential wrongdoers with the constant possibility of investigation and punishment. In short, the court would prevent crime as well as punishing it. Since the court has become operational, influential voices have encouraged the court to embrace this preventive potential, and senior ICC officials have repeatedly proclaimed their intent to do so.⁴ Indeed, in June 2009, the ICC prosecutor appointed a special adviser to assist on prevention issues.⁵

Observers are divided over whether the court can serve as an effective preventive mechanism. Legal scholars have tried to predict the court’s preventive effect, drawing on the experience of other international tribunals, the ICC’s architecture, and its first years of experience.⁶ A political

antitrust matters. Served as a political analyst and journalist in Bosnia and Herzegovina and as deputy director of a joint United Nations/NATO project repatriating refugees in Sarajevo. He would like to acknowledge advice and comments from Edgar Chen, Steve Kostas and Shana Wallace.

1. See *Profile: General Rashid Dostum*, BBC NEWS (Sept. 25, 2001, 17:43 GMT), http://news.bbc.co.uk/2/hi/south_asia/1563344.stm.

2. See Ilene R. Prusher, *Battling Warlords Try Civility: A Grim Human-Rights Report Spurred Afghan Warlords to Agree to Stop Targeting Civilians*, CHRISTIAN SCI. MONITOR, May 9, 2002, at 1.

3. See, e.g., Parliamentarians for Global Action, *A Deterrent International Criminal Court—The Ultimate Objective*, <http://www.pgaction.org/uploadedfiles/deterrent%20paper%20rev%20Tokyo.pdf> (quoting Arthur Robinson, former president of Trinidad & Tobago, arguing that, if a permanent tribunal had existed before violence erupted in Bosnia and Rwanda, those crises might have been avoided or mitigated) (last visited Oct. 4, 2010).

4. See Statement by Antoine Bernard, Int’l Fed. for Human Rights, Public Hearing of the Office of the Prosecutor (June 17-18, 2003).

5. Press Release, Int’l Criminal Court, ICC Prosecutor Appoints Juan E. Méndez as Special Adviser on Crime Prevention (June 19, 2009), <http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/press%20releases%20%282009%29/pr425>. Méndez previously served as an advisor to then UN Secretary General Kofi Annan regarding the prevention of genocide.

6. See, e.g., James F. Alexander, *The International Criminal Court and the Prevention of Atrocities: Predicting the Court’s Impact*, 54 VILL. L. REV. 1 (2009) (canvassing and assessing the various studies on the ICC’s preventive impact); Julian Ku & Jide Nzilebe, *Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?*, 84 WASH. U. L. REV. 777, 787-90 (2006); Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT’L L. 1 (2001); Major Michael L. Smidt, *The International Criminal Court: An Effective Means of*

scientist has employed theoretical models of individual behavior to analyze the court's likely deterrent effect.⁷ An economist has examined how international prosecution will affect the cost–benefit calculations of national leaders.⁸ Others have questioned whether crime prevention—and deterrence in particular—is an appropriate objective for the institution and have encouraged the court and the international community to prioritize other goals.⁹

What has not been adequately examined is the extent to which the goal of prevention is actually influencing the work and decisions of the court. Prevention of future crimes is a natural goal for the court, but it is not the only one that might guide its activities. Other goals could include achieving justice (regardless of the preventive effect), establishing a historical record, fostering reconciliation, and maintaining peace. These goals will sometimes overlap and reinforce each other, but not in all cases, and the court's own view of its priorities matters.

Examining the policy goals at work in the court is particularly important given the wide latitude that the ICC prosecutor and the judges have in developing a strategy for the institution.¹⁰ The court's statute and other key documents offer little guidance on policy goals or how they should be prioritized. Unlike national courts, there is no expectation that the ICC will pursue all—or perhaps even most—of the crimes that fall under its jurisdiction. As a former international prosecutor has argued, “[t]he main distinction between domestic enforcement of criminal law, and the international context, rests upon the broad discretionary power granted to the international Prosecutor in selecting the targets for prosecution.”¹¹ The court does not have the resources to pursue all the cases over which it has jurisdiction. “If only for reasons of cost and capacity,” one ICC judge

Deterrence?, 167 MIL. L. REV. 156 (2001); David Wippman, *Atrocities, Deterrence, and the Limits of International Justice*, 23 FORDHAM INT'L L.J. 477 (1999).

7. See Michael J. Gilligan, *Is Enforcement Necessary for Effectiveness? A Model of the International Criminal Regime*, 60 INT'L ORG., 935 (2006).

8. See Daniel Sutter, *The Deterrent Effects of the International Criminal Court*, in 23 CONFERENCES IN NEW POLITICAL ECONOMY 9 (2006).

9. See Pablo Castillo, *Rethinking Deterrence: The International Criminal Court in Sudan*, 13 UNISCI DISCUSSION PAPERS 167 (2007); Kenneth A. Rodman, *Darfur and the Limits of Legal Deterrence*, 30 HUM. RTS. Q. 529 (2008).

10. For assessments of the prosecutor's discretion and the exercise thereof, see William A. Schabas, *Prosecutorial Discretion v. Judicial Activism at the International Criminal Court*, 6 J. INT'L CRIM. JUSTICE 731 (2008) [hereinafter *Prosecutorial Discretion*]; Alexander K.A. Greenawalt, *Justice Without Politics? Prosecutorial Discretion and the International Criminal Court*, 39 N.Y.U. J. INT'L L. & POL. 583 (2007); Luc Côté, *Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law*, 3 J. INT'L CRIM. JUST. 162 (2005); Allison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 AM. J. INT'L L. 510 (2003).

11. Justice Louise Arbour, *The Need for an Independent and Effective Prosecutor in the Permanent International Criminal Court*, 17 WINDSOR Y.B. ACCESS JUST. 207, 213 (1999).

argued recently, “the Court will never be able to do more than conduct a few, exemplary trials.”¹²

This element of discretion is enhanced by another aspect of the ICC’s architecture. In national legal systems, the legislative and the executive branches will typically establish policy goals and metrics for the judicial system. Policymakers can respond to prosecutorial decisions and court actions via additional legislation or regulation and thereby adjust the priorities of the judicial system. There is, in effect, a dialogue between the branches of government that keeps courts and judges in touch with the policy goals and priorities of the legislative and executive branches. Politically appointed or elected prosecutors, in particular, will respond readily to the policy goals of the government and the public more broadly. It is not clear that this dynamic operates at the ICC. The prosecutor serves one, nonrenewable nine-year term and therefore may not be particularly sensitive to political guidance or pressure.¹³ Given that the ICC has more than one hundred member states, the political and policy signals that it does receive are likely to be confused and contradictory.

Moreover, the ICC in many respects lacks the institutional interlocutors that national prosecutors have. The Assembly of States Party (ASP)—comprised of all states that have ratified the Rome Statute—is effectively the legislative arm of the court. It meets annually, elects judges and the prosecutor, and considers statements and resolutions. Seven years after the Rome Statute entered into force, the ASP acquired the ability to amend the statute.¹⁴ Thus far, however, the ASP has not engaged in oversight or dialogue with the court in the way that a national legislature would. The first ever ICC review conference, held in June 2010 in Uganda, offered a more developed format for dialogue between states and the court, but it focused largely on defining the crime of aggression rather than discussing the court’s methods and policy goals.¹⁵

The UN Security Council (“Council”) might also be a potential communicator of policy goals to the court, but the Council’s role in court

12. Hans-Peter Kaul, Second Vice-President of the Int’l Criminal Court, *Peace Through Justice? The International Criminal Court in the Hague* 15 (Nov. 2, 2009), <http://www.icc-cpi.int/NR/rdonlyres/B7BC9709-394D-4449-AA08-4182A98C567B/281395/JudgeKaulSpeech.pdf>.

13. Rome Statute of the International Criminal Court art. 42, para. 4, July 12, 1998, 2187 U.N.T.S. 900 [hereinafter Rome Statute]. The prosecutor’s independence was seen as a virtue by many of the drafters of the Rome Statute. But political pressure may not always be negative, and it may contain important signals about the intention of states that should factor into the court’s decisions.

14. *See Id.* art. 121. A variety of amendments were considered at the Review Conference held in Kampala, Uganda in May/June 2010. *See ASP Working Group on Amendments*, COALITION FOR THE INT’L CRIM. CT., <http://www.coalitionfortheicc.org/?mod=asp-wgoa> (last visited Oct. 5, 2010).

15. *See, e.g.,* David Scheffer, *State Parties Approve New Crimes for International Criminal Court* (ASIL Insight, Wash. D.C.), June 22, 2010.

operations is, by design, quite limited.¹⁶ The Council may refer cases, delay investigations, and expand the jurisdiction of the court to non-states parties, but it otherwise has no role in court decisions on which cases to pursue. The court's latitude in defining its scope of activity and the absence of close oversight make an examination of the goals and policy considerations influencing the court critical.

This Article will assess in several stages how the goal of crime prevention is affecting the court. First, and briefly, it will outline the relevant structural elements and procedures of the court and define several key concepts related to prevention and deterrence. Second, it will review the debates and discussions that preceded the adoption of the Rome Statute with an eye to what role the drafters believed the goal of prevention should play in the court's operations. Certain provisions in the Rome Statute, the court's Rules of Procedure and Evidence, and the Office of the Prosecutor's own guidelines that bear on prevention will be discussed.

This Article's most extensive section will survey the court's more than eight years of operation to assess whether and how court personnel are pursuing the goal of crime prevention. The court's work is still in the early stages—no case has yet been completed—but it is possible to make an initial assessment. This part of the analysis will move through the various stages of the ICC's investigations and prosecutions—from preliminary investigation through sentencing. This Article concludes with observations on whether and how the court should attempt to maximize its preventive impact. It notes that discussion of prevention serves a strategic purpose for the court at a time when other more quantifiable achievements are limited. It urges the court to move beyond rhetoric to develop a comprehensive prevention strategy that can guide the court, particularly as the prosecutor decides where to focus its activities and as the court considers how to conduct its public outreach.

I. DEFINITIONS AND DISTINCTIONS

A. The ICC Structure and Role

The ICC was designed as a court of last resort that would prosecute those responsible for certain serious crimes when national jurisdictions proved unwilling or unable to do so. This "complementarity" regime means that the ICC seeks to work together with national judicial systems to investigate and prosecute the crimes listed in the Rome Statute and only launches

16. The Security Council's role in the court's operations was one of the most divisive issues during the negotiations that led to the Rome Statute. For an examination of this debate, see William A. Schabas, *United States Hostility to the International Criminal Court: It's All About the Security Council*, 15 EUR. J. INT'L L. 701 (2004).

prosecutions of its own when national courts cannot or will not.¹⁷ (Indeed, the ICC prosecutor, Luis Moreno-Ocampo, has argued on several occasions that the court could be a success without holding trials, so long as it encourages national court systems to prosecute offenders.)¹⁸

The ICC has jurisdiction over genocide, crimes against humanity, aggression, and certain war crimes committed on the territory of a state party or by an individual who is a citizen of an ICC member state. The court's Statute and the Rules of Procedure and Evidence defined all these crimes, with the exception of aggression.¹⁹ That crime has been the subject of considerable debate and controversy. The 2010 Review Conference reached agreement on a definition of the crime of aggression but also determined that the court would not acquire jurisdiction until a two-thirds vote by the Assembly of States Parties sometime after January 2017.²⁰ The UN Security Council may expand the jurisdiction of the court through a resolution under its Chapter VII powers and has done so in the case of Sudan, which is not a state party.²¹

The court has three principal components: the Office of the Prosecutor (OTP), the judicial divisions (including pre-trial, trial, and appeals chambers), and the Registry, which is responsible for the non-judicial administration of the court, including certain outreach and informational activities. A president of the court is selected from among the judges and is responsible for the judicial administration of the court. The ICC also has several smaller components, including offices of public counsel for victims and for the defense.

The task of identifying and investigating crimes falls to the OTP. States parties and the Security Council may refer cases, but in all situations the final decision to pursue cases falls to the prosecutor. He or she may also

17. Rome Statute, *supra* note 13, art. 17, para. 1(a).

18. See Luis Moreno-Ocampo, Prosecutor of the Int'l Criminal Court, Statement made at the Ceremony for the Solemn Undertaking of the Chief Prosecutor of the Int'l Criminal Court 3 (June 16, 2003), http://icc-cpi.int/NR/rdonlyres/D7572226-264A-4B6B-85E3-2673648B4896/143585/030616_moreno_ocampo_english.pdf. The Office of the Prosecutor's most recent strategy document reiterates the point, noting that "the number of cases that reach the Court is not a positive measure of effectiveness." Int'l Criminal Court [ICC], Office of the Prosecutor, *Prosecutorial Strategy 2009-2012*, para. 79 (Feb. 1, 2010) [hereinafter *Prosecutorial Strategy 2009-2012*].

19. See, e.g., Sean D. Murphy, *Aggression, Legitimacy, and the International Criminal Court*, 20 EUR. J. INT'L L. 1147 (2009); Theodor Meron, *Defining Aggression for the International Criminal Court*, 25 SUFFOLK TRANSNAT'L L. REV. 1 (2001-2001).

20. Scheffer, *supra* note 15.

21. S.C. Res 1593, U.N. Doc. S/Res/1593 (Mar. 31, 2005). For commentary on the referral, see John E. Tanagho & John P. Hermina, *The International Community Responds To Darfur: ICC Prosecution Renews Hope for International Justice*, 6 LOY. U. CHI. INT'L L. REV. 367, 386 (2009); Corrina Heyder, *The U.N. Security Council's Referral of the Crimes in Darfur to the International Criminal Court in Light of U.S. Opposition to the Court: Implications for the International Criminal Court's Functions and Status*, 24 BERKELEY J. INT'L L. 650 (2006).

initiate cases that have not been referred; in this respect, the prosecutor has *proprio motu* powers.²² The prosecutor's discretion is significantly limited, however, by the pre-trial chamber, composed of three judges. This chamber must determine that there is a "reasonable basis" for opening formal investigations and must review requests to issue indictments, summons, and arrest warrants.²³ Decisions of the pre-trial and trial chambers can be reviewed by an appeals chamber. Upon determination of guilt, the trial chamber issues a sentencing decision, which may also be appealed.²⁴

The ICC has no independent enforcement powers. It is entirely dependent on the ability and willingness of states to provide resources, cooperate with the court's requests for information and, ultimately, enforce arrest warrants. States parties to the Rome Statute are under an obligation to assist the court, and the Security Council may also create legal obligations to assist the court and enforce its decisions.

B. Deterrence and Prevention

The goals and purposes of criminal law have been widely debated, but there is general acceptance that processes of investigation and punishment have both backward-looking and forward-facing elements.²⁵ The prevention of future crimes—the focus of this article—is only one of several purposes that a system of punishment may have. Retribution, in effect, a structured and controlled system of vengeance, is a powerful alternative purpose.²⁶ Rehabilitation may also be an alternative purpose that seeks to convert offenders into responsible citizens. Although rehabilitation can have preventive effects, its advocates often see it primarily as a matter of individual rights and basic humanity.²⁷

When discussion does turn explicitly to crime prevention, the concept of deterrence often dominates, and it has done so in the context of the ICC.

22. Early drafts of a statute for the court denied the prosecutor this power. See William Schabas, INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 120 (2001).

23. Rome Statute, *supra* note 13, arts. 57-58.

24. *Id.* at arts. 76, 84.

25. See, e.g., Albert W. Alschuler, *The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts About the Next*, 70 U. CHI. L. R. 1 (2003).

26. Retribution has moved in and out of favor as a purpose of punishment but has never disappeared. See, e.g., Michele Cotton, *Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 AM. CRIM. L. REV. 1313 (2000); See generally Martin R. Gardner, *The Renaissance of Retribution—An Examination of Doing Justice*, 1976 WIS. L. REV. 781.

27. See, e.g., Ramsey Clark, CRIME IN AMERICA: OBSERVATIONS ON ITS NATURE, CAUSES, PREVENTION, AND CONTROL 220 (1970) (arguing first that rehabilitation is a form of "individual salvation," but also that it is "the one clear way that criminal justice processes can significantly reduce crime.").

Indeed, one delegate at the Rome Conference in 1998 made the concepts of deterrence and prevention almost one and the same. “A particular advantage [of the ICC] would be its preventive role,” he argued, “through its deterrent effect on potential criminals, thereby strengthening efforts to maintain peace and stability in the world.”²⁸ As will be discussed below, deterrence does not remotely exhaust the subject of prevention, but it is a critical component.

1. Deterrence

The literature on deterrence and criminal law is vast, although most of it approaches the issue from the perspective of national legal systems. Legal scholars, criminologists, philosophers, sociologists, and economists have all explored the concept. In part because of the volume of contributions on the issue, terminology has varied considerably.²⁹ For the purposes of this Article, the following concepts will be used. *General deterrence* refers to the discouragement of criminal activity through fear of punishment among the general public—i.e., those who have not been legally punished. The ICC hopes to deter the crimes it has jurisdiction to prosecute, namely genocide, crimes against humanity, and certain war crimes. As an international institution, the ICC’s general deterrent effect should reach around the globe, and at the very least to the populations of countries that are members of the court.³⁰

Specific deterrence refers to the discouragement of subsequent criminal activity by those who have been punished. The concept is of limited relevance to an enterprise like the ICC. As James Alexander has argued, “[o]ne struggles to name any historical occurrence in which an individual has been convicted of a crime like genocide by an international tribunal, served time, was released, and then found himself or herself in a second situation in which he or she might again commit genocide.”³¹ Instead, this article uses the term *targeted deterrence* to refer to attempts by the court to deter specific individuals or groups within a society.³² The court could pursue targeted deterrence in several ways. First, the court may seek to

28. U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 4th plen. mtg. ¶ 40, U.N. Doc. A/CONF.183 (Vol. II) (June 16, 1998) (comment by Mr. Michalek, Austria).

29. See Jack P. Gibbs, *Deterrence Theory and Research*, in *THE LAW AS A BEHAVIORAL INSTRUMENT* 87, 87-88 (Gary B. Melton, ed., 1986) [hereinafter *Deterrence Theory*].

30. While 114 countries are now states parties, many of the world’s most populous countries have not joined the court. The United States, China, Russia, India, Pakistan, Indonesia, Malaysia, Turkey, and Egypt among others remain outside the system. Together, non-states parties account for approximately 70 percent of world population.

31. Alexander, *supra* note 6, at 22.

32. The concept has been used sparingly in legal scholarship. See, e.g., Tom R. Tyler, *Trust and Law Abidingness*, 81 B.U.L. REV. 361, 396 (2001).

deter selected individuals from continued criminal activity by issuing arrest warrants or summons. In so doing, the court might not expect that the individuals would be detained but may hope that a warrant or summons would nonetheless deter them from further criminal conduct. This scenario is particularly relevant for the ICC, which has already created a small pool of indicted but still at-large individuals.³³ Targeted deterrence may also take a somewhat broader form. The court might seek to prevent a particular violent scenario from occurring through public statements and warnings directed at political or ethnic leaders. For example, if the context of a previous round of violence and atrocities was a disputed election, the court might seek to prevent a recurrence of that violence during the next round of elections.

At certain points, this article also discusses the concept of *restrictive deterrence*, which refers to the minimization—rather than the abandonment—of criminal activity. Restrictive deterrence has occurred “when, to diminish the risk or severity of a legal punishment, a potential offender engages in some action that has the effect of reducing his or her commissions of a crime.”³⁴ A warlord or militia commander who, in an effort to avoid the ICC’s attentions, instructs his forces to avoid large-scale massacres while continuing to commit certain war crimes covered by the Rome Statute (e.g., the recruitment of child soldiers) would demonstrate the effects of restrictive deterrence.

2. *Prevention*

A law enforcement system can discourage criminal activity through means other than fear of punishment, and this broader concept of *prevention* must also be examined. Punishment can incapacitate offenders and thus render these individuals unable to commit new crimes.³⁵ If punishment satisfies the retributive desires of those affected by a crime, the system may prevent crimes motivated by the desire for revenge. Individualization of guilt can facilitate group reconciliation and help prevent violent reprisals.³⁶ As Johannes Andenaes has argued, public awareness of potential punishment for certain activity can have an educative effect that generates

33. Prominent indicted individuals still at large include Sudanese president Omar Al-Bashir, Lord’s Resistance Army commander Joseph Kony, and Congolese warlord Bosco Ntanga.

34. *Deterrence Theory*, *supra* note 29, at 89.

35. See JACK P. GIBBS, CRIME, PUNISHMENT, AND DETERRENCE 58-60 (1975) [hereinafter CRIME, PUNISHMENT, AND DETERRENCE].

36. See Catherine Lu, *The ICC as an Institution of Moral Regeneration*, in BRINGING POWER TO JUSTICE? THE PROSPECTS OF THE INTERNATIONAL CRIMINAL COURT 191, 199 (2006). *But see* David Wippman, *Exaggerating the ICC*, in BRINGING POWER TO JUSTICE?, *supra*, at 99, 120 (arguing that “members of politically polarized ethnic communities are at least as likely to interpret prosecutions in ways that confirm existing biases as they are to see them as neutral confirmations of individual rather than collective guilt.”).

moral disapprobation of the activity in question and consequently reduces the occurrence of that activity. It may be the disapprobation, rather than the threat of punishment, that reduces the occurrence of the proscribed activity.³⁷ Other scholars contend that a system of punishment can validate and strengthen existing norms against proscribed behavior, habituate lawful conduct, and limit the normative influence of perpetrators, thus discouraging imitation.³⁸ In this realm, the ICC's lack of effective enforcement power—so often cited as a critical weakness—may not be debilitating.³⁹ According to Catherine Lu, “the moral authority of the ICC is not necessarily undermined by its political weakness; the lack of endorsement by the world’s most powerful states may even boost its moral legitimacy.”⁴⁰

II. PREVENTION AND THE ROME STATUTE

The language of deterrence was ubiquitous at the Rome Conference in the summer of 1998 as national delegates—supported and prodded by a variety of nongovernmental organizations—negotiated the terms of the new court. A succession of diplomats expressed the view that the court’s existence would deter serious violations of humanitarian law.⁴¹ Canada’s

37. JOHANNES ANDENAES, PUNISHMENT AND DETERRENCE 35-36 (1974).

38. See *Deterrence Theory*, *supra* note 29, at 87-93.

39. For notable criticisms of the court on enforcement grounds see, for example, Jack Goldsmith, *The Self-Defeating International Criminal Court*, 70 U. CHI. L. REV. 89, 92 (2003) (noting that the ICC has no inherent enforcement capacity and is dependent on state enforcement powers); John Bolton, *The United States and the International Criminal Court: The Risks and Weaknesses of the International Criminal Court from America’s Perspective*, 64 LAW & CONTEMP. PROBS. 167, 176 (2001) (“A weak and distant court will have no deterrent effect on the hard men like Pol Pot most likely to commit crimes against humanity.”).

40. Lu, *supra* note 36, at 203.

41. Representative examples include statements by the South Korean representative (“Bringing to justice the perpetrators of crimes of international concern would serve as an effective deterrent”), U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 2nd plen. mtg. ¶ 81, U.N. Doc. A/CONF.183 (Vol. II) (June 15, 1998); the Romanian delegate (“A permanent, universal, independent and strong international criminal court empowered to prosecute and convict persons responsible for genocide, crimes against humanity and war crimes would not only overcome the disadvantages of ad hoc tribunals but would also act as a potential deterrent.”), U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 3rd plen. mtg. ¶ 57, U.N. Doc. A/CONF.183 (Vol. II) (June 16, 1998); the delegate from Burkina Faso (“The limitations of the ad hoc tribunals set up in connection with those tragedies had demonstrated the need for a permanent international court, which would also serve as a deterrent to potential criminals.”), U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 4th plen. mtg. ¶ 31, U.N. Doc. A/CONF.183 (Vol. II) (June 16, 1998); and the delegate from Bahrain (“the purpose of establishing an international criminal court was to act as a deterrent against the commission of war crimes during armed conflict.”), U.N. Diplomatic Conference of

delegate, for example, insisted that “an independent and effective international criminal court would help to deter some of the most serious violations of international humanitarian law.”⁴² An international criminal court, predicted one advocacy group, would be “a veritable sword of Damocles hanging over the head of all warlords and their henchmen.”⁴³

Deterrence was also discussed in a variety of more specific contexts during the negotiations. Several delegates argued that it could not be achieved absent a careful and precise definition of the crimes under the court’s jurisdiction.⁴⁴ Other delegates argued that appropriately severe punishment, including the death penalty, would be necessary to create an effective deterrent.⁴⁵ Singapore’s delegate expressed concern that the absence of this punishment would reduce the court’s impact, “especially in parts of the world where the deprivation of liberty was not an adequate deterrent.”⁴⁶

The court’s anticipated deterrent function was a particular concern during debate on the role of the UN Security Council in the court’s operations. The U.S. delegation advocated requiring a decision of the Security Council to initiate an investigation. U.S. officials stated that international criminal justice could only be successful with the support of the powerful countries on the Council. U.S. delegate David Scheffer argued that “because the [Security] Council alone among international institutions exercises police powers, the design of the court must take into account the proper role of the Council.”⁴⁷ This suggestion that the Security Council should have a central role was vociferously opposed by the “like-minded” states—a group that had emerged as the strongest advocate of an independent court—and by most of the NGOs involved in the process, who

Plenipotentiaries on the Establishment of an International Criminal Court, 8th plen. mtg. ¶ 45, U.N. Doc. A/CONF.183 (Vol. II) (June 18, 1998).

42. U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 2nd plen. mtg. ¶ 63, U.N. Doc. A/CONF.183 (Vol. II) (June 15, 1998) (comment by Mr. Axworthy, Canada).

43. Charles Trueheart, *U.N. Conference to Draft War Crimes Treaty*, WASH. POST, June 14, 1998, at A22.

44. U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 3d plen. mtg. ¶ 100, U.N. Doc. A/CONF.183 (Vol. II) (June 16, 1998) (comment by Mr. Barnhardt, Observer for the European Court of Human Rights). U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 7th plen. mtg. ¶ 27, U.N. Doc. A/CONF.183 (Vol. II) (June 18, 1998) (comment by Mr. Zamir, Bangladesh).

45. U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 8th plen. mtg. ¶ 3640, U.N. Doc. A/CONF.183 (Vol. II) (June 18, 1998) (comment by Mr. Al Badri, Yemen).

46. U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 9th plen. mtg. ¶ 49, U.N. Doc. A/CONF.183 (Vol. II) (July 17, 1998) (comment by Mr. Yee, Singapore).

47. David J. Scheffer, *Responding to Genocide and Crimes Against Humanity*, U.S. DEP’T OF STATE DISPATCH 20, 24 (1998).

argued that such a structure would dramatically reduce the court's deterrent impact. The Lawyers' Committee for Human Rights warned that a large Security Council role would politicize the court's operations and insisted that the court be "bound by legal considerations only if the Court is to play a meaningful role in the prevention and punishment of genocide, crimes against humanity, and other serious violations of international humanitarian law."⁴⁸

Other preventive theories were discussed during the negotiations, although far less frequently. Several delegates, for example, predicted that the court would improve chances for reconciliation by offering redress through law and thereby preventing cycles of violence.⁴⁹ But, in general, deterrence displaced discussion of broader preventive theories, including incapacitation, rehabilitation, education, stigmatization, and moral pressure.

When the statute was completed, some observers expressed certainty that the court's mere existence would prevent crimes. William Pace, head of the influential Coalition for an International Criminal Court, predicted significant results:

The ICC will deter; the ICC will prevent; the ICC will cause the greatest strengthening ever of national legal systems prosecution of crimes against humanity. The ICC will save millions of humans from suffering unspeakably horrible and inhumane death in the coming decades. This is an incredible achievement. This will be part of the legacy of this night.⁵⁰

The final text of the Rome Statute itself is considerably less expansive than its advocates on the court's preventive function. The Statute's preamble provides that the signatories are "determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes."⁵¹ The phrasing suggests that prevention will be a consequence of the court's activities rather than a conscious goal; ending impunity will prevent future crimes, but the court's actual role is prosecution.

The only other explicit reference to deterrence or prevention as a policy goal in the statute comes in Article 58(c)(3), which grants the pre-trial

48. Lawyers Committee for Human Rights, *The Accountability of an Ex Officio Prosecutor*, in 1 INT'L CRIMINAL COURT BRIEFING SERIES NO. 6, 6 (1998).

49. See U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 8th plen. mtg. ¶ 77, U.N. Doc. A/CONF.183 (Vol. II) (June 18, 1998) (comment by Mr. Dorsen, Observer for the Lawyers Committee for Human Rights); U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 5th plen. mtg. ¶ 12, U.N. Doc. A/CONF.183 (Vol. II) (June 17, 1998) (comment by Mr. Hashim, Brunei).

50. William R. Pace, Convenor, Statement of World Federalist Movement on behalf of the Coalition for an International Criminal Court (July 17, 1998), <http://www.un.org/icc/speeches/n717wfm.htm>

51. Rome Statute, *supra* note 13, pmb1.

chamber the authority to issue an arrest warrant or summons to appear in order to, among other reasons, “prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.”⁵² This article appears to aim at an incapacitation effect rather than a deterrent one. The presumed intent is to physically remove the individual from the conflict zone rather than to deter him through the threat of punishment. However, it is possible that a targeted deterrent effect was intended as well. It was known to the drafters that the court would have no enforcement arm, and they likely considered the possibility that a warrant issued under Article 58(c)(3) would go unenforced. In that situation, they may have nonetheless hoped that the existence of an arrest warrant would lead the individual in question to modify his behavior, perhaps in anticipation of an eventual trial or out of a desire to demonstrate to observers “clean hands.”

The ICC’s drafting history indicates a strong desire on the part of many drafters to create an institution that would deter and prevent future crimes. But the Rome Statute and the subsequently adopted Rules of Procedure and Evidence offer little guidance on whether and how the court should seek to maximize that effect. The court’s prosecutor, judges, and administrators are now in the process of exploring the court’s preventive potential.

III. THE COURT IN OPERATION

The court is now in its eighth year of operation and has active cases at several different stages. As of late 2010, the court was conducting five formal investigations, had indicted thirteen individuals, and initiated three trials. At least another nine situations were being monitored by the court. The court’s pre-trial chambers and appeals chamber have ruled on several different aspects of the court’s operations, primarily on questions related to opening investigations, the standards for issuing arrest warrants, and victims’ rights and participation.⁵³ It is possible to make an initial assessment of whether and how the goal of prevention is influencing the court’s deliberations and operations, although certain relevant information--most importantly, the deliberations of the court’s senior leadership--is not available. More than most courts, however, the ICC has attempted to explain its reasoning and strategy through press statements, published papers, and speeches. As representatives of a new and fragile institution,

52. *Id.* at art. 58(c)(3). Article 28 discusses prevention in the context of command responsibility, but only in a retrospective sense. Military commanders who “failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission” may be individually criminally responsible. *Id.* at art. 28(a)(ii).

53. For an analysis of early appeals chamber decisions, see Jason Manning, Note, *On Power, Participation and Authority: The International Criminal Court’s Initial Appellate Jurisprudence*, 38 GEO. J. INT’L L. 803 (2007).

ICC officials feel an obligation to explain their actions and educate a variety of audiences about the court's operations.

In these public statements, prevention is a recurring theme. Indeed, the ICC prosecutor and other senior court officials have claimed on several occasions that the court has already had a notable preventive effect. The cases it has pursued on child soldiers in Africa, it is claimed, have had an impact in Colombia and Sri Lanka.⁵⁴ Crimes by the Lord's Resistance Army in northern Uganda "have dramatically decreased" as a result of the ICC indictment and the group's recruitment efforts "dried up almost instantly" after the indictments.⁵⁵ The prosecutor himself has contended that the Russian armed forces "[tried] to take the Rome Statute into consideration when it planned its military campaign in Georgia."⁵⁶ More broadly, he has argued that "armies all over the world, even those of non-States Parties, are adjusting their standards and rules of engagement to the Rome Statute. This is the way to prevent crimes."⁵⁷

The prosecutor has pointed to even more specific instances in which the court served as an effective deterrent. Before one audience, he argued that the Rome Statute was influencing the battlefield decisions of individual combatants: "In 2003 an Australian military pilot conducting operations in Iraq realized that if he executed the order received, he could be prosecuted in accordance with the Rome Statute. He returned to his base without dropping the bombs."⁵⁸

Observers outside the court have also identified situations in which they believe the court's activities, or at least awareness of the court, has prevented crimes.

- After a coup attempt in the Central African Republic, the nongovernmental International Federation of Human Rights made a widely publicized call for ICC involvement. The Federation claims that the public discussion of an ICC role reduced tension notably in the country and may have prevented further atrocities.⁵⁹

54. Luis Moreno-Ocampo, Prosecutor of the Int'l Criminal Court, Address to the Assembly of States Parties, Eighth Session, 3 (Nov. 18, 2009) [hereinafter Address to Assembly of States Parties], <http://icc-cpi.int/NR/rdonlyres/CDF496C7-7BA7-4AA3-B670-1EE85BC3E3E8/281268/20091118ASPspeech.pdf>.

55. Kaul, *supra* note 12, at 13.

56. Luis Moreno-Ocampo, Prosecutor of the Int'l Criminal Court, Opening Keynote Address to the 2009 Global Creative Leadership Summit 5 (Sept. 23, 2009), <http://icc-cpi.int/NR/rdonlyres/323EC3FC-0856-4FDB-8BE5-7A3F6C5C76F6/280864/SP220909.pdf>.

57. Address to Assembly of States Parties, *supra* note 54, at 3.

58. Luis Moreno-Ocampo, Prosecutor of the Int'l Criminal Court, Remarks at the Qatar Law Forum on the Role of International Judicial Bodies in Administering the Rule of Law 7 (May 30, 2009), http://icc-cpi.int/NR/rdonlyres/10F9092D-4376-4E0B-84E1-DEBD55FA183B/280466/300509_QatarLawForum.pdf.

59. See Antoine Bernard, Int'l Fed'n of Human Rights, Statement at the Second Public Hearing of the Office of the Prosecutor, Session 2 (Sept. 26, 2006), <http://www.icc-pi.int/Menu/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Network+with+Partn>

- It has been reported that the content of government statements in Cote d'Ivoire changed after a senior UN official stated that ethnic violence might fall under the jurisdiction of the court. Statements that had been aggressive turned more conciliatory.⁶⁰
- Human Rights Watch researchers have recounted being told certain militia commanders in eastern Congo are desperate to avoid being sent to [T]he Hague.⁶¹

These claims are anecdotal and there is little empirical research yet on whether the ICC has played a preventive role. Indeed, research on the preventive impact of international justice mechanisms in general is limited and inconclusive.⁶² That senior ICC officials have frequently commented on the court's preventive function does not necessarily imply that the court is structuring its activity to produce that effect, but it does at least suggest that court officials value prevention and see it as a critical indicator of the court's effectiveness. As the court's president stated recently: "If only one warlord has decided to release his child soldiers, then the ICC can already be deemed a success."⁶³

The frequent references to the court's preventive effect may therefore serve a pragmatic function. In the absence of convictions, and faced with significant numbers of indictees at large, court officials need some method of demonstrating the court's effectiveness to the public, member states, and important non-signatory states. The prosecutor's special adviser on prevention, Juan Mendez, has suggested that prevention serves as a convenient response to criticisms of the ICC.⁶⁴

A. Preliminary Examination

In advance of a formal investigation, the OTP reviews situations to determine whether crimes that fall within the jurisdiction of the court have been or are being committed. Information and complaints from individuals and organizations outside the court—of which there have been several

ers/Public+Hearings/Second+Public+Hearing/Session+2/Mr_+Antoine+Bernard+%E2%80%93+International+Federation+for+Human+Rights+_FIDH_.htm.

60. See Parliamentarians for Global Action, *supra* note 3, at 4-5; HUMAN RIGHTS WATCH, SELLING JUSTICE SHORT 124-25 (2009).

61. HUMAN RIGHTS WATCH, *supra* note 60, at 125.

62. For an able summary of recent empirical work, see Alexander, *supra* note 6, at 45-50.

63. Judge Sang-Hyun Song, President of the Int'l Criminal Court, The Bridge to Peace Rests on Pillars of Justice 5 (Sept. 19, 2009), http://www.icc-cpi.int/NR/rdonlyres/822CEE43-F747-4161-89EA-9407E2EB3338/280866/090918_Arnhem_speech_ENG.pdf.

64. Interview with Juan Mendez, Special Advisor, ICC Office of the Prosecutor, in Washington, D.C. (Apr. 27, 2010).

thousand—are reviewed by the prosecutor and his staff.⁶⁵ A state party or Security Council referral will also lead to a preliminary examination.⁶⁶

The prosecutor's discretion is broad during this phase of the court's work. Neither the Rome Statute nor the Rules of Procedure and Evidence offer the prosecutor any significant guidance on how to conduct preliminary examinations, although they do make clear that the prosecutor may seek additional information and may take oral or written testimony during this phase.⁶⁷ The prosecutor may monitor a situation without any input from a pre-trial chamber and without any temporal limitation. Perhaps because of this leeway, the OTP has sought to use this phase assertively for the purposes of prevention.

Publicity surrounding a preliminary examination has proved to be a key tool. Certain court documents suggest that the process of pre-investigation will normally be conducted without publicity and without public statements, noting that “[g]enerally, work in a situation does not become public knowledge until the Office opens an investigation.”⁶⁸ The court's Rules of Procedure and Evidence require the prosecutor to “analyse the seriousness of information received” but they do not specify whether this is to be done publicly.⁶⁹ The OTP's own regulations provide only that “the Prosecutor *may* decide to make public the Office's activities in relation to the preliminary examination of information”⁷⁰

During the court's several years of operation, however, preliminary investigations have regularly become public. In some cases, preliminary investigations appear to have had a notable impact on domestic politics as well as on international mediation efforts. In Kenya, for example, the ICC's

65. See ICC, *Regulations of the Office of the Prosecutor*, Reg. 25-28, ICC-BD/05-01/09 (Apr. 23, 2009) [hereinafter *Regulations of the Office of the Prosecutor*]. The OTP reports that, since July 2002, the court has received more than 8,733 communications from more than 140 countries, with a majority of those communications from individuals in the United States of America, the United Kingdom, Germany, Russia and France. ICC, *Office of the Prosecutor – Communications, Referrals, and Preliminary Analysis*, <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Comm+and+Ref/> (last visited Oct. 14, 2010).

66. When a case is referred by a state party or by the Security Council, the burden is on the prosecutor to explain the “reasonable basis” for not pursuing the case and the pre-trial chamber may review the decision and ask the prosecutor to reconsider. See Rome Statute, *supra* note 13, art. 53, para. 3(a); see also ICC, *Annex to the “Paper on Some Policy Issues Before the Office of the Prosecutor”*: *Referrals and Communications*, http://www.icc-cpi.int/NR/rdonlyres/278614ED-A8CA-4835-B91DDB7FA7639E02/143706/policy_annex_final_210404.pdf.

67. Rome Statute, *supra* note 13, art. 15, para. 2.

68. ICC, *Frequently Asked Questions*, <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/FAQ> (last visited Oct. 14, 2010).

69. ICC, Rules of Procedure and Evidence, Rule 104, ICC Doc. ICC-ASP/1/3 (Sept. 3-10, 2002) [hereinafter ICC Rules of Procedure and Evidence].

70. *Regulations of the Office of the Prosecutor*, *supra* note 65, at Reg. 28(2) (emphasis added).

prolonged monitoring occasioned significant national debate and influenced the work of lead international mediator Kofi Annan.⁷¹ The prosecutor's office has embraced the attention that its preliminary investigations receive. Even in the absence of a formal requirement, the OTP now routinely reports on situations it is monitoring. As the deputy prosecutor stated, "the Office has developed the practice of being as transparent as possible so the international community and our partners will know whether there are situations which may require investigations to be carried out."⁷² In public documents, the OTP has stressed the benefits that awareness of ICC scrutiny can have:

[T]he announcement of ICC activities can have a preventive impact. The mere monitoring of a situation can deter future crimes. It increases the risk of punishment even before trials begin. This effect is not limited to the situation under investigation but extends to all State Parties and reverberates worldwide.⁷³

In places like Colombia, the prosecutor has argued, scrutiny itself is salutary. "Because we are there watching, they have to do everything perfectly . . .," Moreno-Ocampo said. "Colombia shows how important it is to have this back-up system."⁷⁴ In 2008, the prosecutor announced that his office was examining the conduct of Taliban and NATO forces in Afghanistan. At times, he appeared inclined to use that examination as a mechanism for encouraging forward-looking preventive mechanisms. In discussing the inquiry, for example, the prosecutor emphasized policies such as appropriate education for the new Afghan armed forces. "That is the most important [thing] because these massive atrocities are planned. So if those who are planning know they will be prosecuted, they will do something different."⁷⁵

During certain of its preliminary investigations, the OTP has focused on quite specific preventive goals. The 2008 post-election violence in Kenya

71. See Barney Jopson, *Odinga Seeks Help Over Power Struggle*, FIN. TIMES (Feb. 16, 2010) (quoting a source close to Odinga describing the ICC's involvement as "explosive"); Daniel Howden, *Prosecutor Arrives in Kenya on Trail of War Crimes; Intervention by International Criminal Court Greeted with Fury by Senior Politicians*, INDEPENDENT (London), Nov. 6, 2009, at 32.

72. Fatou Bensouda, ICC Deputy Prosecutor, Sixteenth Diplomatic Briefing 5 (May 26, 2009), available at http://www.icc-cpi.int/NR/rdonlyres/302CA5E0-E2B5-4663-96DE-93E55B1FD26C/280424/DP_ENG.pdf.

73. ICC, Office of the Prosecutor, *Report on Prosecutorial Strategy*, 6 (Sept. 14, 2006) [hereinafter *Report on Prosecutorial Strategy 2006*].

74. Edith M. Lederer, *Prosecutor: War Crimes Tribunal 'Working Well'*, ASSOCIATED PRESS, Feb. 2, 2010, available at WL 2/2/10 APWORLD 19:48:37.

75. Edith M. Lederer, *International Criminal Court Prosecutor Eyeing War Crimes In Afghanistan*, ASSOCIATED PRESS, Sept. 9, 2009, available at http://www.huffingtonpost.com/2009/09/09/international-criminal-co_0_n_281385.html (quoting ICC Prosecutor Luis Moreno Ocampo) (parenthesis omitted for brackets).

was the subject of a preliminary examination for several months before the prosecutor sought permission to open a formal investigation in November 2009.⁷⁶ During that period, the prosecutor visited Kenya and made numerous public statements about the situation. He pledged that “[w]e will do justice, we will work together to avoid a repetition of the crimes It has been two years since the post election violence in Kenya. In two years another election is planned. The world is watching Kenya and this Court.”⁷⁷ He later stressed that the court would try to proceed on a timetable that could maximize the chances for prevention. “Everyone is worried about the next election in Kenya in 2012,” he told the press. “That’s why I understand the importance of speed, and I am working to be sure that during 2010—if the judges authorize investigations—we will be able to complete investigations and to define who are the suspects, who are the accused, that have to have justice in Kenya. And that will clean the situation [so] that you can have peaceful election [seasons] in 2011 and 2012.”⁷⁸

In situations where conflict has broken out abruptly, the OTP has signaled to combatants that it is scrutinizing events, a clear attempt to use its influence to alter the conduct of hostilities. When fighting erupted between Georgian and Russian forces in August 2008, the court released a statement indicating that it was analyzing alleged crimes committed during combat operations. The prosecutor also reportedly met with Russian and Georgian officials about possible violations committed.⁷⁹ In other cases, the prosecutor has commented on specific incidents in ongoing conflicts. Just two days after a massacre at a refugee camp in Uganda, the prosecutor released a statement indicating his intent to investigate, which could be seen as an effort to assure the affected Ugandan communities that revenge attacks were unnecessary and to thereby help prevent a spiral of violence.⁸⁰ When violence broke out in Cote d’Ivoire after a disputed election, the

76. See Luis Moreno Ocampo, Prosecutor of the Int’l Criminal Court, Press Conference by the ICC Prosecutor of the International Criminal Court (Nov. 26, 2009), <http://www.icc-cpi.int/NR/rdonlyres/E11C3A8B-731E-4BCC-9625-BBC26D27E6E1/281314/OTPNotesfortheMediaBackgroundunderonly26112009FINALEN.pdf>.

77. *Prosecutor Requests Judges Authorization to Open an Investigation into Kenya Situation*, OTP WEEKLY BRIEFING, No. 15 (Office of the Prosecutor of the Int’l Criminal Court, The Hague), Nov. 24-30, at 1.

78. Voice of America News, *ICC Prosecutor Promises Speed in Kenya Proceedings* (Nov. 7, 2009), available at <http://www1.voanews.com/english/news/a-13-2009-11-07-voa13.html>

79. See Press Release, Int’l Criminal Court, ICC Prosecutor Confirms Situation in Georgia Under Analysis (Aug. 20, 2008), <http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/press%20releases%20%282008%29/icc%20prosecutor%20confirms%20situation%20in%20georgia%20under%20analysis>.

80. See Press Release, ICC, Statement by the Prosecutor Related to Crimes Committed in Barlonya Camp in Uganda (Feb. 23, 2004), <http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2004/statement%20by%20the%20prosecutor%20related%20to%20crimes%20committed%20in%20barlonya%20camp%20in%20uganda>.

prosecutor publicly warned one individual that his incitements to violence might be prosecuted.⁸¹

Further, the OTP has incorporated into its latest strategy document the goal of prevention through public monitoring. It states that the office will “make preventive statements noting that crimes possibly falling within the jurisdiction of the Court are being committed . . . [and] make public the commencement of a preliminary examination at the earliest possible stage through press releases and public statements.”⁸² The prosecutor has also expressed his intent to catalogue and assess the preventive impact of these activities, although he has not offered a methodology for doing so.

Public awareness of ICC monitoring could have important benefits in this respect. In particular, the prosecutor can employ monitoring as a form of targeted deterrence in situations where it appears that a recurrence of crimes is likely, as is the case in Kenya. ICC scrutiny may lead combatants and political leaders to modify their future behavior in an attempt to discourage the prosecutor from seeking a formal investigation or to minimize the chances that they will be indicted. At the same time, it may create pressure for national judicial proceedings and the possible incarceration of those responsible for crimes. The prosecutor has, at various times, advanced the idea of “positive complementarity”—the notion that the court should actively encourage and assist states to conduct their own prosecutions and assist them in doing so.⁸³ ICC involvement may serve as an effective means of “catalyz[ing] political will toward prosecution in situations under analysis.”⁸⁴

In theory, the OTP’s choice to highlight and publicize the court’s preliminary investigations could create complications for the methodical building of a case against perpetrators. A high degree of publicity about prosecutorial activities might lead perpetrators to cover up evidence, destroy documentation, and intimidate potential witnesses, steps which could complicate construction of a case for trial. Publicity may also complicate the ultimate enforcement of any warrants, as individuals who expect to be investigated may go into hiding or make preparations to do so. It is for this

81. See Press Release, ICC, Statement by ICC Prosecutor Luis Moreno-Ocampo on the situation in Côte d’Ivoire (Dec. 21, 2010), <http://www.icc-cpi.int/NR/exeres/EB76851B-C125-4E70-8271-D781C54E2A65.htm>

82. *Prosecutorial Strategy 2009-2012*, *supra* note 18, at 10, para. 39.

83. See *Prosecutorial Strategy 2009-2012*, *supra* note 18, at 4-5, para. 16; Luis Moreno-Ocampo, Prosecutor of the Int’l Criminal Court, Statement of the Prosecutor to the Diplomatic Corps (Feb. 12, 2004), http://icc-cpi.int/NR/rdonlyres/0F999F00-A609-4516-A91A-80467BC432D3/143670/LOM_20040212_En.pdf. For an argument that the court should make proactive complementarity a main focus, see William Burke-White, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice*, 49 HARV. J. INT’L L. 54 (2008).

84. HUMAN RIGHTS WATCH, MAKING KAMPALA COUNT: ADVANCING THE GLOBAL FIGHT AGAINST IMPUNITY AT THE ICC REVIEW CONFERENCE 34 (2010) [hereinafter MAKING KAMPALA COUNT].

reason that the International Criminal Tribunal for the former Yugoslavia (ICTY) often kept indictments secret until they could be enforced.⁸⁵ However, these complications might be unavoidable. It is not clear that the OTP could keep a preliminary examination quiet even if it wanted to. For example, news that the prosecutor was examining crimes committed in Colombia became public in March 2005 when Colombian lawmakers released a letter from Moreno-Ocampo requesting information on alleged crimes.⁸⁶ Given this reality, the OTP has sought to extract as much preventive value from preliminary examinations as possible.

B. Formal Investigations and Indictments

The Rome Statute provides for increasing judicial oversight of the prosecutor when he seeks to begin a formal investigation or to issue summons or arrest warrants. The pre-trial chamber assigned to the case must approve of major decisions by the prosecutor. Even at this stage, however, the Rome Statute asks the prosecutor to use his discretion in certain limited but important ways. In contrast to the preliminary investigation phase, the prosecutor has at several points resisted the idea of using formal investigations for preventive purposes or of requiring an assessment of the preventive effects of its formal steps.

1. *Abstention as Prevention*

The simplest way in which the court might factor prevention into its calculus at this stage is by deciding that formal investigation and indictment risk inciting additional crimes and therefore choosing not to pursue them. The possibility that ICC involvement would itself be the cause of violations has been raised as a theoretical possibility by observers and critics. The argument has taken several forms. A court investigation or indictment of a prominent politician or commander might spark a violent backlash by supporters. An existing indictment might make an accused leader more committed to staying in power, including through the use of violent repression and atrocities.

It did not take long for the issue to present itself as more than an abstract possibility. One of the court's earliest formal investigations was the situation in Uganda, which was referred to the court by the Ugandan

85. See, e.g., Sean D. Murphy, *Developments in International Criminal Law: Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, 93 AM. J. INT'L L. 57, 74 (1999); John F. Harris & Dana Priest, *Alliance Gets Aggressive on Arrests*, WASH. POST, July 11, 1997, at A1 (discussing development of the practice of issuing sealed indictments).

86. See Javier Baena, *War Crimes Tribunal Asks Colombia for Information on Alleged Abuses*, ASSOCIATED PRESS (Bogota), Mar. 31, 2005, available at WL 3/31/05 APDATASTREAM 23:29:27.

government.⁸⁷ The referral specifically referenced the activities of the Lord's Resistance Army, led by Joseph Kony. The court's involvement in Uganda soon sparked a vigorous debate about the likely impact of the investigation on prospects for negotiation and reconciliation. At one point, a delegation of senior Ugandan civil society representatives appealed to the prosecutor to drop the case. In essence, their argument was that the ICC's most important contribution to preventing future atrocities would be discontinuing its investigation.⁸⁸ The prosecutor met with the elders and promised to take work cooperatively.⁸⁹ He pointedly declined to offer immunity or end the investigation although he did express a willingness to consider delaying the investigation if he was convinced that it was not serving the interests of justice.⁹⁰

Should the prosecutor decide to adopt that line of reasoning, the Rome Statute provides him with a mechanism to decline a formal investigation as a matter of discretion even when the admissibility requirements are met. Article 53(1)(c) provides that the prosecutor may decline to open an investigation when "substantial reasons to believe that an investigation would not serve the interests of justice."⁹¹ In September 2007, the OTP produced a policy paper on this provision in an effort to clarify how it might be used.⁹² It stated that use of the "interests of justice" provision would be

87. The referral, and the prosecutor's announcement of it, was controversial from its first moments. Moreno-Ocampo appeared together with Ugandan president Yoweri Museveni at a press conference to announce the referral, a move that many human rights groups saw as linking the court too closely to the Ugandan government, which is accused of committing many of its own crimes. See Press Release, Human Rights Watch, ICC: Investigate All Sides in Uganda—Chance for Impartial ICC Investigation into Serious Crimes a Welcome Step (Feb. 4, 2004), <http://www.hrw.org/en/news/2004/02/04/icc-investigate-all-sides-uganda> (warning that "the ICC prosecutor cannot ignore the crimes that Ugandan government troops allegedly have committed"). For an analysis of the referral's impact, see Payam Akhavan, *The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court*, 99 AM. J. INT'L L. 403 (2005).

88. See, e.g., BENJAMIN N. SCHIFF, BUILDING THE INTERNATIONAL CRIMINAL COURT 201-04 (2008).

89. See Press Release, Int'l Criminal Court, Joint Statement by ICC Chief Prosecutor and the visiting Delegation of Lango, Acholi, Iteso and Madi Community Leaders from Northern Uganda (Apr. 16, 2005), <http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2005/joint%20statement%20by%20icc%20chief%20prosecutor%20and%20the%20visiting%20delegation%20of%20lango%20acholi%20iteso%20and%20madi%20c>.

90. See SCHIFF, *supra* note 87, at 204.

91. See, e.g., Linda M. Keller, *Achieving Peace with Justice: The International Criminal Court and Ugandan Alternative Justice Mechanisms*, 23 CONN. J. INT'L L. 209, 246-52 (2008) (surveying interpretations of the provision in the context of the Uganda investigation); Greenawalt, *supra* note 10, at 596-97; Henry Lovat, *Delineating the Interests of Justice*, 35 DENV. J. INT'L L. & POL'Y 275 (2007).

92. ICC, Office of the Prosecutor, *Policy Paper on the Interests of Justice* (Sept. 2007), <http://www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPIInterestsOfJustice.pdf>.

exceptional.⁹³ The OTP noted that Article 53 essentially requires a balancing test, and it acknowledged that alternative justice processes (i.e., truth commissions) and the existence of peace and reconciliation efforts might be relevant to this balancing. But the OTP pointed out that the Security Council has the power to delay proceedings and insisted that questions of peace and security are not its responsibility.⁹⁴ This interpretation makes it unlikely that the court will explicitly decline jurisdiction based on the possibility that its involvement could prolong conflict and thus encourage, rather than prevent, future atrocities, although this possibility may of course factor into the prosecutor's decision about whether to seek a formal investigation in the first place.

As an empirical matter, the OTP has appeared to cast doubt on the idea that pursuing justice can threaten peace processes or worsen violence. In a paper released during the Kampala Review Conference, the prosecutor's special adviser on prevention argued forcefully that none of the ICC's cases to date suggest that justice efforts have hampered peace processes. He presented evidence that indictments in Sudan, in particular, galvanized rather than complicated diplomatic efforts. "Efforts to bring President Al Bashir to justice did not hamper peace," he asserted, "they may well have had a decisive role in fostering it."⁹⁵ The paper essentially argued that the oft-discussed tension between justice and peace does not exist. If this reflects the thinking within the OTP, it is very unlikely that the prosecutor will pursue prevention by staying his hand.

2. *A Deterrence Test? The "Gravity Requirement"*

Article 17 of the Rome Statute, which addresses issues of admissibility, sets out several situations in which cases will be inadmissible. At both the stage of initiating formal investigations and at the stage of issuing warrants or filing charges, the pre-trial chamber must ensure that situations and cases meet these requirements.⁹⁶ This process of review has occasioned explicit discussion about the court's preventive function.

Subsections 1(a) and 1(b) together exclude those cases that are being or have been genuinely investigated by competent national authorities: these provisions effectuate the court's well-known complementarity requirement and were debated at length during the Rome Conference.⁹⁷ Subsection 1(c) declares inadmissible cases in which the person concerned has already been tried. Subsection 1(d) provides a distinct test: It provides that a case will be

93. *Id.* at 1.

94. *Id.* at 8-9.

95. *Review Conference of the Rome Statute*, Kampala, Uganda, May 31- June 11, 2010, RC/ST/PJ/INF.3 (May 30, 2010).

96. The wording of Article 17 makes clear that these requirements apply at both stages. Rome Statute, *supra* note 13, art. 17.

97. Rome Statute, *supra* note 13, art. 17, paras. (1)(a)-(b).

inadmissible if it is “not of sufficient gravity to justify further action by the Court.”⁹⁸ This provision appears potentially redundant, given that Articles 5, 7 and 8 of the Statute emphasize that the court should consider crimes that are large-scale or systematic, and define certain crimes accordingly.⁹⁹

The Rome Statute’s drafting history does not provide clear guidance on the precise purpose of this separate Article 17 gravity requirement, and the concept of gravity is not defined in the Statute or in the court’s Rules of Procedure and Evidence. Indeed, as William Schabas has argued, “the issue of gravity was virtually ignored in the negotiations of the Rome Statute, and did not manifest itself as an important question until well after the Court had begun to operate.”¹⁰⁰ The provision first appeared during proceedings of the International Law Commission, which produced an early draft treaty, and was apparently intended as a mechanism for allowing the court to manage its caseload and prevent it from being overburdened with minor cases. The provision remained in subsequent drafts even as the definition of the crimes under the court’s jurisdiction was altered to include only the most serious.¹⁰¹

In reviewing the prosecutor’s request for arrest warrants for Congolese militia leader Thomas Lubanga Dyilo and his deputy, Bosco Ntaganda, the pre-trial chamber (“PTC”) examined in some depth the meaning of this “gravity” threshold for admissibility.¹⁰² The chamber noted that the provision is separate from the gravity considerations included in the selection of the crimes under Articles 6-8 of the Rome Statute and should consequently be analyzed as a distinct requirement. Moreover, the judges held that the court has no choice but to assess whether a case meets the gravity requirement. “The Statute leaves the Chamber no discretion as to the declaration of the inadmissibility of a case once it is satisfied that the case ‘is not of sufficient gravity to justify further action by the Court.’”¹⁰³ The PTC also determined that the hurdle provided by the provision must be

98. Rome Statute, *supra* note 13, art. 17, para. 1(d). For a general discussion of the gravity requirement see Mohamed M. El Zeidy, *The Gravity Threshold Under the Statute of the International Criminal Court*, 19 CRIM. L.F. 35 (2008); Ray Murphy, *Gravity Issues and the International Criminal Court*, 17 CRIM. L.F. 281 (2006).

99. Article 5(1) states that the court is designed to address “the most serious crimes of concern to the international community as a whole.” Rome Statute, *supra* note 13, art. 5, para. 1. Article 7 defines a crime against humanity as any of a series of acts “when committed as part of a widespread or systematic attack . . .” *Id.* at art. 7. Article 8 provides that the court shall have jurisdiction over enumerated war crimes “in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.” *Id.* at art. 8.

100. *Prosecutorial Discretion*, *supra* note 10, at 736.

101. See War Crimes Research Office, American University Washington College of Law, *The Gravity Threshold of the International Criminal Court* (March 2008), 12-18.

102. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-8-Corr 17-03-2006, Decision Concerning Pre-Trial Chamber I’s Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo, (Feb. 24, 2006) [hereinafter Lubanga Feb. 24].

103. *Id.* ¶ 43.

cleared twice: once when an investigation is initiated and again when a case is brought.¹⁰⁴

On the substance of the gravity requirement, the chamber found that (1) the conduct in question must be either systematic or large-scale; and (2) that “due consideration must be given to the social alarm such conduct may have caused in the international community.”¹⁰⁵ Drawing on the reference to prevention in the Rome Statute’s preamble, the chamber concluded that 17(1)(d) required that prosecutions only be initiated against those senior leaders who have committed systematic or large-scale crimes. At the root of this reasoning was the view that deterrence was a principal objective of the court, and that the gravity requirement is “a key tool provided by the drafters to maximize the Court’s deterrent effect.”¹⁰⁶ The chamber reasoned that “only by concentrating on this type of individual can the deterrence effects of the activities of the Court be maximized because other senior leaders in similar circumstances will know that solely by doing what they can to prevent the systematic or large-scale commission of crimes within the jurisdiction of the Court can they be sure that they will not be prosecuted by the Court.”¹⁰⁷

The chamber found further support for its reasoning in the principles and rules of international law. Specifically, it cited UN Security Council resolutions calling on the ICTY and International Criminal Tribunal for Rwanda (“ICTR”), as part of their completion strategy, to concentrate on “the most senior leaders suspected of being most responsible for crimes”¹⁰⁸ For the judges, the fact that the ICC is a permanent rather than an *ad hoc* institution heightened the importance of “ensuring the effectiveness of the Court in carrying out its deterrence function and maximizing the deterrence effect of its activities.”¹⁰⁹ On the facts presented to it, the chamber found that the case against Lubanga met this test but that the case against Ntaganda did not. According to the judges, not enough evidence was presented that Ntaganda, as the third in command of the militia, “was a core actor in the decision-making.”¹¹⁰ The case against him was accordingly declared inadmissible.¹¹¹

104. *Id.* ¶ 44.

105. *Id.* ¶ 46.

106. *Id.* ¶ 48.

107. *Id.* ¶ 54. Certain commentators have endorsed the view that prosecuting senior leaders will provide the most effective form of deterrence. *See, e.g.*, Greenawalt, *supra* note 10, at 629 (arguing that planners and leaders “provide a relatively narrow target for deterrence, and the deterrence resulting from their punishment, if effective, will have a broader impact than that of individual low-level perpetrators.”).

108. Lubanga Feb. 24, *supra* note 101, ¶ 55.

109. *Id.* ¶ 60.

110. Prosecutor v. Dyilo, Case No. ICC-01/04-01/07, Decision on the Prosecutor’s Application for Warrants of Arrest, ¶ 87 (Feb. 10, 2006).

111. *Id.* ¶ 89.

The substance of the chamber's ruling aside, the decision was an important signal that the judges were inclined to play an active role in supervising the OTP's work and that they would not hesitate to express themselves on prosecutorial strategy and policy goals. Indeed, the chamber appeared eager to begin filling in the interstices of the Rome Statute and to provide principles that would guide the court in its choice of cases and prosecutions.

Several months after the PTC issued its decision, the court's appeals chamber rejected this reading of the gravity requirement.¹¹² In reviewing the refusal to grant the arrest warrant, the appeals chamber found that the pre-trial chamber had erroneously created an additional requirement at the admissibility stage that conduct in question must be "systematic or large-scale."¹¹³ The appeals chamber reasoned that such a requirement would render meaningless other provisions of the Rome Statute.¹¹⁴ The judges also found no support for the "social alarm" test set forth by the pre-trial chamber, and it directly questioned the pre-trial chamber's reasoning on deterrence. In particular, it argued that excluding cases against all lower-level perpetrators might actually weaken the deterrent effect of the court. "It seems more logical to assume that the deterrent effect of the Court is highest if no category of perpetrators is per se excluded from potentially being brought before the Court."¹¹⁵ The appeals chamber also expanded on the issue of the Court's broader preventive function:

The imposition of rigid standards primarily based on top seniority may result in neither retribution nor prevention being achieved. Also, the capacity of individuals to prevent crimes in the field should not be implicitly or inadvertently assimilated to the preventive role of the Court more generally. Whether prevention is interpreted as a long-term objective, i.e. the overall result of the Court's activities generally, or as a factor in a specific situation, the preventive role of the Court may depend on many factors, much broader than the capacity of the individual to prevent crimes.¹¹⁶

On the broad issue of the court's preventive function, the appeals chamber here showed itself to be essentially agnostic on whether prevention should be conceived of as a byproduct of the court's activity or whether it should factor into the court's decision-making. While the appeals chamber rejected the pre-trial chamber's reasoning, it did not exclude the possibility

112. Situation in the Democratic Republic of Congo, Case No. ICC-01-04, Appeals Chamber, Judgment on the Prosecutor's Appeal Against the Decision of Pre-Trial Chamber I Entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58" (July 13, 2006).

113. *Id.* ¶ 61.

114. *Id.* ¶¶ 69-70.

115. *Id.* ¶ 73.

116. *Id.* ¶ 74.

that the concept of gravity might still involve consideration of the deterrent impact of an investigation or case. It appears unlikely that 17(1)(d) will ultimately be interpreted to require such an assessment; the provision's text and the Rome Statute more broadly cannot support such an interpretation. The ICC prosecutor has acknowledged at several points that his office is in the process of defining and putting into practice the concept of gravity,¹¹⁷ and it appears that the chambers are engaged in the same process.

3. *The Conduct of Investigations*

Once the pre-trial chamber has authorized a formal investigation, the OTP has responsibility for "extend[ing] the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute"¹¹⁸ The interests of victims and witnesses and the nature of the crime should play a significant role in the development of an investigative strategy.¹¹⁹ Throughout the Rome Statute, the Rules of Procedure and Evidence and the OTP's own guidelines make the protection and wellbeing of victims a high priority during investigations.¹²⁰

The court's apparent commitment to both the protection of victims and maximizing its preventive effect creates the possibility of tension. What best serves the victims of crimes already committed may not necessarily be best for those facing ongoing or imminent violence. This tension manifested itself during the early stages of the court's investigation into crimes committed in the Darfur region of Sudan. Specifically, the question arose as to whether the court's investigations and the presence of ICC personnel can mitigate or restrain ongoing violence and atrocities by making visible the threat of prosecution. The UN Security Council had referred the case of Darfur to the ICC in March 2005, and the Prosecutor formally opened its first investigation in June of that year.¹²¹ In July, the pre-trial chamber, acting through Article 103 of the Rome Statute, invited observations from certain eminent international jurists on aspects of the court's investigation there, notably the protection of victims.¹²²

117. See, e.g., Statement by Luis Moreno-Ocampo, Prosecutor of the ICC, Informal Meeting of Legal Advisors of Ministries of Foreign Affairs, New York, 6 (Oct. 24, 2005), http://www.icc-cpi.int/NR/rdonlyres/9D70039E-4BEC-4F32-9D4A-CEA8B6799E37/143836/LMO_20051024_English.pdf.

118. Rome Statute, *supra* note 13, art. 54, para. 1.

119. *Id.*

120. See, e.g., Rome Statute, *supra* note 13, art. 53(1)(c), 54(1)(b), 57(3)(c); ICC Rules of Procedure and Evidence, *supra* note 69, at Rules 16-19; *Regulations of the Office of the Prosecutor*, *supra* note 65, at Regs. 16, 44-48.

121. S.C. Res. 1593, *supra* note 21.

122. Situation in Darfur, Sudan, Case No. ICC-02/05, Pre-Trial Chamber I, Decision Inviting Observations in Application of Rule 103 of the Rules of Procedure and Evidence (July 24, 2006).

In response to the pre-trial chamber's request, Louise Arbour, United Nations High Commissioner for Human Rights, submitted observations.¹²³ She criticized the ICC prosecutor for not conducting investigations in Darfur and for instead relying primarily on refugees and displaced persons for witness testimony. Arbour contended that in crafting its investigative strategy the ICC had placed too much emphasis on the possible risks to witnesses and victims and too little on the benefits that an active investigation in Darfur might yield. She encouraged the prosecutor to consider "the potential deterrent effect of ICC investigations on the perpetrators of the very crimes that put the civilian population at risk and thus of its impact on the general reduction of violence."¹²⁴ The presence of ICC investigators "can create an atmosphere in which the costs of abuse are more apparent to the perpetrators of violence against civilians."¹²⁵ The ICC's position in the international system, she argued, makes it particularly suited to targeted deterrence:

The High Commissioner is of the view that the promise of the ICC is that, contrary to ad hoc tribunals created ex post facto, it has the potential of being effective *during* armed conflicts and to contribute to the effective prevention of current crimes and general reduction of violence. The ICC's potential power of deterrence can thus be more situation-specific and makes it a tool without equivalent for the international community. . . .¹²⁶

A few weeks later, the OTP responded to the Arbour observations.¹²⁷ The Prosecutor acknowledged the reference to prevention in the Rome Statute's preamble but insisted that the office cannot be expected to help provide physical security in a conflict zone:

The OTP has expressed on many occasions the firm belief in the deterrent power of ICC investigations and prosecutions and the objective of maximizing the deterrent effects of its activities. Still, the OTP's mandate cannot reasonably be expanded to encompass a duty to protect the security of civilians in areas in which it has chosen not to investigate. *As the Preamble acknowledges, deterrence is a consequence of prosecution and accountability, not an independent objective.*¹²⁸

123. Situation in Darfur, Sudan, Case No. ICC-02/05, Observations of the United Nations High Commissioner for Human Rights Invited in Application of Rule 103 of the Rules of Procedure and Evidence, ¶ 68 (Oct. 10, 2006).

124. *Id.*

125. *Id.* ¶ 70.

126. *Id.* ¶ 76.

127. Situation in Darfur, Sudan, Case No. ICC-02/05, Prosecutor's Response to Arbour's Observations of the United Nations High Commissioner for Human Rights Invited in Application of Rule 103 of the Rules of Procedure and Evidence (Oct. 19 2006).

128. *Id.* ¶ 12 (emphasis added).

The responsibility for security and prevention in Darfur, argued the prosecutor, lies with the government of Sudan and with the UN Security Council. As an empirical matter, the prosecutor's office also cast doubt on whether an increased international presence has any deterrent effect. It noted that in the context of the Darfur conflict, "increased international presence . . . has not had the effect of reducing the level of violence in the region."¹²⁹

The OTP's broad statement on the place of deterrence in the court's work should likely be limited to the context of investigations. Even in that limited sense, however, it is not clear that the prosecutor is persuaded by his argument that deterrence should not be an independent objective. The prosecutor has regularly briefed the Security Council on the progress of the Sudan case, and those briefings have included several suggestions that the office would craft its strategy so as to halt ongoing atrocities. He has also stated that prevention will affect how the office directs its resources:

The impact of ICC investigations and prosecutions on the prevention of future crimes is also an important consideration, and particular attention will therefore be given to investigating the crimes currently affecting the lives and safety of the two million displaced civilians, in an effort to contribute to their protection from further attack and to the delivery of humanitarian aid.¹³⁰

The prosecutor does not make clear whether he expects OTP's activities to prevent ongoing crimes through deterrence or through the arrest and incapacitation of those responsible. In either case, this policy might suggest that the prosecutor is willing to complicate investigations in order to maximize the preventive impact. Ongoing crimes could be significantly harder to investigate than those committed months or years in the past, particularly given the investigative approach the OTP has taken in Darfur. Eyewitnesses and victims of the most recent crimes might not be in refugee camps and might be therefore out of reach for investigators. Moreover, it can be expected that senior commanders and government officials are now more adept at disguising responsibility for crimes than they were in the early stages of the conflict.

Taken together, the prosecutor's exchange with Arbour and his briefings to the Security Council suggest a calibrated approach to prevention at the investigate stage: the prosecutor will consider prevention in crafting an investigation and prosecution strategy but will not allow prevention or deterrence to influence decisions on where investigators are deployed. In

129. *Id.* ¶ 14.

130. ICC, Office of the Prosecutor, *Third Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005)*, 3 (June 16, 2006), http://www.icc-cpi.int/NR/rdonlyres/E61D7F34-7D21-44B9-8840-53B254172AF7/0/OTP_ReportUNSC_3Darfur_English.pdf.

essence, the prosecutor has argued that it may be appropriate for the court to become an instrument of prevention, but not its personnel.

4. *Choice of Charges*

Once the prosecutor has identified individuals against whom it will bring charges, there remains the question of precisely what charges to bring. The PTC must approve of charges filed, but the Rome Statute and the Rules of Evidence and Procedure offer no guidance on how the prosecutor should choose the precise charges to bring or whether he should prioritize certain crimes over others. The OTP's regulations provide that the investigative team "shall aim to select incidents reflective of the most serious crimes and the main types of victimization—including sexual and gender violence and violence against children—and which are the most representative of the scale and impact of the crimes."¹³¹

In its early cases, the OTP targeted several individuals against whom it was possible to bring a variety of different charges. Militia leaders in the Congo, for example, have been accused of committing or authorizing murder, rapes, pillage, and forced displacement, among a number of other crimes covered by the Rome Statute. It is likely that this will be the situation in many of the court's future cases. The selection of charges therefore becomes an important element of the prosecutor's discretion and could be used to maximize the court's preventive impact.

The court's indictments related to the conflict in eastern Congo suggest just such a dynamic. The three charges brought against Thomas Lubanga all involved the use of child soldiers.¹³² By emphasizing this theme, the prosecutor may have decided to help stigmatize a practice that is accepted as normal in some environments. However common, murder and rape have a basic stigma attached to them, while recruiting child soldiers may not. In media interviews as the case opened, Moreno-Ocampo stressed the broad effect he hoped the prosecution would have. "The charges in the Lubanga case will reverberate around the world . . . in Sri Lanka, in Colombia, in many countries. This trial will make clear that this is a law to be respected. If you conscript, enlist or use child soldiers you will have a problem, you will be prosecuted."¹³³ The prosecutor's opening argument to the court continued the theme: "The Lubanga case, beyond the guilt or innocence of Mr Lubanga, is also a clear message to perpetrators of crimes against

131. *Regulations of the Office of the Prosecutor*, *supra* note 65, at Reg. 34(2). This policy was reiterated in the OTP's latest strategy document. See *Prosecutorial Strategy 2009-2012*, *supra* note 18, at para. 20.

132. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Warrant of Arrest, ¶ 4 (Feb. 10, 2006), <http://www.icc-cpi.int/iccdocs/doc/doc191959.PDF>.

133. Mariette le Roux, *Lubanga Trial Will Open Eyes to Child Soldiers: ICC Prosecutor*, AGENCE FRANCE PRESSE (The Hague), Jan. 23, 2009, available at WL 1/23/09 Agence Fr.-Presse 03:04:00.

children such as enlisting them as soldiers, are very grave and will be prosecuted.”¹³⁴

The prosecutor runs a risk in seeking to isolate and raise the profile of certain criminal behavior. In the case of the Congo indictments, the court’s narrow focus elicited strong reactions from some quarters. Women’s Initiatives for Gender Justice confronted the prosecutor about the absence of sexually-based offenses:

It is evident that if the Prosecutor, in the exercise of his or her discretion, chose never to prosecute certain types of crimes, the ICC would not have the effect of deterring those types of crimes. Indeed, the ICC might in such circumstances send the signal that such crimes can be committed with impunity. Thus, the selection of the particular charges against those who are accused is even more important than the overall number of accused.¹³⁵

If the court consciously decides to pursue an educative approach, it might, in some cases, seek to prioritize those crimes within its jurisdiction that are lesser known and where the educational impact can be maximized. As has been demonstrated, however, that approach runs the risk of alienating certain victims groups and those advocating on their behalf.

5. The Preventive Effect of Indictment

To date, the court has issued thirteen indictments, the majority of which remain unenforced, including those against Sudanese President Omar al-Bashir and Lord’s Resistance Army Commander Joseph Kony. From a crime prevention standpoint, unenforced indictments can be analyzed in several different ways. In the case of ongoing crimes, the ICC may hope that issuance of an indictment will lead the indicted individual to modify his or her behavior even if there is little prospect of the individual being apprehended. In effect, the court might be seeking to achieve targeted deterrence that leads the indictee to abandon criminal behavior or at least restrictive deterrence that leads the indictee to reduce, if not completely abandon, criminal activity. The court may also conclude that issuing indictments can have a general educative effect either on the society in question or in the international community as a whole. As discussed above, this may particularly be the case when the indictments focus on crimes that are little known or not widely regarded as serious.

134. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/05, Opening Statement, 29 (Jan. 26, 2009), <http://www.icc-cpi.int/NR/rdonlyres/82809488-9418-4AA9-BCF4-5FE3D609CBA7/279630/ICCOTPSTLMO20090126ENG2.pdf> [hereinafter Lubanga, Opening Statement].

135. Letter from Brigid Inder, Exec. Dir. of Women’s Initiatives for Gender Justice, to Luis Moreno Ocampo, Chief Prosecutor of the Int’l Criminal Court, 2 http://www.iccwomen.org/news/docs/Prosecutor_Letter_August_2006_Redacted.pdf.

But unenforced indictments can serve to highlight the court's lack of enforcement power and, potentially, to diminish its ultimate preventive and deterrent effect. Senior government and non-state leaders in a position to prevent major crimes may conclude that the ICC's indictments are unlikely to threaten them and therefore choose not to modify their behavior. Maintaining the court's ability to affect the calculations of senior leaders—an important element of preventive effect—may suggest a policy of issuing indictments only when it appears likely that enforcement will occur. It is apparent that the court has not chosen this approach, at least not on a consistent basis. There was little prospect, for example, that President Bashir would be apprehended when the court indicted him. Going forward, the court will have to weigh these considerations and decide whether it should only seek indictments when the prospects for enforcement are high.

There is another dimension to the court's effort to use indictments to maximize its preventive effect. As suggested by the *Lubanga* case, the court at times may find itself in the position to take into custody individuals who might not, under normal circumstances, be deemed significant enough to merit the ICC's attentions but whose apprehension could help prevent future atrocities. In this situation, the court must attempt to weigh that preventive effect and determine whether pursuing an indictment is an appropriate use of the court's resources. Most accounts suggest that Lubanga, a militia leader who had been detained by the Congolese authorities, was set to be released. When word of his imminent release reached The Hague, the OTP negotiated with the Congolese authorities to transfer Lubanga to the ICC, and the office moved quickly to seek an indictment.¹³⁶ The suspect's likely release was discussed at some length before the pre-trial chamber as it considered whether to authorize an arrest warrant.¹³⁷ Several commentators have argued that the ICC's focus on preventing Lubanga's release trumped its normal standards for assessing the seriousness of a situation. "One might wonder . . . whether the selection of the Lubanga case was based on gravity or by his 'possible imminent release.'"¹³⁸ From a prevention standpoint, however, the chance to remove a dangerous individual from the conflict zone—and perhaps avoid or limit imminent atrocities—may be hard for the court to ignore.¹³⁹

136. See SCHIFF, *supra* note 87, at 220-21; for discussion of Lubanga's imminent release before the Pre-Trial Chamber, see *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06-48, Redacted Version of the Transcripts of the Hearing Held on 2 February 2006 and Certain Materials Presented During that Hearing (Mac. 22, 2006), <http://www.icc-cpi.int/iccdocs/doc/doc191916.PDF>.

137. *Id.* at 34-35.

138. El Zeidy, *supra* note 97, at 41. See also *Prosecutorial Discretion*, *supra* note 10, at 741 ("It is difficult to reconcile the prosecutorial discourse about gravity with the decision to proceed against Lubanga.").

139. Another, more practical, argument for the focus on Lubanga has been advanced: the ICC needed a detainee in order to proceed with the trial phase of its work and to demonstrate that the court was functioning. William Schabas has argued that "the

C. Sentencing

The guidelines for sentencing at the ICC are elaborated in the Rules of Procedure and Evidence, but they do not include any reference to the deterrence function or indeed to any of the traditional purposes of punishment. “The ICC Statute is in effect silent on the purposes and principles that govern the rules on sentencing.”¹⁴⁰ Rule 145(a) calls for the Court to “balance all the relevant factors, including any mitigating and aggravating factors and consider the circumstances both of the convicted person and of the crime”¹⁴¹ The Rules outline certain relevant considerations including the damage caused; degree of intent; and the age, education, and social and economic condition of the convicted person. A number of aggravating and mitigating conditions are also listed, but none of them relate specifically to prevention or deterrence. The only sentencing provision that can be considered to focus on prevention appears in Rule 223, which addresses the possible reduction of sentences. It instructs the court to consider whether early release “would give rise to significant social instability.”¹⁴² The provision appears to anticipate a situation in which the release of a controversial individual would lead to protests, political instability, or even violence and atrocities. It may also encompass the possibility that the individual released may commit or instigate additional crimes. As such, it can be considered to have a preventive purpose.

The experience of the ICTY and ICTR on sentencing suggests that even in the absence of statutory guidance, the court will likely begin to articulate a sentencing philosophy, although not necessarily a comprehensive one.¹⁴³ Both of those tribunals adopted the practice of issuing sentencing decisions, and on several occasions they specifically addressed the question of sentencing’s preventive impact, always in deterrence terms. In the *Tadic* case, the judges determining the sentence went so far as to declare that “deterrence is probably the most important factor in the assessment of

impression remains that in the *Lubanga* case, the exercise of prosecutorial discretion had more to do with the fact that this was an accused who was accessible to a Court starved for trial work rather than any compelling analysis based upon either gravity or complementarity.” *Prosecutorial Discretion*, *supra* note 10, at 744.

140. Dragana Radosavljevic, *Restorative Justice Under the ICC Penalty Regime*, 7 L. & PRAC. INT’L CT. & TRIBUNALS 235, 235 (2008).

141. ICC Rules of Procedure and Evidence, *supra* note 69, at R. 145(1)(b).

142. *Id.* R. 223(c).

143. For a discussion of ICTY and ICTR sentencing practice, see Andrew N. Keller, *Punishment for Violations of International Criminal Law: An Analysis of Sentencing at the ICTY and ICTR*, 12 IND. INT’L & COMP. L. REV. 53 (2001). For an analysis of the differences between the two tribunals on sentencing, see Inés Monica Weinberg de Roca & Christopher M. Rassi, *Sentencing and Incarceration in the Ad Hoc Tribunals*, 44 STAN. J. INT’L L. 1 (2008).

appropriate sentences for violations of international humanitarian law.”¹⁴⁴ The ICTR also suggested that deterrence should have pride of place in sentencing decisions:

It is clear that the penalties imposed on accused persons found guilty by the Tribunal must be directed, on the one hand, at retribution of the said accused, who must see their crimes punished, *and over and above that*, on the other hand, at deterrence, namely to dissuade for good, others who may be tempted in the future to perpetrate such atrocities by showing that that the international community shall not tolerate the serious violations of international humanitarian law and human rights.¹⁴⁵

The first indication of the OTP’s approach to sentencing came in the Lubanga case. In his opening statement, the prosecutor signaled that he would seek harsh punishment for the accused:

I want to put the Defence on notice that the prosecution anticipates to call for a severe punishment, close to the maximum. The Prosecution believes that the massive crimes litigated in this International Criminal Court, with hundreds or thousands of victims, with entire communities affected, warrant very high penalties. In this case, the defendant stole the childhood of the victims by forcing them to kill and rape.¹⁴⁶

One should be wary of extrapolating from this statement a defined philosophy of sentencing, but the prosecutor’s statement does suggest an emphasis on retribution and “just deserts” rather than prevention, a notable departure from the emphasis that the OTP placed on stigmatizing and deterring the recruitment of children in other public statements before and during the trial. The ICC judges, for their part, have not yet had the opportunity to elaborate their own approach to sentencing.

D. Public Outreach

The ICTY and the ICTR were often criticized, particularly in their first years of operation, for being distant from and little understood by the people

144. Prosecutor v. Tadic, Case No. IT-94-1, Sentencing Judgment, ¶ 7 (Nov. 11, 1999). In the *Furundzija* case, the court reasoned somewhat differently, stating that “[i]t is the infallibility of punishment, rather than the severity of the sanction, which is the tool for retribution, stigmatisation and deterrence. This is particularly the case for the International Tribunal; penalties are made more onerous by its international stature, moral authority and impact upon world public opinion, and this punitive effect must be borne in mind when assessing the suitable length of sentence.” Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment, ¶ 290 (Dec. 10, 1998).

145. Prosecutor v. Rutaganda, Case No. ICTR-96-3, Judgment and Sentence, ¶ 456 (Dec. 6 1999) (emphasis added).

146. Lubanga, Opening Statement, *supra* note 133, at 29 .

most affected by their activities.¹⁴⁷ Responding to these concerns, the ICC has developed an active outreach program to publicize and explain the work of the ICC, particularly in countries where active investigations are underway.

The court's strategic plan for outreach acknowledges that the institution is designed to help foster "long-lasting respect for and enforcement of international criminal justice, the prevention of such crimes, and the fight against impunity."¹⁴⁸ The prosecutor's office has stressed the importance of explaining court activity so that "ICC investigations and prosecutions, and in particular the conduct charged . . . are known to all parties to conflicts in order to deter perpetrators."¹⁴⁹ However, prevention is not listed as one of the explicit goals of the outreach program itself, and perpetrators or potential perpetrators are not discussed as target audiences.¹⁵⁰ The strategic plan does refer somewhat obliquely to prevention when it discusses directing information about the court specifically to those involved in conflicts. "Stigmatised by their families and/or the ethnic groups to which they belong for their active participation in hostilities, they represent a volatile segment of the society and could be the source of significant instability."¹⁵¹ Describing combatants in these terms alone appears to intentionally avoid casting them as potential perpetrators of atrocities and to minimize the implication that the outreach program has an explicit deterrent purpose.

In practice, the court's outreach program has focused on those countries where formal investigations are underway. The court has established offices and stationed some personnel in the Central African Republic, the Democratic Republic of Congo, Sudan, and Uganda. On its own, this choice of limiting major outreach activities to these societies suggests limited ambition as regards prevention. These societies have already experienced extreme violence and, as targets of formal investigations that often receive significant media attention, may be least in need of education about the court's existence. From a broad prevention standpoint, a focus on vulnerable societies that have not yet experienced major violence might be more effective.

147. For a discussion of the ICTR's outreach program, see Victor Peskin, *Courting Rwanda: The Promises and Pitfalls of the ICTR Outreach Programme*, in 3 J. INT'L CRIM. JUSTICE, 951(2005); for discussion of the ICTY's difficulties, see Ralph Zacklin, *The Failings of Ad Hoc International Tribunals*, 2 J. INT'L CRIM. JUST. 541, 544 (2004). For a discussion of how the ICC has sought to incorporate the lessons of the ad hoc tribunals see MAKING KAMPALA COUNT, *supra* note 83, at 38.

148. ICC Assembly of States Parties, Strategic Plan for Outreach of the International Criminal Court, ICC-ASP/5/12, 3 (Sept. 29, 2006) [hereinafter Strategic Plan for Outreach].

149. *Prosecutorial Strategy 2009-2012*, *supra* note 18, at para. 59.

150. Strategic Plan for Outreach, *supra* note 147, at 5, 7-9.

151. *Id.* at 9.

The content of the court's outreach activities reflects a strong emphasis on normative and educative approaches and a very limited use of deterrence. Principal outreach strategies have included meetings with civil society representatives, question-and-answer sessions about the work of the court, special briefings for local media, information sessions at schools and universities, coordination with relevant non-governmental organizations, screenings of court proceedings, and selected radio messages. In Uganda, for example, the ICC reports that almost 21,000 people participated in more than 200 interactive sessions and that ICC radio messages may have reached eight million people.¹⁵²

Targeted groups have included victims groups, former child soldiers, and women. Court officials have designed information sessions for them that have included tailored messages on the rights of victims, the crime of child recruitment, and sexual crimes, respectively.¹⁵³ In some instances, the court has sought to seek out populations that might be skeptical of or even hostile to the court's work. In Congo, for example, the court arranged information sessions in areas of the country where support for indictee Jean-Pierre Bemba is high.¹⁵⁴

It is notable, however, that the ICC has rarely attempted to communicate targeted messages to senior government officials, military representatives, or militia commanders about their responsibilities or the threat of punishment (the prosecutor's December 2010 statement on Cote d'Ivoire being a notable exception). It is possible that this type of communication occurs more regularly behind the scenes, but in general, the outreach effort has focused on education rather than targeted deterrence. Given the court's ambition to alter the calculations of senior leaders, this omission is striking.

CONCLUSION

There can be no doubt that, in the abstract, the ICC prosecutor and judges see crime prevention as an important objective of the court's work. The court's Special Adviser on Crime Prevention concedes that "our task is very complicated and difficult," but argues that the court has no choice but to engage with the complexities of measuring and assessing the institution's preventive impact:

152. INT'L CRIMINAL COURT PUB. INFO. & DOCUMENTATION SECTION, OUTREACH UNIT, OUTREACH REPORT 2009 1-6 (2009), available at http://www.icc-cpi.int/NR/rdonlyres/8A3D8107-5421-4238-AA64-D5AB32D33247/281271/OR_2009_ENG_web.pdf.

153. *Id.* at 35 (noting activities in the capital of Kinshasa included poetry readings and dramatic performances by students that included the message: "the place of the child is not in the armed forces and those who use children as soldiers are committing a war crime.").

154. *Id.*

[W]e have a legal but also a moral and political obligation to engage in prevention and to study the way justice can serve the purposes of prevention in specific and detailed ways. We will probably never have the specific evidence because we prosecute and punish this particular case [that] we prevented similar cases to happen in this jurisdiction or in others. *But our ability to make arguments that justice is what contributes to a preventive mechanism is important.*¹⁵⁵

His comments suggest that the court's prevention discourse may be as much about justification as strategy. More than eight years after it opened its doors, the court still has no convictions. A significant number of the individuals it has indicted remain at large. Tension has emerged between the court and many African member states over the emphasis on African conflicts. The court's first trial has been characterized by repeated sparring between the prosecutor and the judges and may not be completed.¹⁵⁶ In this context, discussion of the court's preventive effect and potential can easily become a gloss to cover the absence of more concrete and quantifiable achievements.

At the very least, it is apparent that the broad goal of prevention is not yet accompanied by a coherent strategy on how to do so. One close observer of the court concluded that "the potential of preventive impact is widely unexplored. It requires a systematic approach and use."¹⁵⁷ The evidence to this point suggests that the ICC prosecutor is particularly interested in the preventive impact of preliminary investigations and has sought to maximize that effect through frequent and targeted public statements. The court is also pursuing an active outreach campaign that emphasizes information and education as a preventive tool.

Beyond that, the place of prevention appears uncertain. The prosecutor and his office have sometimes claimed that prevention and deterrence cannot be conscious goals of the institution and at other times have suggested that they are key objectives. The OTP's discussion of its preventive role at the investigation phase captures this uncertainty well. The appeals chamber, for its part, declined the opportunity to state clearly whether prevention should be conceived of as a byproduct or conscious goal of the court's work.

It is not surprising that the ICC's approach to crime prevention is fragmented and, at times, inconsistent. The absence of clear guidance from

155. Juan E. Mendez, Special Adviser to the Prosecutor on Prevention, Introduction to the Work of the Special Advisers: Special Adviser on Prevention (Mar. 2, 2010) (emphasis added), http://www.icc-cpi.int/NR/rdonlyres/F57A26F6-30DE-4C47-831E-C3ECAC044BF6/281614/Juan_Mendez02032010.pdf.

156. Wairagala Wakabi, *Judges Issue Warning to Prosecutors as Lubanga's ICC Trial is Halted*, THE LUBANGA TRIAL AT THE INTERNATIONAL CRIMINAL COURT (July 10, 2010), <http://www.lubangatrial.org/2010/07/10/judges-issue-warning-to-prosecutors-as-lubanga%E2%80%99s-icc-trial-is-halted/>.

157. Statement by Antoine Bernard, *supra* note 4.

the Rome Statute and the court's other published rules and guidelines create fertile ground for uncertainty. For an institution like the ICC, that lack of clarity may ultimately be an advantage; many international organizations use ambiguity in their underlying charters in an attempt to shape their mandate—converting ambiguity into a form of autonomy.¹⁵⁸ While the ICC will undoubtedly engage in this process, its senior officials are sensitive to accusations that they are abusing their discretion. Prominent court critics have pointed out the danger of the court's broad discretion and lack of oversight.¹⁵⁹ In response, the prosecutor and other court officials have declared that they will not seek to engage in ambitious interpretations of the court's role. "I have to respect scrupulously my legal limits," Moreno-Ocampo said recently. "Our policy is never to stretch the interpretation of the norms adopted in Rome."¹⁶⁰ As a new institution, the ICC faces an imperative to establish its place in international politics and to demonstrate its effectiveness. In so doing it must respond pragmatically and flexibly to events. At least until the court is better established, consistency will often have to yield to expediency.

There are other significant hurdles to a well developed prevention strategy. The difficulties of measuring and analyzing the preventive effects of criminal justice are well documented.¹⁶¹ Those difficulties are compounded for the ICC because the small number of prosecutions offers limited data for empirical study and because it is difficult to assess the calculations of those targeted by the court. Moreover, conducting formalized and public assessments of the likely preventive effect of court action would involve political, social, and even psychological calculations that judicial bodies are hesitant and usually ill-equipped to make.

Still, within these constraints, there is room for the court to improve and systematize its approach to prevention. Either within the OTP or the registry, the court should develop a small prevention unit with two principal tasks: assessing the likely impact of possible investigations and recording and analyzing the effects of ongoing investigations and cases. In particular, the court should develop a set of prevention guidelines for use as it considers information it has received and referrals from states parties and

158. See MICHAEL BARNETT & MARTHA FINNEMORE, *RULES FOR THE WORLD* 27-28 (2004).

159. See, e.g., Eric Posner, *Political Trials in Domestic and International Law*, 55 DUKE L.J. 75, 148 (2005) (arguing that many ICC trials will be considered politically motivated); Bolton, *supra* note 39, at 174 (arguing that the court and prosecutor lack "both any semblance of democratic accountability or effective governmental oversight and control").

160. Luis Moreno-Ocampo, Prosecutor of the Int'l Criminal Court, Keynote Address Before the Council on Foreign Relations 6 (Feb. 4, 2010), <http://www.icc-cpi.int/NR/rdonlyres/A80CDDDD-8A9A-432E-97CE-F6EAD700B5AE/281527/100204ProsecutorsspeechforCFR.pdf>.

161. See CRIME, PUNISHMENT, AND DETERRENCE, *supra* note 35, at 12-18.

the Security Council. These guidelines might include the following considerations:

- Whether there is ongoing conflict that a preliminary or formal investigation might help mitigate.
- If conflict is not ongoing, an assessment of how likely it is that violence will recur and how the court's involvement might affect that possibility.
- Whether political and military leaders thought to be involved in committing atrocities will be susceptible to the pressure of an ICC investigation.
- The degree of attention that an ICC investigation will likely garner in the country and region.
- Whether the situation would expose types of international crimes that are underpublicized and thereby contribute substantially to the building of awareness.

While the guidelines should be published as part of a broader policy paper on prevention, the court's assessment should be conducted internally and without rendering formal decisions or evaluations. The efforts of the pre-trial chamber regarding the gravity requirement notwithstanding, it would not be fruitful or plausible to read into the Rome Statute a formal prevention requirement. Without structured internal guidance, however, there is a danger that the focus on prevention may begin to fade as other achievements accumulate. That would be unfortunate. For all its rhetoric, the court has only begun to explore systematically its preventive potential.