Justice v. Prevention: A Nuanced Approach to International Criminal Prosecutions

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ABSTRACT

One of the principal purposes of the Rome Statute is the prevention of future international crimes. To achieve this goal, the International Criminal Court (ICC) must consider the effects that its law enforcement measures will have on the commission of atrocities in a situation under review. This article responds to the need for context-specific empirical research elucidating the effects of ICC interventions. Reviewing evidence from the situations subject to ICC intervention over the past two decades and advances in social psychology and neuroscience, this article offers a number of factors the ICC should take into account when deciding whether to pursue an investigation or prosecution. First, when conducting the positive complementarity analysis and determining whether an investigation or prosecution would not serve the interests of justice, the ICC should consider whether deferring a prosecution would prevent international crimes. The situation of Colombia provides a prime example of a case in which the ICC should defer to the domestic jurisdiction, because the deferral promoted both accountability for international crimes and the prevention of future atrocities. In deciding whether an ICC investigation or prosecution would not serve the interests of justice, the ICC should also take into account the stage of a conflict, the relative power of the targets of the ICC's actions, and the presence of psychological factors in the situation, including dehumanization, an overpowering authority, post-traumatic stress disorder, and the use of drugs and child soldiers. Only by adopting such nuanced approaches to international prosecutions will the ICC be able to accurately predict the effects

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its actions will have in a situation and promote the purposes of the Rome Statute.

I. INTRODUCTION

Over the last three decades, the world has witnessed an unprecedented increase in the enforcement of international criminal law (ICL) norms. An array of international legal mechanisms have been implemented to uphold ICL, including the ad hoc International Criminal Tribunal for the Former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR), the permanent International Criminal Court (ICC), and the hybrid Special Court for Sierra Leone (SCSL) and Extraordinary Chambers in the Courts of Cambodia (ECCC). In addition to these international measures, domestic prosecutions for ICL violations have taken place in countries such as Colombia and Uganda.[1] Throughout these differing ICL enforcement mechanisms, a range of punishments has been meted out in response to serious violations of ICL, from the grant of amnesty to Foday Sankoh, the leader of the Revolutionary United Front (RUF) in Sierra Leone, under the Lomé Peace Agreement,[2] to the sentence of Saddam Hussein to death by hanging, by the Iraqi Special Tribunal. These various approaches to ICL enforcement reflect both differing ethical standards among the actors implementing the measures and the complexity of the political realities experienced in the conflict situations involved.

In reaction to the implementation of differing types of international justice worldwide, what has been termed the "peace versus justice debate" has taken place between the "judicial romantic," naïvely pursuing justice despite the possibility of disincentivizing peace, and the "political realist," seeking peace through the grant of amnesties or reduced sentences to those responsible for atrocities.[3] However, given the novelty of international justice, much of the debate has been

1. *See* Natalie Sedacca, *The 'turn' to Criminal Justice in Human Rights Law: An Analysis in the Context of the 2016 Colombian Peace Agreement*, 19 HUM. RTS. L. REV. 315, 316 (2019).

2. *See* Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone art. IX(1), (July 7, 1999), U.N. Doc. S/1999/777 [hereinafter Lomé Peace Agreement].

3. Payam Akhavan, *Are International Criminal Tribunals a Disincentive to Peace: Reconciling Judicial Romanticism with Political Realism*, 31 HUM. RTS. Q. 624, 625 (2009).

confined to theoretical considerations[4] or based on anecdotal evidence. Thus, scholars have recognized the need for additional empirical research to elucidate the uncertainties surrounding the effects of ICL enforcement mechanisms.[5]

Over 17 years, from the entry into force of the Rome Statute of the ICC, and with 27 cases having been completed or proceeding through the ICC at the time of writing, a large body of empirical evidence has become available, shedding light on the effects of the ICC's decisions in conflict-afflicted regions. Additionally, advances in social psychology and neuroscience over the past two decades, including the increase in functional magnetic resonance imaging (fMRI) studies, allow for greater precision in the assessment of how combatants may react to varying international law enforcement actions.[6] Synthesizing the above-mentioned empirical evidence with relevant social psychological and neuroscience findings, this article analyzes the effects that ICL enforcement measures have on the commission of ICL violations and proposes a number of factors the ICC and the United Nations Security Council (UNSC) should take into consideration when implementing actions under the Rome Statute. Specifically, the ICC should adopt a nuanced approach to investigations and prosecutions under the Rome Statute, considering the competency of domestic legal measures, the timing of its ICL enforcement actions, the power dynamics, and the psychological factors involved in a conflict situation under review. Despite the traditional framing of the debate, this article concludes that peace and justice need not be mutually exclusive ideals, and actors implementing ICL enforcement mechanisms may administer justice while promoting a cessation to hostilities and an associated prevention of further atrocities.

This article first analyzes the criminal procedure provided by the Rome Statute and the grounds upon which the ICC's Office of the Prosecutor (OTP) and the UNSC may choose to defer an investigation or prosecution. The article then considers the effect that the OTP's decision to defer to Colombian domestic prosecutions has had on the commission of ICL violations in the

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4. *See, e.g.*, Darryl Robinson, *Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court*, 14 EUR. J. INT'L L. 481 (2003).

5. *See* David Wippman, *Atrocities, Deterrence, and the Limits of International Justice*, 23 FORDHAM INT'L L. J. 473, 488 (1999).

6. *See generally* Marcelo Ienca & Roberto Andorno, *Towards New Human Rights in the Age of Neuroscience and Neurotechnology*, LIFE SCIENCES, SOC'Y & POL'Y (Apr. 26, 2017).

country over the past 20 years, concluding that Colombia provides a prime example of a context in which the OTP should defer an investigation or prosecution under positive complementarity. Then, the article examines the empirical and psychological evidence that support several factors the ICC and UNSC should take into consideration when determining whether to pursue ICL enforcement measures, in situations where the domestic prosecuting authority lacks the competence or capacity to carry out meaningful prosecutions.

II. CRIMINAL PROCEDURE UNDER THE ROME STATUTE AND THEORETICAL CONSIDERATIONS IN PURSUING INVESTIGATIONS AND PROSECUTIONS

One of the principal justifications for the implementation of ICL enforcement measures has been to deter the future commission of ICL violations.[7] This purpose is reflected in the preamble to the Rome Statute of the ICC, in which the States Parties to the Statute recognize "that such grave crimes threaten the peace, security and well-being of the world" and the States Parties are therefore "[d]etermined to put an end to impunity for perpetrators of these crimes and thus to contribute to the prevention of such crimes . . . ."[8] To achieve these ends, the ICC was granted jurisdiction over "the most serious crimes of concern to the international community," including genocide, crimes against humanity, war crimes and the crime of aggression,[9] committed after the entry into force of the Rome Statute on July 1, 2002.[10]

As part of its preliminary examination, in determining whether to initiate an investigation, the OTP must first decide whether there is "a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed . . . ."[11] The ICC may exercise its jurisdiction over a crime described in article 5 of the Rome Statute committed either by a national or on the territory of States who have become parties to the Rome Statute[12] or States who have made

7. Wippman, *supra* note 5, at 473–74.

8. Rome Statute of the International Criminal Court pmbl. ¶¶ 3, 5, (July 17, 1998), 2187 U.N.T.S. 90 [hereinafter Rome Statute].

9. *Id.* art. 5.

10. *Id.* art. 11.

11. *Id.* art. 53(1)(a).

12. *Id.* art. 12(1).

an ad hoc declaration accepting the exercise of jurisdiction by the ICC over a specific crime.[13] Alternatively, the ICC may exercise its jurisdiction over a crime committed on any territory or by a national of any State if the situation is referred to the OTP by the UNSC acting under Chapter VII of the United Nations (U.N.) Charter.[14]

Once a situation has been referred to the ICC and the OTP determines it has jurisdiction to proceed, the OTP must decide whether the case is admissible under article 17 of the Rome Statute.[15] A determination of admissibility under article 17 requires the OTP to consider the gravity of the case and positive complementarity.[16] With regard to gravity, a case may be inadmissible if "[t]he case is not of sufficient gravity to justify further action by the Court."[17] In determining whether a case is of sufficient gravity to warrant an investigation or prosecution, the OTP considers "the scale, nature, manner of commission of the crimes, and their impact."[18]

In assessing positive complementarity, the OTP first considers whether the case is being or has been investigated or prosecuted by the State having jurisdiction over it.[19] The consideration "must be based on the concrete facts as they exist at the time," as opposed to considering "hypothetical national proceedings that may or may not take place in the future."[20] If the State having jurisdiction over the case has not taken measures to investigate or prosecute the case at the time the OTP considers admissibility, and the case is of sufficient gravity to proceed, then the case is likely admissible under article 17.[21]

Nonetheless, if the target of the investigation or prosecution has been tried by the domestic courts of a State, the OTP must consider whether the proceedings "[w]ere for the purpose of shielding the person concerned from criminal responsibility" or were otherwise "not conducted independently or impartially" and "were conducted in a manner which, in the circumstances,

13. *Id.* art. 12(3).
14. *Id.* art. 13(b).
15. *Id.* art. 53(1)(b).
16. *See id.* art. 17.
17. *Id.* art. 17(1)(d).
18. OFF. OF THE PROSECUTOR, INT'L CRIM. CT., POLICY PAPER ON PRELIMINARY EXAMINATIONS 15 (Nov. 2013), https://www.icc-cpi.int/iccdocs/otp/OTP-Policy_Paper_Preliminary_Examinations_2013-ENG.pdf.
19. Rome Statute, *supra* note 8, art. 17(1)(a)–(c).
20. OFF. OF THE PROSECUTOR, *supra* note 18, at 12.
21. *Id.*

was inconsistent with an intent to bring the person concerned to justice."[22] Alternatively, if the case was investigated but not prosecuted, or is being investigated or prosecuted by the domestic authority, the OTP must consider the State's willingness and ability to genuinely investigate and prosecute the crimes involved.[23] In determining the willingness of a State to investigate or prosecute an individual, the OTP examines: whether the circumstances indicate that domestic action was taken for the purpose of shielding the target individual from criminal responsibility for crimes within the jurisdiction of the ICC; whether there is an unjustified delay in domestic proceedings indicating an intent not to bring the target individual to justice; or whether the proceedings are not being conducted independently or impartially and otherwise indicate an intent not to bring the target individual to justice.[24] In assessing the ability of a State to investigate or prosecute an individual, the OTP considers whether "the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings."[25] The inability of a State to investigate or prosecute may result from "the absence of the required legislative framework to prosecute the same conduct or forms of responsibility . . . ."[26]

Once the OTP decides there is a reasonable basis to believe the ICC has jurisdiction over a case and the case is admissible under article 17, the OTP must consider whether an investigation or prosecution would not serve the "interests of justice."[27] In determining whether an investigation would not serve the interests of justice, the OTP must consider "the gravity of the crime and the interests of victims . . . ."[28] Similarly, in analyzing whether a prosecution would not serve the interests of justice, the OTP must take "into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime . . . ."[29] If the OTP determines that an investigation or prosecution would not serve the

22. Rome Statute, *supra* note 8, art. 20(3).
23. *Id.* art. 17(1)(a)–(b).
24. *Id.* art. 17(2).
25. *Id.* art. 17(3).
26. OFF. OF THE PROSECUTOR, *supra* note 18, at 14.
27. Rome Statute, *supra* note 8, art. 53(1)(c) & (2)(c).
28. *Id.* art. 53(1)(c).
29. *Id.* art. 53(2)(c).

interests of justice, then the OTP will not proceed with an investigation or prosecution.[30] Further, if the OTP bases its decision not to pursue an investigation or prosecution solely on the determination that the proceedings would not serve the interests of justice, the Pre-Trial Chamber may review the decision *sua sponte* or at the request of the referring State or the UNSC, and the decision of the OTP not to proceed must be confirmed by the Pre-Trial Chamber, if it chooses to review the decision *sua sponte*.[31]

The OTP has opined that it will find that an investigation or prosecution does not serve the interests of justice only in "exceptional circumstances," and the "decision not to proceed on the basis of the interests of justice should be understood as a course of last resort."[32] The OTP also recognized that, in light of the Preamble of the Rome Statute, "considerations of prevention of serious crimes and guaranteeing lasting respect for international justice may be significant touchstones in assessing the interests of justice."[33] The OTP interprets the "interests of victims" to include "the victims' interest in seeing justice done, but also other essential interests such as their protection . . . ."[34] To understand the interests of victims, the OTP conducts dialogue with victims and representatives of their local communities, as it has done in the situations in Uganda and the Democratic Republic of the Congo (DRC).[35] While, in accordance with its duty under article 68 of the Rome Statute, the OTP has also opined that it "will consider issues of crime prevention and security under the interests of justice;" it has stated that "the broader matter of international peace and security is not the responsibility of the Prosecutor; it falls within the mandate of other institutions."[36]

In its 2013 Policy Paper on Preliminary Examinations, the

30. *Id.* art. 53.

31. *Id.* art. 53(3).

32. OFF. OF THE PROSECUTOR, INT'L CRIM. CT., POLICY PAPER ON THE INTERESTS OF JUSTICE, 3, 9 (Sept. 2007), https://www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPInterestsOfJustice.pdf.

33. *Id.* at 4.

34. *Id.* at 5; *see* OFF. OF THE PROSECUTOR, POLICY PAPER ON CASE SELECTION AND PRIORITISATION, INT'L CRIM. CT. 1, 12 ¶ 33 (Sept. 2016), https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf.

35. OFF. OF THE PROSECUTOR, *supra* note 32, at 6.

36. *Id.* at 9.

OTP appears to have expanded its opinion concerning its consideration of peace and security matters under the "interests of justice" assessment, stating as follows:

> The Statute, namely article 16, recognises a specific role for the Security Council in matters affecting international peace and security. Accordingly, the concept of the interests of justice should not be perceived to embrace all issues related to peace and security. In particular, the interests of justice provision should not be considered a conflict management tool requiring the Prosecutor to assume the role of a mediator in political negotiations: such an outcome would run contrary to the explicit judicial functions of the Office and the Court as a whole.[37]

The OTP's opinion—that its assessment of the interests of justice, including the interests of victims, should not take into consideration all issues relating to peace and security—runs contrary to the plain language and purpose of the Rome Statute.

Under the Vienna Convention on the Law of Treaties, "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."[38] As cited above, reflecting the legal optimist's view that the prosecution of crimes may lead to their deterrence, one of the principal purposes of the Rome Statute is "to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes . . . ."[39] In assessing whether an investigation or prosecution would not serve the interests of justice, the OTP must consider the "interests of victims."[40] Under article 68 of the Rome Statute, the ICC must "take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses."[41] In determining whether a prosecution would not serve the "interests of justice," the OTP must take "into account *all* the circumstances . . . ."[42] The

37. OFF. OF THE PROSECUTOR, *supra* note 18, ¶ 69.

38. Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

39. Rome Statute, *supra* note 8, at pmbl. ¶ 5.

40. *Id.* art. 53(1)(c), (2)(c).

41. *Id.* art. 68(1).

42. *Id.* art. 53(2)(c) (emphasis added).

absence of any qualifying adjectives such as "some" or "certain" modifying the "interests of victims" and the express inclusion of the language "all the circumstances" in article 53 demonstrate that the Rome Statute mandates the OTP to consider all relevant issues relating to peace and security involved in a situation in which an investigation or prosecution is contemplated, without leaving some of these considerations to the UNSC. Additionally, in order to contribute to the prevention of ICL violations and to ensure the safety of victims and witnesses under article 68, the assessment of whether an investigation or prosecution would not serve the interests of justice must include an examination of whether such legal action might cause an escalation in hostilities and an associated increase in the commission of ICL violations against victims or other members of the communities affected by the situation before the ICC. Nonetheless, as the OTP's 2007 Policy Paper mentions,[43] the victims' interest in protection must be balanced with the victims' interest in seeing justice done in light of the Rome Statute's purpose of putting an end to impunity for the perpetrators of ICL violations.

As elaborated upon below,[44] in the years following the ICC's issuance of arrest warrants in the situations of Uganda and the DRC, the two countries in which the OTP stated that it conducted dialogue with victims in the affected regions,[45] empirical evidence demonstrates that the ICC's conduct may have caused the escalation of violence and an associated increase in ICL violations committed by the Lord's Resistence Army (LRA) and the *Mouvement du 23 mars* (M23). This evidence underscores why it is imperative that the OTP take into account all considerations of peace and security in its analysis of the interests of victims and justice, without leaving the analysis to the UNSC, whose members may vote not to defer an investigation or prosecution for any number of politically expedient reasons, which is completely unrelated to the security of the communities that may be affected by the ICC's legal actions. Nonetheless, as the analysis below makes clear, an investigation or prosecution may still be determined to promote the interests and security of victims, and thus serve the interests of justice, despite causing a short-term escalation in ICL violations, by instigating the incapacitation of individual targets

43. OFF. OF THE PROSECUTOR, *supra* note 32, at 5.

44. *See infra* Section IV.B.i.

45. OFF. OF THE PROSECUTOR, *supra* note 32, at 6.

and the consequent debilitation of their armed groups. However, the Rome Statute obliges the OTP to conduct this examination.[46]

As mentioned above, even if the OTP finds that an investigation or prosecution would serve the interests of justice, the UNSC may still defer the investigation or prosecution. Under article 16 of the Rome Statute, "[n]o investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect . . . ."[47] Under Chapter VII of the U.N. Charter, the UNSC "shall determine the existence of any threat to the peace, breach of the peace, or act of aggression" and decide what measures might be necessary "to maintain or restore international peace and security."[48] The inclusion of the obligatory "shall" in the U.N. Charter demonstrates the duty of the UNSC to consider whether an action of the ICC may constitute a "threat to the peace" by leading to an escalation in hostilities and associated increase in ICL violations.[49] Nonetheless, just as the OTP must do in considering the interests of justice under article 53 of the Rome Statute, the UNSC must conduct an analysis balancing the probability of a short-term escalation in hostilities with the possible long-term effect of an ICC investigation or prosecution incapacitating a targeted individual and debilitating the target's armed group, thus promoting the restoration of lasting peace.[50]

The balance of this article explores the cost-benefit analysis that the OTP and the UNSC must undertake in deciding whether the OTP should pursue investigations and prosecutions. The article first considers when the ICC should defer to domestic prosecutions under the positive complementarity analysis. The article then offers proposals concerning whether the ICC should pursue investigations and prosecutions, considering the interests of victims and justice, in situations in which deferral to domestic prosecutions is not an option.

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46. Rome Statute, *supra* note 8, at pmbl. ¶ 5, arts. 53 & 68.
47. *Id.* art. 16.
48. U.N. Charter art. 39.
49. *See id.*
50. *See id.* art. 37.

III. POSITIVE COMPLEMENTARITY: BALANCING JUSTICE AND PEACE IN COLOMBIA

In considering the admissibility of a case, the OTP must conduct the positive complementarity analysis.[51] As elaborated above, the complementarity analysis includes, in the first instance, a determination of whether the crimes involved in a situation—under consideration of the OTP—are being, or have been, investigated or prosecuted by the State with jurisdiction over the crimes.[52] If the crimes are being, or have been, investigated or prosecuted, the OTP must next consider whether the domestic authority having jurisdiction over the crimes is or was unable or unwilling to genuinely carry out the investigation or prosecution.[53] The plain language of article 17 of the Rome Statute clearly demonstrates that, as with its analysis of the interests of justice, the OTP's consideration of positive complementarity must be conducted in light of the purpose of the Rome Statute "to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes . . . ."[54]

Despite initial widespread criticism of Colombia's adoption of its transitional justice Law 975 of 2005 ("Law 975/05") and its inclusion of relatively low sentences for serious crimes,[55] empirical evidence supports the conclusion that the deferral to Colombia's domestic legal actions by the OTP under the positive complementarity assessment led to the prevention of ICL violations, by promoting the demobilization and incapacitation of combatants in the country. Colombia's transitional justice regime includes other positive mechanisms, such as reparations, a truth component, and economic and education projects, which may have further contributed to demobilization and the decrease in ICL violations in the country. Colombia thus provides an excellent case study of when the OTP's deference to a domestic legal authority under the positive complementarity analysis promotes the purposes of the Rome Statute by upholding

51. Rome Statute, *supra* note 8, arts. 17, 53.

52. *Id.* art. 17(1)(a)–(c).

53. *Id.* art. 53(2).

54. *Id.* at pmbl. ¶ 5; *see* Vienna Convention, *supra* note 38, art. 31(1).

55. *See, e.g.*, Jennifer S. Easterday, *Deciding the Fate of Complementarity: A Colombian Case Study*, 26 ARIZ. J. INT'L & COMP. L. 50, 79 (2009); Lisa J. Laplante & Kimberly Theidon, *Transitional Justice in Times of Conflict: Colombia's Ley de Justicia y Paz*, 28 MICH. J. INT'L L. 49, 81 (2006) (noting the many initial criticisms of Law 975/05).

accountability for ICL violations, while supporting the prevention of future atrocities.

Armed violence between revolutionary armed groups and the government has raged in Colombia for over 50 years. Starting in the 1960s, new revolutionary armed groups were formed, causing widespread violence throughout the country. These groups included the *Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo* (FARC-EP), *Ejército de Liberación Nacional* (ELN), *Ejército Popular de Liberación* (EPL), *Movimiento 19 de Abril* (M-19), and *Movimiento Armado Quintín Lame*, among others.[56] In reaction to this upsurge in violence, the government of Colombia promulgated Decree 3398, which would become permanent legislation, authorizing the armament with military weapons of factions of civilians termed "self-defense groups," supported by the Ministry of National Defense.[57] However, by the 1970s and 1980s, the self-defense groups gained ties to drug-trafficking and started committing selective assassinations and massacres.[58] These paramilitary groups were later consolidated in approximately 1997, into an organization named the *Autodefensas Unidas de Colombia* (AUC), whose stated purpose, in line with the official reason for the groups' creation, was to act against the revolutionary guerilla groups.[59] In 1989, following the commission by the self-defense groups of atrocities, including the La Rochela massacre, the Colombian government promulgated Decree 0815, suspending the provisions of Decree 3398 that permitted the arming of the groups.[60]

In the early 1990s, armed groups including the M-19, part of the EPL, and the Quintín Lame group took part in demobilization processes with the government of Colombia, as a result of peace agreements.[61] The adoption of laws authorizing pardons and amnesties for political and related crimes facilitated the peace agreements that was reached with many of the dissident armed groups.[62] Nonetheless, the FARC-EP and

56. *Report on the Demobilization Process in Colombia*, *in* Follow-Up on the Demobilization Process of the AUC in Colombia, Inter-Am. Comm'n H.R., OEA/Ser.L./V/II., CIDH/INF.2/07 1, 17 ¶ 35 (2007) [hereinafter IACHR 2004 Report].

57. *Id.* ¶ 36.

58. *Id.* ¶ 37.

59. *Id.* ¶ 42.

60. *Id.* ¶ 39.

61. *Id.* ¶ 42, ¶¶ 55–56.

62. *Id.* ¶¶ 55–56.

the ELN refused to demobilize, and, along with the self-defense groups, continued to commit ICL violations throughout the 1990s and 2000s.[63]

In an attempt to promote the demobilization of the self-defense groups, in 1995 the Colombian Congress adopted Law 241, which provided legal benefits for the self-defense groups, in exchange for their demobilization.[64] In 1997, the Colombian Congress adopted Law 418, authorizing the government to extinguish the criminal action and penalty for political and related crimes.[65] The provisions of Law 418 were extended by the Colombian Congress in December 2002, with the adoption of Law 782, to apply to the AUC's demobilization.[66] Together, Law 418 and Law 782 provide that the Colombian government may pardon individuals of political crimes, who choose to participate in individual or collective demobilizations.[67] However, under Law 418 and Law 782, the Colombian government may not pardon combatants who committed acts of ferocity or barbarism, terrorism, kidnapping, genocide, or homicide against individuals not participating in combat.[68] Laws 418 and 782 are regulated by Decree 128 of 2003, which establishes the procedure for demobilizing combatants to avail themselves of the benefits of the Laws.[69] Additionally, Decree 128 provides benefits for demobilizing combatants, including health services, protection and security, and payments for providing information on the activities of illegal armed organizations and surrendering their weapons.[70]

On December 1, 2002, the leaders of the AUC declared a unilateral ceasefire, and in July 2003, a preliminary agreement was reached providing for the demobilization of the AUC by the end of 2005.[71] One of the main issues discussed by the AUC and the Colombian government during the demobilization process was the legal incentives for demobilization.[72] Specifically, negotiations between the Colombian government and the AUC

63. *Id.* ¶¶ 43–47.
64. *Id.* ¶ 57.
65. *Id.*
66. *Id.* ¶ 62.
67. *Id.*
68. *Id.*
69. *Id.* ¶ 73.
70. *Id.*
71. *Id.* ¶ 61.
72. *Id.* ¶ 61.

turned to the legal incentives for members of the AUC not in a position to benefit from the framework provided by Laws 418 and 782.[73]

In response to the AUC's concerns, on June 22, 2005, the Colombian Congress passed Law 975/05, entitled *Ley de justicia y paz* ("Justice and Peace Law"), which took effect when it was signed by the Colombian President Álvaro Uribe on July 22, 2005.[74] Law 975/05 extends the legal framework governing the demobilization of the members of the AUC provided by Laws 418 and 782. Decree 4760 was issued in December 2005 to regulate certain aspects of Law 975/05, including deadlines to investigate applicants for benefits under the law.[75] Law 975/05 provides qualifying demobilized individuals convicted of genocide, crimes against humanity or war crimes with the opportunity to obtain an alternative penalty of 5 to 8 years detention, sentenced in accordance with the gravity of the crimes they committed and their collaboration in the clarification of their crimes.[76] Thus, in practice, a demobilized individual was directed to the Law 975/05 framework if they faced an investigation for a crime which was not eligible for a pardon under Laws 418 and 782.[77]

Several human rights organizations challenged the constitutionality of Law 975/05 before the Colombian Constitutional Court.[78] In a ruling issued on May 18, 2006, the Colombian Constitutional Court largely upheld the constitutionality of Law 975/05, while setting constitutionality

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73. *Id.* ¶ 63.

74. Inter-Am. Comm'n H.R., Org. Am. St., *Truth, Justice and Reparation: Fourth Report on Human Rights Situation in Colombia*, ¶ 279, at 130, OEA/Ser.L/V/II, Doc. 49/13 (Dec. 31, 2013), http://www.oas.org/en/iachr/reports/pdfs/Colombia-Truth-Justice-Reparation.pdf [hereinafter IACHR 2013 Report].

75. *Id.*; *see* Inter-Am. Comm'n H.R., Org. Am. St., *Statement by the Inter-American Commission on Human Rights on the Application and Scope of the Justice and Peace Law in Colombia*, ¶ 9 (Aug. 1, 2006), *reprinted in* INTER-AMERICAN COMMISSION ON HUMAN RIGHTS FOLLOW-UP ON THE DEMOBILIZATION PROCESS OF THE AUC IN COLOMBIA, DIGEST OF PUBLISHED DOCUMENTS (2004–07) 43, 49 OEA/Ser.L/V/II, CIDH/INF.2/07 (2007), http://www.cidh.org/pdf%20files/Colombia-Demobilization-AUC%202008.pdf [hereinafter IACHR 2006 Report].

76. *See* L. 975/05, julio 25, 2005, DIARIO OFICIAL [D.O.] 45.980, art. 29 (Colom.) [hereinafter Law 975/05]; OFF. OF THE PROSECUTOR, Int'l Crim. Ct., *Situation in Colombia Interim Report* ¶ 162 (Nov. 2012), https://www.icc-cpi.int/NR/rdonlyres/3D3055BD-16E2-4C83-BA85-35BCFD2A7922/285102/OTPCOLOMBIAPublicInterimReportNovember2012.pdf [hereinafter OTP 2012 Report].

77. IACHR 2013 Report, *supra* note 74, ¶ 283.

78. *Id.* ¶ 280.

requirements for several provisions of the Law, including measures ensuring victim participation in proceedings under the Law and the loss of benefits if applicants conceal information from the judiciary.[79] Additionally, the Constitutional Court decided that the alternative-penalty benefits received by the demobilized individuals may be revoked if the individuals subsequently commit a criminal offense.[80]

In order to qualify for benefits under Law 975/05, the demobilized individual must first give a complete account of the crimes he/she committed in "free version" hearings, during which victims have the right to ask questions of the individual.[81] Then, the prosecutor investigates the veracity of the testimony and formulates criminal charges before a magistrate judge.[82] If the defendant admits the charges, then he/she is sent to the Justice and Peace Chamber of the Higher Tribunals,[83] which determines the status of victims for the purposes of awarding reparations,[84] issues a sentence to the defendant under ordinary criminal law, and determines if the defendant is eligible for the alternative sentence provided under Law 975/05.[85] If the defendant does not admit the charges, the charges are processed through the regular criminal justice system.[86]

Eligibility requirements for the alternative sentence under Law 975/05 vary for combatants involved in collective or individual demobilizations.[87] Generally, in the case of collective demobilizations, the combatant's eligibility for the alternative sentence requires that the combatant's organized armed group was demobilized and dismantled in accordance with an agreement with the Colombian government, proceeds of illegal activity were surrendered, the group was not organized for the purpose of drug trafficking or for making illegal profits, and the

79. *Id.* ¶ 281; *see* IACHR 2006 Report, *supra* note 75, ¶ 40.

80. IACHR 2006 Report, *supra* note 75, ¶ 36.

81. Law 975/05, *supra* note 76, art. 17; *see Colombia: The Justice and Peace Law*, CTR. FOR JUSTICE & ACCOUNTABILITY., https://cja.org/where-we-work/colombia/related-resources/colombia-the-justice-and-peace-law/ (last visited Mar. 7, 2020).

82. Law 975/05, *supra* note 76, art. 18.

83. *Id.* art. 19; Brian Harper and Holly Sonneland, *Explainer: Colombia's Special Jurisdiction for Peace (JEP)*, AMERICAS SOCIETY/COUNCIL OF THE AMERICAS (Aug. 3, 2018), https://www.as-coa.org/articles/explainer-colombias-special-jurisdiction-peace-jep.

84. Law 975/05, *supra* note 76, art. 23.

85. *Id.* art. 24.

86. *Id.* art. 19.

87. *Id.* arts. 10–11.

group releases all kidnapped persons, among other requirements.[88] Similarly, for a combatant taking part in an individual demobilization to be eligible for the alternative sentence under Law 975/05, the individual must provide information on the group to which he/she belonged, must have demobilized in accordance with the terms set by the Colombian government, must cease any unlawful activity, must turn over proceeds from any illegal activities to benefit the victims, must sign an agreement with the Colombian government, and must not have been involved with drug trafficking or making illegal profits.[89] However, only individuals whose names are presented by the Colombian government to the National Prosecutor's Office are eligible for benefits under the individual demobilization program.[90]

Between 2003 and 2006, 37 collective demobilization processes were implemented, resulting in the demobilization of 31,671 members of the AUC.[91] Additionally, 21,909 members of the AUC, along with other guerrilla groups, demobilized at the individual level, between 2002 and 2010.[92] However, of this number, the Inter-American Commission on Human Rights (IACHR) reported that only 2,695 individuals declared an interest in applying for benefits under Law 975/05.[93] The IACHR also reported that, as of 2013, only 14 applicants had been convicted and sentenced by the Justice and Peace Chambers under the Law 975/05 framework and 9 of these convictions had become final.[94] In 2013, the IACHR reported that, based on Colombian government figures, since 2006 there had been

88. *Id.* art. 10.

89. *Id.* art. 11.

90. *Id.*

91. *Transitional Justice in Colombia, Justice and Peace Law: An Experience in Truth, Justice and Reparation*, COLOMBIA MINISTRY OF FOREIGN AFF., at 9, RC/ST/PJ/M.1 (June 1, 2010), https://asp.icc-cpi.int/iccdocs/asp_docs/RC2010/Stocktaking/RC-ST-PJ-M.1-ENG.pdf [hereinafter Colombia 2010 Report].

92. *Id.*

93. IACHR 2013 Report, *supra* note 74, ¶ 284; *see* Inter-Am. Comm'n H.R., Org. Am. St., *Report on the Implementation of the Justice and Peace Law: Initial Stages in the Demobilization of the AUC and First Judicial Proceedings*, ¶ 44 (Oct. 2, 2007), *reprinted in* INTER-AMERICAN COMMISSION ON HUMAN RIGHTS FOLLOW-UP ON THE DEMOBILIZATION PROCESS OF THE AUC IN COLOMBIA, DIGEST OF PUBLISHED DOCUMENTS (2004–2007) 62, 74, OEA/Ser.L/V/II, CIDH/INF.2/07 (2007), http://www.cidh.org/pdf%20files/Colombia-Demobilization-AUC%202008.pdf [hereinafter IACHR 2007 Report].

94. IACHR 2013 Report, *supra* note 74, ¶ 292; *see* OTP 2012 Report, *supra* note 76, ¶ 165.

39,546 confessions involving 51,906 victims under the Law 975/05 framework, including confessions to 1,046 massacres, 25,757 murders, 1,618 unlawful recruitments, 3,551 forced disappearances, 11,132 forcible displacements, 1,168 extortions, 1,916 abductions, 96 rapes, and 773 acts of torture.[95] The IACHR stated that 76,688 victims had participated in the voluntary depositions under the Law 975/05 framework, and the Justice and Peace Unit had assisted 152,150 victims since 2006.[96] The OTP reported that, as of 2012, 4,714 individuals had been nominated by the Colombian government for benefits under the Law 975/05 framework and 3,640 individuals had testified in the "free version" hearings.[97]

Despite the relatively low number of convictions obtained under the framework of Law 975/05, the OTP reported that many of the cases against the AUC, FARC and ELN have proceeded under the ordinary criminal justice system in Colombia, as opposed to the Law 975/05 framework.[98] As a result of the facts revealed through the Law 975/05 proceedings, as of 2012, 10,780 cases had been initiated against third persons in the ordinary criminal justice system.[99] In addition, as of 2012, 218 FARC and 28 ELN members had been convicted under the ordinary criminal justice framework, for crimes within the jurisdiction of the ICC, including several members of the leadership of the two guerrilla groups.[100] Thus, in assessing the admissibility of the situation in Colombia under articles 17(1) and 53(1)(b) of the Rome Statute, the OTP found that Colombia had commenced genuine national proceedings against those individuals most responsible for the crimes committed by the FARC and ELN.[101]

The OTP also reported that 23 AUC leaders had been convicted under the ordinary criminal justice system, as of 2012.[102] Further, of the 46 leaders of the AUC that were still alive in 2012, 30 had been convicted of a crime falling within the jurisdiction of the ICC, and 13 were subject to ongoing proceedings, either under the Law 975/05 framework or the

95. IACHR 2013 Report, *supra* note 74, ¶ 294.
96. *Id.* ¶ 295.
97. OTP 2012 Report, *supra* note 76, ¶ 165.
98. *Id.* ¶ 160.
99. *Id.* ¶ 165.
100. *Id.* ¶ 160.
101. *Id.* ¶ 161.
102. *Id.* ¶ 166.

ordinary criminal justice system.[103] The OTP reported that sentences for homicide under Colombia's ordinary criminal justice system against AUC leaders were much longer than those provided in Law 975/05, ranging from 12 to 40 years imprisonment.[104] In light of these figures, the OTP found that proceedings against the AUC leadership would not be admissible before the ICC, because the legal proceedings conducted by the Colombian government were sufficient under the positive complementarity analysis.[105] Accordingly, the OTP ultimately decided not to commence an investigation into the situation in Colombia, and the situation remains under preliminary examination as of the time of writing.[106]

Empirical evidence demonstrates that the OTP's decision to defer to Colombia's domestic criminal justice system, in responding to the atrocities committed by the various armed groups in the country, has contributed to the prevention of ICL violations and thus advanced one of the primary purposes of the Rome Statute cited above. Deferral to the Law 975/05 and ordinary criminal justice frameworks in Colombia has also ensured the administration of justice in Colombia, where justice may not have been obtained had the OTP commenced an investigation or prosecution in the situation. First, the fact that the legal incentives for members of the AUC played an integral role in the demobilization process demonstrates that the more lenient sentences and pardons provided by Colombia's domestic legal framework constituted a primary factor in the ultimate demobilization of the AUC.[107] This observation has been confirmed by Eduardo Pizarro, a Professor at the National University of Colombia, who met frequently with demobilized paramilitary leaders, and reported that the paramilitary leaders cited, as their main motivating factors for voluntary disarmament, "the incentive of greatly reduced prison sentences offered by the Justice and Peace Law" and "the desire to serve any prison sentences in Colombia rather than in an unknown

103. *Id.*

104. *Id.* ¶¶ 167–68.

105. *Id.* ¶ 173.

106. *See Preliminary Examination Colombia*, INT'L CRIM. CT.: SITUATIONS AND CASES, https://www.icc-cpi.int/colombia (last visited Jan. 21, 2020).

107. *See* IACHR 2004 Report, *supra* note 56, ¶ 61, 63 ("The negotiations between the Government and the leaders of the AUC involved in the process have revolved around establishing a legal framework that encourages demobilization of the members of the AUC who are not in a position to benefit from the extinguishment of the penalty provided for by Law 782.").

country following an ICC indictment and trial."[108] Likewise, Jineth Bedoya, a journalist at *El Tiempo* newspaper of Colombia, who has worked extensively on the Colombian conflict, "agreed that many paramilitary demobilizations had been catalyzed by the threat of ICC proceedings."[109]

As part of the demobilization process of the AUC, the Colombian government reported that the paramilitary groups gave up 18,051 weapons, 13,117 grenades, and 2,716,401 rounds of ammunition.[110] The Colombian government also reported that, during the period covering the demobilization of the AUC from 2002 through 2011, both homicides and kidnappings decreased drastically throughout the country.[111] In the first year of the ceasefire with the AUC and the implementation of the demobilization process, homicides in Colombia decreased from 28,775 in 2002 to 23,523 in 2003.[112] Homicides in Colombia continued to decrease every year through 2011, when the number of homicides dropped to 14,712.[113] Following this trend, massacres in Colombia decreased from 115 cases involving 680 victims in 2002, to 94 cases involving 504 victims in 2003, and to 37 cases involving 171 victims in 2011.[114] Likewise, kidnappings in Colombia decreased from 2,882 in 2002, to 2,121 in 2003, and kidnappings decreased every year through 2009, when the number of kidnappings dropped to 213.[115] Further, the percentage of the total reported torture cases involving the paramilitary groups in Colombia decreased from 56% in 2002 to 40% in 2005.[116] Linking part of the decrease in overall homicides in Colombia specifically to the AUC, the Uppsala Conflict Data Program (UCDP) One-sided Violence (OSV) dataset, giving

108. Éadaoin O'Brien et al., *In the Shadow of the ICC: Colombia and International Criminal Justice*, HUM. RTS. CONSORTIUM 28 (2011), http://sas-space.sas.ac.uk/3206/1/ICC,_Colombia_and_International_Criminal_Justice_Conference_Report.pdf.

109. *Id.*

110. Colombia 2010 Report, *supra* note 91, at 10–11.

111. Consejería Presidencial para los Derechos Humanos [Presidential Counsel for Human Rights], *Cifras Nacionales 2002 – Julio 2012: Violaciones a los derechos a la vida e integridad* [*National Figures 2002 – July 2012: Violations of the rights to life and integrity*] (2012) (Colom.), http://historico.derechoshumanos.gov.co/Observatorio/Documents/Cifras-Nacionales-2002-Julio-2012.pdf [hereinafter Colombia 2012 National Figures].

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. OTP 2012 Report, *supra* note 76, ¶ 48.

annual best estimates for the number of civilians killed by the AUC throughout Colombia, reports that the number of civilians killed by the AUC decreased from 603 in 2001, to 334 in 2002, then to 149 in 2003, to 142 in 2004, and to 38 in 2005.[117] Along with the qualitative evidence cited above, this quantitative evidence demonstrates that the OTP's decision to defer to Colombia's Law 975/05 framework, including the possibility of reduced sentences for AUC combatants, influenced the demobilization of the AUC and the corresponding drastic decrease in the commission of ICL violations by the group.

In addition to contributing to the prevention of future ICL violations, Law 975/05 and Colombia's demobilization framework provided additional benefits which may have been difficult to implement in the absence of the alternative sentence provided by Law 975/05. These benefits include reparations, a truth component, and economic and education projects. As mentioned above, Law 975/05 obligates demobilized individuals to return their ill-gotten gains for the benefit of victims and provides for further reparations for victims.[118] The truth component of Law 975/05 stipulates that the defendant must give a complete account of the crimes committed and the State must investigate the veracity of the confession.[119] According to the Colombian government, these confessions led to 3,131 bodies being found, of which 807 were identified and returned to their families.[120] The confessions of paramilitaries also elucidated the relationship of the AUC with Colombian politicians, leading to the investigation and conviction of several Colombian government officials for their involvement in the crimes of the AUC.[121] The Colombian government has launched economic projects to provide demobilized individuals with employment, including work such as livestock raising and growing crops, in an attempt to assist them in the transition back to civilian life.[122] Finally, the Colombian government has implemented education

117. Therese Pettersson, Stina Högbladh & Magnus Öberg, *Organized Violence, 1989–2018 and Peace Agreements*, 56 J. OF PEACE RES. 589 (June 3, 2019) [hereinafter One-Sided Violence Dataset].

118. *See* Law 975/05, *supra* note 76, arts. 10–11, 44, 46 & 54; IACHR 2006 Report, *supra* note 74, ¶ 44.

119. *See* Law 975/05, *supra* note 76, arts. 17–18; IACHR 2013 Report, *supra* note 74, ¶ 286.

120. Colombia 2010 Report, *supra* note 91, at 16.

121. *Id.* at 23.

122. IACHR 2007 Report, *supra* note 93, ¶ 102.

programs providing academic and occupational training.[123] While these programs have been criticized for the relatively low participation rate of demobilized individuals,[124] they still provided important incentives for the demobilization of the AUC, where none might otherwise have existed.

Thus, balancing the interests in justice with the desire to prevent the commission of ICL violations, by promoting the demobilization of the paramilitaries, the Colombian government was able to reduce the ICL violations committed in Colombia, while obtaining justice, truth and reparations for victims of the atrocities. Accordingly, Colombia provides a prime example of a situation in which the OTP advanced the purposes of the Rome Statute by deferring to the relevant domestic jurisdiction through the positive complementarity assessment, even when the domestic jurisdiction incentivized peace with reduced prison sentences and pardons. In light of the purpose of the Rome Statute to prevent ICL violations,[125] the OTP should defer to domestic criminal prosecutions if circumstances similar to the case of Colombia arise in the future. The remainder of this article is devoted to exploring the factors the UNSC and the OTP should take into consideration when determining whether the OTP should pursue an investigation or prosecution, in situations in which deferral to domestic prosecutions is not an option.

IV. THE INTERESTS OF VICTIMS AND PEACE: TIMING, POWER DYNAMICS, AND PSYCHOLOGICAL CONSIDERATIONS IN PURSUING ICC INVESTIGATIONS AND PROSECUTIONS

After conducting the positive complementarity analysis, the OTP must consider whether an investigation or prosecution would not serve the "interests of justice," taking into account all of the circumstances, including the "interests of victims."[126] If the OTP determines the investigation or prosecution would not serve these interests, it must not proceed with the investigation or prosecution.[127] As analyzed in greater depth above,[128] the OTP's consideration of whether an investigation or prosecution

123. *Id.* ¶ 103.
124. *Id.*
125. Rome Statute, *supra* note 8, at pmbl.
126. *Id.* art. 53(1)(c), (2)(c).
127. *Id.*
128. *See supra* Section II.

would not serve the interests of justice and the interests of victims must include the determination of whether the legal action would cause an escalation in hostilities and an associated increase in ICL violations against members of the communities affected by the situation under review. The OTP must balance the interest in protecting victims with the victims' interests in seeing justice done and promoting prosecutorial deterrence by ending impunity for ICL violations.[129] Similarly, in deciding whether to defer an investigation or prosecution under the Rome Statute, the UNSC must consider whether the ICC action might constitute a "threat to the peace," by leading to an escalation in hostilities and an associated increase in ICL violations.[130]

Empirical evidence drawn from the experience of the ICC in Africa over the past two decades demonstrates that, in analyzing whether ICL enforcement actions might cause an escalation in ICL violations, the ICC and UNSC must consider the timing of ICC actions, the power dynamics involved in the situation under review, and the psychology of the combatants against whom the ICC intends to take action.[131] If conflict has yet to break out but the situation under review involves the fomentation of ethnic hatred or dehumanization, then signaling the prospect of legal action may have a de-escalating effect.[132] If conflict has ensued, then ICC actions may lead to a short-term escalation in violence and an associated increase in ICL violations. Nonetheless, an investigation and prosecution may promote the stigmatization of defendants, their incapacitation, and a consequent decrease in ICL violations over a longer period of time. Thus, during conflicts, the ICC and UNSC must balance the possibility of a short-term escalation in ICL violations with the long-term prevention of such atrocities. Finally, the presence of psychology factors involved in conflict contexts inhibiting combatants' rational cost-benefit analyses—upon which criminal deterrence and escalation theories depend—support taking legal actions against the combatants as soon as practicable, in order to incapacitate the actors.

129. *See id.*
130. *See* U.N. Charter art. 39.
131. *See infra* Section IV.
132. *See infra* Section IV(A).

A. PREVENTING THE STORM: ICC SIGNALING AT THE OUTBREAK OF CONFLICT

The OTP signaling its willingness to pursue investigations and prosecutions of political leaders, prior to their fomentation of ethnic hatred and the commencement of conflict, may serve the interests of justice by de-escalating a situation and preventing ICL violations. Empirical evidence demonstrates that, once hatemongering takes its course, it may be far more difficult to deter ICL violations through ICL enforcement measures. Conscious-choice deterrence theory presumes that actors engage in rational cost-benefit analyses, through which they weigh the expected costs of a decision against the expected benefits to be gained by the decision.[133] If an actor is considering taking action that might violate ICL, then the conscious-choice deterrence hypothesis provides that the actor will elect not to commit the conduct if the expected loss to be incurred outweighs the expected benefit to be gained. For instance, the expected gain that most political elites consider in their cost-benefit analyses pertains to their long-term political viability.[134] If an actor's political longevity is threatened by the stigmatization and incapacitation associated with a prosecution, then the individual may conclude that the expected loss incurred from conduct potentially violative of ICL outweighs any expected gain from the conduct, in which case the individual will refrain from taking the action.[135] However, the conscious-choice deterrence hypothesis is upended if actors do not rationally weigh the expected costs and benefits of their decisions.

As elaborated upon in greater depth below,[136] psychological

133. *See* DIANE DIEULIIS & JAMES GIORDANO, A PRIMER ON THE NEUROCOGNITIVE SCIENCE OF AGGRESSION, DECISION MAKING, AND DETERRENCE 10 (2017), http://nsiteam.com/social/wp-content/uploads/2017/08/A-Primer-on-Neuroscientific-insights_Final.pdf; Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT'L L. 7, 12 (2001) (discussing conscious-choice deterrence theory).

134. *See* Akhavan, *supra* note 133, at 12.

135. *See id.* ("Momentary glory and political ascendancy, to be followed by downfall and humiliation, are considerably less attractive than long-term political viability."); Hunjoon Kim & Kathryn Sikkink, *Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries*, 54 INT'L STUD. Q. 939, 944 (2010) ("For this approach, the main mechanism through which prosecutions lead to improvements in human rights practices is by increasing the costs of repression for state officials at the same time that the benefits of repression remain constant.").

136. *See infra* Section IV.C.

factors encountered in conflicts may skew cost-benefit analyses or prevent actors from rationally weighing the expected costs and benefits to be gained from their conduct altogether. As the experience in Hitler's Europe, the former Yugoslavia, and Rwanda demonstrate, one of the psychological factors—which may skew cost-benefit analyses—consists in the dehumanization of perceived enemies resulting in many cases from the fomentation of ethnic hatred.[137] Dehumanization is defined as the perception that members of an outgroup are less human than members of an ingroup.[138] In contrast, full human perception involves "a view of the other person as deserving protection, empathy, and compassion," engaging the neural network including the medial prefrontal cortex (mPFC).[139] Hypotheses drawn from social psychology provide that dehumanized individuals are perceived as not experiencing complex social emotions to the same extent as humanized individuals, and, in turn, dehumanized individuals do not elicit complex, exclusively social emotions, such as pity, in the perceiver.[140] Instead, dehumanized individuals elicit non-exclusively social emotions in the perceiver, occurring in the presence of people, animals and objects, such as disgust.[141]

Lasana Harris and Susan Fiske have conducted fMRI studies supporting these hypotheses.[142] Specifically, Harris and Fiske observed greater mPFC activation in observers who view target individuals eliciting social emotions in contrast to target individuals eliciting non-exclusively social emotions, such as disgust.[143] They also observed a negative correlation between the warmth with which participants view a social target and the

137. *See* Lasana T. Harris, *Why Economic, Health, Legal, and Immigration Policy Should Consider Dehumanization*, 1 POL'Y INSIGHTS FROM THE BEHAV. & BRAIN SCI. 144, 145–46 (2014) [hereinafter Harris 2014].

138. *See id.* at 145 (discussing the difference between person perception and dehumanized perception); Lasana T. Harris & Susan T. Fiske, *Social Groups that Elicit Disgust Are Differentially Processed in mPFC*, 2 SOC. COGNITIVE & AFFECTIVE NEUROSCIENCE 45, 45–46 (2007) [hereinafter Harris & Fiske 2007] (discussing infrahumanization theory's hypotheses concerning ingroup and outgroup perception).

139. Harris 2014, *supra* note 137, at 145.

140. Harris & Fiske 2007, *supra* note 138, at 45–46.

141. *Id.* at 45.

142. *See, e.g.*, *id.*; Lasana T. Harris & Susan T. Fiske, *Dehumanized Perception: A Psychological Means to Facilitate Atrocities, Torture, and Genocide?*, 219 ZEITSCHRIFT FÜR PSYCHOLOGIE 175 (2011) [hereinafter Harris & Fiske 2011].

143. Harris & Fiske 2007, *supra* note 138, at 49–50.

activation of the anterior insula, implicated in disgust, pain and punishment, suggesting that increased insula activation, and thus feelings of disgust towards a target individual, may facilitate dehumanization.[144] Harris and Fiske also suggest that dehumanization might facilitate the commission of ICL violations, by preventing the perceiver from empathizing with a target individual and ascribing to the individual moral rules and norms governing interactions with other human beings.[145]

This effect was observed in the case of the Rwandan genocide, with regard to which the ICTR causally linked the broadcasts of *Radio Télévision Libre des Mille Collines* (RTLM), promoting hatred for the Tutsi ethnic group and portraying the Tutsi as *Inyenzi*, cockroaches, to the commission of the genocide.[146] Additionally, in a survey commissioned by the International Committee of the Red Cross (ICRC), conducted in Bosnia-Herzegovina following the conflict in the former Yugoslavia, individuals who supported a side to the conflict were more likely to accept attacks on civilians than individuals who did not support a side.[147] This evidence demonstrates that actors more easily accept violations of ICL when committed against members of a perceived outgroup, supporting Harris and Fiske's observation that actors may not empathize with or ascribe the same individual moral rules and norms to members of an outgroup.[148]

In the context of criminal deterrence, dehumanization of target individuals may have the effect of eliminating feelings of empathy or compassion towards the individual, reducing the expected costs of harming the dehumanized target, and thus increasing the overall expected value to be gained from committing an ICL violation.[149] Consequently, signaling legal action before dehumanization occurs might engage an actor's cost-benefit analysis at a time when the perceived cost of committing an ICL violation may be increased not only by the prospect of incapacitation or socio-political stigmatization but

144. Harris & Fiske 2011, *supra* note 142, at 179.

145. *Id*. at 180–81.

146. Prosecutor v. Nahimana, Case No. ICTR 99-52-T, Judgement and Sentence, ¶¶ 433, 487–88 (Dec. 3, 2003).

147. GREENBERG RES. INC., INT'L COMM. OF THE RED CROSS, COUNTRY REPORT BOSNIA-HERZEGOVINA, ICRC WORLDWIDE CONSULTATION ON THE RULES OF WAR 17 (1999), https://www.icrc.org/eng/assets/files/other/bosnia.pdf [hereinafter ICRC Survey].

148. *See* Harris & Fiske 2011, *supra* note 142.

149. *Id.*

also by the greater feelings of empathy that an actor experiences towards the potentially dehumanized outgroup. Accordingly, signaling the prospect of an investigation or prosecution for potential ICL violations, before the fomentation of ethnic hatred and associated dehumanization of perceived outgroups may have a stronger deterrent effect.

The case of Côte d'Ivoire provides an example of the preventative effect of the ICC's signaling of legal action, before the widespread dehumanization of perceived outgroups. In order to gather support according to ethno-regional origins, in the mid-1990s, political leaders and the media in Côte d'Ivoire started to use the term *ivoirité* to distinguish those persons from the southern regions of the country and the capital Abidjan as true Ivorians, to the exclusion of immigrants, largely from Burkina Faso, and Ivorians born in the northern regions.[150] From 2002–2003, during the escalation in hostilities between the government forces of President Laurent Gbagbo and the rebel New Forces in the north of Côte d'Ivoire, ultimately culminating in the First Ivorian Civil War, the country experienced an increase in radio broadcasts reminiscent of RTLM, inciting hatred and violence against deemed non-Ivorians.[151] These broadcasts promoted widespread atrocities by pro-government militias against the perceived non-Ivorians throughout the country.[152] Specifically, most of the pro-government militia members were Bété, the same ethnic group as Gbagbo, while the targets of their attacks were West African immigrants and Ivorians of the Baoulé ethnic group.[153] During the November 2004 offensive by Gbagbo's forces against the New Forces, pro-government combatants took control of television and radio broadcasts in the country, sabotaged the FM relay transmitters of foreign broadcasters, and burned the offices of pro-opposition newspapers.[154] The pro-government media incited hatred and

150. Akhavan, *supra* note 3, at 637.

151. *Id.* at 637–39.

152. *Id.*; *see Côte d'Ivoire: Militias Commit Abuses with Impunity*, HUM. RTS. WATCH (Nov. 27, 2003), https://www.hrw.org/news/2003/11/27/cote-divoire-militias-commit-abuses-impunity ("Human Rights Watch received many credible accounts that armed groups-which the official security forces allowed to act with impunity-had carried out serious abuses against civilians in government-controlled parts of the country.").

153. *Côte d'Ivoire: Militias Commit Abuses with Impunity*, *supra* note 152.

154. Rob Mahoney, *Country on a Precipice, The Precarious State of Human Rights and Civilian Protection in Côte d'Ivoire*, HUM. RTS. WATCH (May 3, 2005), https://www.hrw.org/report/2005/05/03/country-precipice/precarious-state-human-rights-and-civilian-protection-cote.

violence against northerners, immigrants, and the French in the country, who had intervened in the conflict against the government forces.[155] In response to a fatal attack by the Ivorian army on French troops on November 6, 2004, French forces decimated the Côte d'Ivoire government's air force.[156] This attack in turn triggered a stream of anti-French hatemongering broadcasts by the government-controlled media, including *Radio Télévision Ivoirienne* (RTI) and *Radio Côte d'Ivoire* (RCI).[157] For instance, RTI played videos of speakers calling on Ivorians to take to the streets and save the country from the rebels and the French, gory footage of victims shot by French soldiers, and patriotic songs.[158] These broadcasts instigated the looting and burning of French homes, businesses and institutions, and the largest evacuation of foreigners in the country's post-colonial history.[159]

In reaction to this upsurge in violence, the UNSC in Resolution 1572 of November 15, 2004, imposed an arms embargo on Côte d'Ivoire, demanding that the Ivorian government stop the broadcasts inciting hatred.[160] At the same time as the issuance of Resolution 1572, Juan Méndez, then U.N. Special Advisor on the Prevention of Genocide, issued a statement reminding the Ivorian government of its obligation to take action against the incitement of violence directed against civilians or ethnic, religious or racial communities, or risk being subject to ICC action under the Rome Statute.[161] This threat was anything but empty, given the Ivorian government had made an ad hoc declaration under article 12(3) of the Rome Statute to the ICC in September 2003, seeking help to bring the New Forces to justice.[162] Shortly thereafter, on January 28, 2005, then chief prosecutor of the ICC, Luis Moreno Ocampo, announced that he would send a team to Côte d'Ivoire to research a possible investigation into war crimes and that government officials could face eventual prosecution.[163] The hatemongering broadcasts of the state-controlled media in Côte d'Ivoire

155. *Id.* at 33.
156. *Id.* at 11.
157. *Id.* at 11, 33–34.
158. *Id.* at 34.
159. *Id.* at 11.
160. S.C. Res. 1572, ¶¶ 6–7 (Nov. 15, 2004).
161. Akhavan, *supra* note 3, at 639–40.
162. Mahoney, *supra* note 154, at 39.
163. *Id.* at 38–39.

thereafter stopped, in response to the communication from Juan Méndez.[164]

Thus, there is credible evidence that signaling the prospect of ICC intervention into the situation in Côte d'Ivoire, at a time when the fomentation of ethnic hatred in the country was still in its relatively nascent stages, caused Gbagbo's government to cease its hatemongering broadcasts. Given the effect of the broadcasts in inciting widespread violence throughout the country, the cessation of the transmissions likely prevented ICL violations. Accordingly, Côte d'Ivoire provides an example of a case in which the OTP's signaling of potential legal action, before the large-scale fomentation of ethnic hatred and the dehumanization of perceived outgroups, may have a deterrent effect on the commission of ICL violations by influencing the cost-benefit analyses of actors at a time when they may be more susceptible to deterrence. The Côte d'Ivoire case therefore supports a policy of early signaling by the OTP that potential ICL violations will not be tolerated and could be subject to an investigation and prosecution. Such signaling will serve the interests of justice and the purposes of the Rome Statute by contributing to the prevention of ICL violations.

B. PURSUING PROSECUTIONS DURING CONFLICT: TIMING AND POWER DYNAMICS TO CONSIDER IN THE INTERESTS OF JUSTICE

Under the Rome Statute, the OTP and the UNSC must consider whether ICC action will lead to an escalation in hostilities and an associated increase in ICL violations, in determining whether to defer an investigation or prosecution.[165] Empirical evidence from the African contexts under review of the ICC demonstrates that ICC action may lead to a short-term escalation in hostilities towards civilians, which may constitute a reason for the OTP or UNSC to defer an investigation or prosecution. However, the same contexts demonstrate that the targets of ICC prosecutions may be using ICC actions as a pretext for increasing their hostilities. This observation favors a policy of proceeding with ICC actions regardless of the short-term escalation in hostilities. Further, empirical evidence

164. *See* Akhavan, *supra* note 3, at 640; *Attacks on the Press 2004: Ivory Coast*, COMM. TO PROTECT JOURNALISTS (Mar. 14, 2005), https://cpj.org/2005/03/attacks-on-the-press-2004-ivory-coast.php.

165. *See supra* Section II.

demonstrates that ICC actions may lead to the long-term prevention of ICL violations through the stigmatization and incapacitation of targeted individuals. Thus, in assessing whether to defer an investigation or prosecution, the OTP and UNSC must balance the possibility of short-term escalation with long-term prevention of ICL violations.

1. Short-Term Escalation: Deferring ICC Action in the Interests of Justice

Similar to the deterrence hypothesis provided by conscious-choice deterrence theory,[166] the escalation hypothesis provides that ICL enforcement actions pose an existential threat to actors contemplating conduct violating ICL.[167] However, instead of deterring the target actors from committing ICL violations, ICL enforcement actions cause the actors to perceive a greater expected value to be gained from the retrenchment of their power through an escalation in conflict.[168] Increasing overall hostilities may be associated with an upsurge in ICL violations, and therefore, ICL enforcement actions may have the perverse effect of stimulating an escalation in ICL violations. This effect has been observed in the situations involving Bosco Ntaganda and the M23, Joseph Kony and the LRA, and Omar al-Bashir and the Sudanese government.

Empirical evidence first demonstrates that ICC actions may have had a short-term escalatory effect in the eastern DRC, with respect to the situation involving Bosco Ntaganda. The DRC ratified the Rome Statute in April 2002.[169] The DRC government referred the situation in the DRC to the ICC, under article 12(2) of the Rome Statute, in April 2004, and the OTP opened

166. *See supra* Section IV.A.

167. *See* Nick Grono, *The Deterrent Effect of the ICC on the Commission of International Crimes by Government Leaders*, INT'L CRISIS GRP. (Oct. 6, 2012), https://www.crisisgroup.org/global/deterrent-effect-icc-commission-international-crimes-government-leaders ("In such situations, prosecution by the International Criminal Court will more likely represent an existential threat to a ruler, or ruling party, and is thus more likely to cause national leaders to seek to entrench themselves, and hence maintain or even escalate an abusive or criminal campaign.").

168. *See id.*

169. *Situation in the Democratic Republic of the Congo*, ICC-01/04, INT'L CRIM. CT.: SITUATIONS AND CASES, https://www.icc-cpi.int/drc (last visited Jan. 21, 2020).

investigations into the situation in June 2004.[170] On March 16, 2006, Thomas Lubanga Dyilo, former leader of the *Union des Patriotes Congolais* (UPC), was transferred to ICC custody in The Hague, and the guilty verdict in his case was issued on March 14, 2012.[171] The ICC sentenced Lubanga to 14 years of imprisonment on July 10, 2012 for enlisting and conscripting children under the age of 15 years into the *Forces Patriotiques pour la Libération du Congo* (FPLC), the military wing of the UPC.[172] Additionally, the first warrant for the arrest of Bosco Ntaganda, a former commander of the FPLC, the *Congrès National pour la Défense du Peuple* (CNDP) and later the M23, was unsealed on April 28, 2008.[173] After the March 2012 ICC verdict in the Lubanga case, the OTP, the U.S. Ambassador to the DRC, and other international human rights organizations again called for Ntaganda's arrest.[174] On July 13, 2012, the ICC issued a second warrant for the arrest of Ntaganda.[175] Following the ICC verdict in the Lubanga case in March 2012, senior ex-CNDP commanders, who had been integrated into the DRC government's armed forces (FARDC), became aware of the Lubanga verdict and discussed it amongst themselves.[176] Interviews with M23 combatants suggest that fear of arrest and future sanctions led Ntaganda, then brigadier general in the FARDC, to encourage former officers of the CNDP to defect from the FARDC.[177] In the next month they did so, and, by April 2012, Ntaganda had helped form the rebel M23 force, which over the next year-and-a-half escalated the commission of ICL violations in the Eastern DRC.[178] Accordingly, the ICL enforcement actions

170. *Id.*

171. *Lubanga Case, The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, INT'L CRIM. CT.: SITUATIONS AND CASES, https://www.icc-cpi.int/drc/lubanga (last visited Jan. 21, 2020).

172. *Id.*

173. *Ntaganda Case, The Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06, INT'L CRIM. CT.: SITUATIONS AND CASES, https://www.icc-cpi.int/drc/ntaganda (last visited Jan. 21, 2020) [hereinafter *Ntaganda Case*].

174. Michael P. Broache, *The International Criminal Court and Atrocities in DRC: A Case Study of the RCD-Goma (Nkunda Faction)/CNDP/M23 Rebel Group* 28 (Sept. 1, 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2434703.

175. *Ntaganda Case*, *supra* note 173.

176. Broache, *supra* note 174, at 28.

177. *Id.* at 28–30.

178. *Id.* at 30; *see also* Michael P. Broache, *Irrelevance, Instigation and Prevention: The Mixed Effects of International Criminal Court Prosecutions on Atrocities in the CNDP/M23 Case*, 10 INT'L J. TRANSITIONAL JUST. 388 (2016).

of the ICC, taken during ongoing conflict and while Ntaganda was powerful, may have contributed to the escalation in hostilities in the Eastern DRC.

ICC actions may also have had an escalatory effect in the context of the Lord's Resistence Army (LRA) in the eastern DRC. Emerging in the late 1980s, the LRA is a rebel group that was formed in northern Uganda to oppose president Yoweri Museveni's regime and the National Resistance Army (NRA), later renamed the Uganda People's Defense Force (UPDF).[179] The LRA's conduct has been characterized by widespread ICL violations, including intentional civilian killings, pillaging, rape, sexual enslavement, and the forced enlistment of children.[180] Uganda ratified the Rome Statute in June 2002 and referred the situation in Uganda to the ICC in January 2004.[181] The ICC opened investigations into the situation in July 2004, investigating both war crimes and crimes against humanity allegedly committed by the LRA.[182] The ICC's Pre-Trial Chamber unsealed warrants of arrest in October 2005 for LRA commandants Joseph Kony, Vincent Otti, Dominic Ongwen, Raska Lukwiya, and Okot Odhiambo.[183] In the ensuing years, Lukwiya and Odhiambo have been confirmed dead.[184] Despite reports of Otti's death,[185] at the time of writing, the ICC considers Otti, along with Kony, at large.[186]

Between 2005 and 2007, the LRA moved from its bases in northern Uganda and southern Sudan into the DRC and set up camp in Garamba National Park.[187] While the LRA was moving into the DRC, the Ugandan government began to engage in peace negotiations with the LRA in Juba, southern Sudan, culminating in a ceasefire agreement that was signed in August

179. *Profile: The Lord's Resistance Army*, AL JAZEERA (May 6, 2014), https://www.aljazeera.com/news/africa/2011/10/2011101418364196576.html.

180. *Situation in Uganda*, ICC-02/04, INT'L CRIM. CT.: SITUATIONS AND CASES, https://www.icc-cpi.int/Uganda (last visited Jan. 21, 2020) [hereinafter *Situation in Uganda*].

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *See Otti 'Executed by Uganda Rebels'*, BBC NEWS (Dec. 21, 2007), http://news.bbc.co.uk/2/hi/africa/7156284.stm.

186. *Situation in Uganda*, *supra* note 180.

187. *The Christmas Massacres, LRA Attacks on Civilians in Northern Congo*, HUM. RTS. WATCH (2009) at 13, https://www.hrw.org/sites/default/files/reports/drc0209webwcover_1.pdf.

2006.[188] During the peace talks, and in the wake of the ceasefire agreement, the civilian killings committed by the LRA drastically decreased in 2006 and 2007.[189] From early on in the peace negotiations, the LRA sought to use the peace process as a means of evading ICC prosecution, demonstrating the LRA's fear of ICC actions.[190] A former LRA combatant reported that Kony was afraid of the ICC, because he had the mistaken belief that he would be subject to the death penalty like Saddam Hussein.[191] In 2006, the LRA threatened to call off the Juba negotiations if the ICC did not withdraw the warrants against the LRA leadership, stating that the withdrawal of the warrants was a precondition to a peace agreement.[192] In February 2008, the LRA agreed to the establishment of a special division—the War Crimes Division—of the Ugandan High Court to prosecute war crimes committed by the LRA domestically, in another apparent attempt to evade ICC prosecution.[193] The Ugandan government agreed that it would ask the UNSC to defer investigations and prosecutions against the leaders of the LRA, upon the LRA's signature of a final peace agreement.[194] However, for the remainder of 2008, Kony failed to sign a final peace accord, and the peace negotiations subsequently collapsed.[195]

In September 2008, the U.N. Organization Mission in the DRC (MONUC) coordinated with the FARDC in Operation Rudia in an attempt to contain the LRA in Garamba National Park, cut its supply lines, and encourage defections.[196] The

188. *Id.* at 14.

189. *See* One-Sided Violence Dataset, *supra* note 117 (reporting a decrease in the best estimate of civilian killing by the LRA from 304 fatalities in 2005, to 47 fatalities in 2006, and 62 fatalities in 2007); *The Christmas Massacres*, *supra* note 187, at 16.

190. *See The Christmas Massacres*, *supra* note 187, at 14 ("From early on, the LRA sought to evade ICC prosecution, in part by claiming that the ICC was a[n] obstacle to peace.").

191. Sarah Kihika Kasande, *Evaluating the Deterrent Effect of the International Criminal Court in Uganda*, *in* TWO STEPS FORWARD, ONE STEP BACK: THE DETERRENT EFFECT OF INTERNATIONAL CRIMINAL TRIBUNALS 201, 208 (Jennifer Schense & Linda Carter eds. 2016), https://www.nurembergacademy.org/fileadmin/media/pdf/publications/DETERRENCEPUBLICATION.pdf.

192. *See id.*; Rodney Muhumuza, Frank Nyakairu & Simon Kasyate, *Uganda: Kony Rebels Refuse to Sign Peace Deal*, DAILY MONITOR (Oct. 10, 2006), https://allafrica.com/stories/200610091534.html.

193. *The Christmas Massacres*, *supra* note 187, at 15.

194. *Id.*

195. *Id.*

196. *Id.* at 17.

operation resulted in more than 12 LRA combatants surrendering.[197] However, reportedly in retaliation for the assistance given to the LRA defectors by local civilians, the LRA attacked several villages in the area around Garamba National Park, committing widespread ICL violations between September and November 2008.[198] After the November 29, 2008 deadline for Kony to sign the final peace accord passed, the UPDF, FARDC, and Sudan People's Liberation Army (SPLA) coordinated in what was codenamed Operation Lightening Thunder, with the intelligence, planning, technical, and logistical support of the United States military.[199] The objectives of Operation Lightning Thunder were to destroy the LRA camps in Garamba National Park, capture or kill the LRA leadership, and rescue abducted civilians.[200] Through the operation, launched on December 14, 2008, the joint forces destroyed the LRA's camps in the area.[201] Nonetheless, several LRA combatants, including Kony and other senior commanders, escaped the attacks, dispersing into several smaller groups.[202] By December 24, 2008, neither the forces involved in the operation nor MONUC remained to protect the civilians who occupied the towns surrounding the LRA's former camps.[203] In apparent retaliation for Operation Lightening Thunder, between December 2008 and January 2009, the LRA launched a series of attacks, termed the Christmas Massacres, against the civilians occupying these towns, killing at least 815 Congolese civilians and at least 50 Sudanese civilians, and abducting 160 children.[204] According to the UCDP OSV dataset, the best estimate of the number of civilians killed by the LRA increased from 62 in 2007, to 734 in 2008, and to 1394 in 2009.[205]

One ex-LRA combatant reported that, instead of signing the final peace agreement, Kony continued to fight, in order to evade arrest by the ICC.[206] Several analysts viewed the ICC's outstanding warrants as the cause for the failure in 2008 of the

197. *Id.* at 18.
198. *See id.* at 20–26.
199. *Id.* at 28.
200. *Id.*
201. *Id.* at 28–29.
202. *See id.* at 29.
203. *Id.*
204. *See id.* at 29–30.
205. One-Sided Violence Dataset, *supra* note 117.
206. *See* Kasande, *supra* note 191, at 207.

Juba peace negotiations.[207] Thus, along with Operations Rudia and Lightening Thunder, the ICC's outstanding arrest warrants for the LRA leadership may have contributed to the significant escalation in ICL violations committed by the group in 2008 and 2009. However, as elaborated upon below,[208] one questions the veracity of this narrative, given the Ugandan government's apparent commitment to hindering ICC prosecutions in exchange for peace with the LRA. Additionally, empirical evidence demonstrates that Kony merely used the peace negotiations to garner time to regroup his forces.[209]

ICC actions may have also led to the deterioration of the human rights situation in Sudan. The UNSC referred the situation in Darfur, Sudan to the ICC in March 2005, and the OTP opened an investigation into the situation in June 2005.[210] The investigation has produced charges for crimes including genocide, war crimes, and crimes against humanity.[211] The OTP issued warrants for the arrest of the former president of Sudan, Omar al-Bashir, on March 4, 2009 and July 12, 2010.[212] Al-Bashir is charged with crimes against humanity, war crimes, and genocide for his involvement in the Darfur genocide commencing in 2003.[213] In reaction to the issuance of the first arrest warrant for al-Bashir, the government of Sudan expelled several humanitarian aid organizations from the country, leaving more than one million people without food, water or healthcare.[214] As in the cases of Ntaganda and Kony, this

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207. *E.g.*, *id.* at 208–09; ALEXIS ARIEFF ET AL., CONG. RES. SERV., THE LORD'S RESISTANCE ARMY: THE U.S. RESPONSE 7 (2015), https://fas.org/sgp/crs/row/R42094.pdf ("The ICC warrants, which Kony wanted repealed, were seen by some analysts as a key stumbling block in the negotiations.").

208. *See* discussion *infra* Section IV.B.ii.a.

209. ARIEFF ET AL., *supra* note 207; *The Christmas Massacres*, *supra* note 187, at 16.

210. *Situation in Darfur, Sudan*, ICC-02/05, INT'L CRIM. CT.: SITUATIONS AND CASES, https://www.icc-cpi.int/darfur (last visited Jan. 21, 2020) [hereinafter *Situation in Darfur*].

211. *Id.*

212. *Al Bashir Case: The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09, INT'L CRIM. CT., https://www.icc-cpi.int/darfur/albashir (last visited Jan. 21, 2020).

213. *Id.*

214. Akhavan, *supra* note 3, at 648; *see also* Patrick Worsnip, *Darfur Mediator Says Bashir Warrant Imperils Talks*, REUTERS (Mar. 26, 2009), https://www.reuters.com/article/us-sudan-darfur-un/darfur-mediator-says-bashir-warrant-imperils-talks-idUSTRE52P7FO20090326 ("Khartoum ordered out 13 foreign groups and shut down three local ones after the ICC issued its warrant.").

evidence demonstrates that ICC actions against al-Bashir may have had the perverse effect of promoting human rights abuses against the civilians inhabiting the region under review of the ICC. This observation weighs in favor of the OTP or UNSC deferring investigations or prosecutions in the interests of justice and victims, in situations involving a target individual who is disposed to escalate ICL violations against civilians, in retaliation for the ICC's enforcement measures. Nonetheless, even given such a target individual, the OTP or UNSC may find it in the interest of victims and justice to pursue an investigation or prosecution, if the target individual is using the ICC actions as a pretext for the commission of ICL violations or if there is a possibility of preventing ICL violations over the long term, through the stigmatization and incapacitation of a target individual.

2. Long-Term Prevention: Pursuing Investigations and Prosecutions Despite the Risk of Short-Term Escalation

Even in situations involving target individuals who are at risk of escalating ICL violations in response to ICC actions, the UNSC and OTP may find that investigations and prosecutions would serve the interests of justice and victims. The ICC situations involving Kony and Ntaganda demonstrate that the individuals and their associated armed groups may have escalated their ICL violations despite ICC actions, thus supporting the prosecution of the individuals notwithstanding the threat of an increase in violence. Even if a group would not escalate their ICL violations in the absence of ICC actions, it may serve the interests of victims and justice for the OTP to choose to pursue prosecutions, balancing the threat of a short-term escalation in ICL violations with the prospect of promoting deterrence and the long-term prevention of ICL violations through the incapacitation of target individuals.

a. Actors Using ICC Actions as Pretext

Several factors support the conclusion that, despite Kony's signaling that the ICC's outstanding arrest warrants prevented the signing of a final peace accord, which lead to the increase in ICL violations in late 2008 and 2009, it is clear that Kony was merely using the ICC's warrants and the peace process as a pretext to strengthen his forces. Ex-LRA combatants have stated

that Kony was not afraid of being arrested or prosecuted by the ICC because of the ICC's lack of enforcement mechanisms to execute its arrest warrants.[215] Throughout the Juba peace negotiations, the Ugandan government signaled its willingness to help prevent the ICC's prosecutions of the LRA leadership by establishing the War Crimes Division of the Ugandan High Court and agreeing that it would ask the UNSC to defer investigations and prosecutions upon the LRA's signature of a final peace agreement.[216] Thus, the perceived likelihood that Kony would be prosecuted by the ICC if he were to sign the final peace agreement in 2008 was relatively low, supporting the conclusion that Kony merely used the ICC's actions as a pretext for his non-signature of a peace agreement.[217]

Reinforcing this conclusion, empirical evidence demonstrates that Kony merely used the Juba peace negotiations from 2006 through 2008 and the associated ceasefire agreement to reduce pressure on the LRA while the group strengthened its ranks.[218] After crossing over from northern Uganda and Sudan into the DRC, between 2007 and 2008, the LRA created farms near their camps in Garamba National Park and stockpiled food and other supplies.[219] From January through April 2008, the LRA abducted 90 civilians each from southern Sudan and the Central African Republic (CAR), as well as at least 9 Congolese civilians in the DRC.[220] The abducted civilians were then given military training and used as soldiers, assigned to cultivate the LRA's fields, or exploited as sex slaves.[221] In early 2008, the LRA stole military equipment from SPLA bases in southern Sudan.[222] Despite the LRA signaling that the outstanding ICC warrants impeded the Juba peace process, this evidence demonstrates that the LRA merely used the ICC actions as pretext for prolonging the peace process and the associated ceasefire, while it strengthened its forces in

215. Kasande, *supra* note 191, at 211.

216. HUMAN RIGHTS WATCH, *supra* note 187, at 14–15.

217. *See Uganda Sets Up War Crimes Court*, THE BBC (May 26, 2008), http://news.bbc.co.uk/2/hi/africa/7420461.stm; *Uganda's LRA Rebels Say ICC Arrest Warrants Obstacles to Peace*, VOICE OF AMERICA NEWS (Nov. 1, 2009), https://www.voanews.com/archive/ugandas-lra-rebels-say-icc-arrest-warrants-obstacles-peace.

218. *See* ARIEFF ET AL., *supra* note 207, at 7.

219. *The Christmas Massacres*, *supra* note 187, at 16.

220. *Id.*

221. *Id.*

222. *Id.* at 17.

anticipation of its escalation of hostilities in 2008 and 2009.

Similar to the situation of Kony and the LRA, empirical evidence from the situation of Ntaganda and the M23 demonstrates that the group may have splintered from the FARDC, regardless of the Lubanga conviction and the ICC actions taken against Ntaganda. Analysts have observed that the former CNDP commanders, including Ntaganda, who defected from the FARDC forming the M23, had been preparing plans for a new rebellion since at least 2011, prior to both the Lubanga verdict and the issuance of the ICC's second warrant for Ntaganda.[223] The reasons for the ex-CNDP commanders' plans included the DRC "government's plans to break up ex-CNDP units in the FARDC and deploy former CNDP outside of the Kivus . . . ."[224] Interviews with ex-CNDP combatants have demonstrated that, like Kony, Ntaganda did not fear arrest by the ICC, given its lack of an effective mechanism to execute the arrest warrants against him.[225] Ntaganda's lack of fear of ICC prosecution, coupled with the evidence that he had been preparing a defection from the FARDC prior to the ICC's 2012 actions, demonstrate that Ntaganda may have instigated the formation of the M23 and the associated escalation in ICL violations despite the ICC's enforcement measures taken against him. Accordingly, the situations of the LRA and the M23 demonstrate that the ICC's actions may have lacked either a deterrent or an escalatory effect with regard to the groups' commission of ICL violations. In such situations, it serves the interests of victims and justice for the UNSC and OTP not to defer investigations and prosecutions because a deferral would not prevent the escalation in hostilities and prosecutions may lead to the incapacitation of the target individuals and the prevention of future ICL violations by their associated armed groups.

b. Balancing Short-Term Escalation with Long-Term Deterrence and Incapacitation

Even if target individuals would not escalate ICL violations if the UNSC or OTP deferred an investigation or prosecution, there are several reasons why it would serve the interests of

223. *See* Broache, *supra* note 174, at 29.
224. *Id.*
225. *Id.* at 26–27.

justice and victims for the OTP to pursue a prosecution, although it may cause a short-term escalation in ICL violations. First, as the case of Foday Sankoh illustrates, target actors may view the deferral of an ICC prosecution as a weakness in the institution, eroding the ICC's deterrent effect on would-be ICL violators and promoting their unabated commission of ICL violations. Sankoh was the leader of the Revolutionary United Front (RUF), which, fighting against the government of Sierra Leone, became notorious in the 1990s for committing widespread ICL violations, including chopping off the arms and hands of men, women, and children.[226] In exchange for peace with the RUF, through the 1999 Lomé Peace Agreement, the government of Sierra Leone granted Sankoh and the RUF complete amnesty from prosecution for their atrocities,[227] made Sankoh the Vice President of Sierra Leone,[228] and gave Sankoh control over the management of Sierra Leone's gold and diamond deposits.[229] Apparently viewing the concessions made in the Lomé Peace Agreement as an indication of the weakness of the government of Sierra Leone, the RUF continued its attempt to overthrow the government, escalating its hostilities and associated ICL violations.[230] Thus, leniency delegitimized any deterrent effect that prosecution by the government of Sierra Leone may have had on the RUF and Sankoh. This case demonstrates that the OTP and UNSC's deferral of prosecutions in the interests of justice may similarly erode the deterrent effect of ICC actions, leading to the escalation of ICL violations by target actors and other individuals who might be subject to ICC jurisdiction. Accordingly, this evidence weighs in favor of the OTP pursuing prosecutions, even if it risks instigating a short-term escalation in ICL violations, in order to bolster the deterrent effect of the ICC and promote the long-term prevention of ICL violations.

The cases of the LRA and the M23 also support the OTP's pursuit of prosecutions in the interests of justice and victims, despite the risk of a short-term escalation in ICL violations, in

226. Kenneth Roth, *International Injustice: The Tragedy of Sierra Leone*, HUM. RTS. WATCH (Aug. 2, 2000), https://www.hrw.org/news/2000/08/02/international-injustice-tragedy-sierra-leone.

227. Lomé Peace Agreement, *supra* note 2, art. IX.

228. *Id.* art. V, ¶2.

229. *See id.* arts. V, VII.

230. *See, e.g.*, Akhavan, *supra* note 3, at 635–36; One-Sided Violence Dataset, *supra* note 117 (showing an increase in the best estimate of civilian killing by the RUF from 232 fatalities in 1999 to 476 fatalities in 2000); Roth, *supra* note 226.

order to promote the stigmatization of target actors and the long-term prevention of ICL violations through their incapacitation. In the 1990s, the Sudanese government started funding and training the LRA, and the LRA used southern Sudanese territory to conduct a proxy fight against the SPLA rebels in southern Sudan and the government of Uganda.[231] At the same time, the Ugandan government supported the SPLA's fight against the government of Sudan.[232] In 1999, Sudan and Uganda agreed to cease their support of the respective rebel groups.[233] Then, in 2005, Sudan entered into the Comprehensive Peace Agreement (CPA) with the SPLA and the Sudan People's Liberation Movement (SPLM), granting partial autonomy to the SPLM in southern Sudan, and the SPLA subsequently started to conduct counter-LRA operations with the UPDF.[234] After entering the CPA, the government of Sudan reduced its support for the LRA, as the Sudanese government no longer needed the LRA's assistance to fight its proxy war against the SPLA.[235] The cessation of aid from Sudan led the LRA to flee from its base in southern Sudan to eastern DRC and the CAR.[236] As discussed above,[237] the LRA's flight to the DRC and CAR was proximately associated, in 2006 and 2007, with a significant decrease in the group's intentional civilian killing.[238] Despite an escalation in hostilities and ICL violations by the LRA in 2008 and 2009,[239] the loss of the Sudanese government's support, and the fact that the LRA was forced to flee to the DRC and CAR, contributed to the LRA's long-term debilitation and the associated drastic

231. *See* ARIEFF ET AL., *supra* note 207, at 6; *The LRA and Sudan: How Serious a Threat Are Joseph Kony and the LRA to Peace and Stability in Sudan Ahead of the Referendum?*, AL JAZEERA (Jan. 5, 2011), https://www.aljazeera.com/programmes/peopleandpower/2011/01/20111585750480428.html [hereinafter *The LRA and Sudan*].

232. ARIEFF ET AL., *supra* note 207, at 6.

233. *Id.*

234. *Id.*

235. *See* Kasande, *supra* note 191, at 213; *The LRA and Sudan*, *supra* note 231.

236. Kasande, *supra* note 191, at 213.

237. *See supra* Section IV.B.i.

238. *See* One-Sided Violence Dataset, *supra* note 117; *The Christmas Massacres*, *supra* note 187, at 16.

239. *See* One-Sided Violence Dataset, *supra* note 117 (reporting an increase in the best estimate of civilian killing by the LRA from 62 fatalities in 2007, to 734 fatalities in 2008, and to 1394 fatalities in 2009); *The Christmas Massacres*, *supra* note 187, at 29–30.

decrease, since 2009, in the group's ICL violations.[240]

Analysts have observed that Uganda's referral of the LRA situation to the ICC in January 2004 and the consequent stigmatization of the LRA leadership, pressured the Sudanese government to allow Ugandan forces to eliminate the LRA bases in southern Sudan in March 2004.[241] Further, the referral of the LRA situation to the ICC and the ICC's issuance of arrest warrants for the LRA leadership in 2005 coincided with the Sudanese government signing the CPA and the LRA's subsequent loss of support from the government of Sudan.[242] This evidence suggests a relationship between the stigmatization of the LRA by the ICC and Sudan cutting off its support for the LRA, which instigated the LRA's flight to the DRC and CAR, military debilitation, and the drastic decrease in the group's ICL violations. Thus, while the ICC's refusal to defer the prosecution of the LRA leadership may have led to the short-term increase in the group's ICL violations in 2008 and 2009,[243] the ICC's stigmatization of the group likely played a role in the government of Sudan's cessation of support for the LRA, which ultimately contributed to the group's demise and the associated long-term decrease in ICL violations committed by the LRA. The case of the LRA therefore provides an example of a situation in which the OTP and UNSC may serve the interests of justice and victims by choosing not to defer ICC prosecutions, despite the threat of a short-term escalation in ICL violations, in order to promote the stigmatization of target actors, the long-term debilitation of target groups, and the associated prevention of further ICL violations.

The situation of Bosco Ntaganda and the M23 provides a similar case to the LRA. Following the release of the ICC verdict in the Lubanga case in March 2012, the OTP once again called for the immediate arrest of Ntaganda on charges of recruiting child soldiers.[244] Wanting to try Ntaganda in Goma, DRC, where the crimes were committed, DRC President Joseph Kabila called

240. *See* One-Sided Violence Dataset, *supra* note 117 (reporting a decrease in the best estimate of civilian killing by the LRA from 1394 fatalities in 2009 to 26 fatalities in 2017).

241. Akhavan, *supra* note 3, at 643.

242. *See generally* Nick Grono & Adam O'Brien COURTING CONFLICT? JUSTICE, PEACE AND THE ICC IN AFRICA, 15 (Nicholas Waddell & Phil Clark eds., 2008).

243. *See supra* Section IV.B.i.

244. *Congo's 'Terminator': Kabila calls for Ntaganda Arrest*, BBC NEWS (Apr. 11, 2012), https://www.bbc.com/news/world-africa-17683196.

for the arrest of Ntaganda in April 2012.[245] Around the same time, rivals of Ntaganda, within the recently-formed M23 rebel group, stated that the DRC government would never agree to a favorable peace deal with Ntaganda because of the ICC warrant for his arrest, in an apparent attempt to erode Ntaganda's support base.[246] The second ICC warrant for Ntaganda's arrest was then issued on July 13, 2012,[247] and throughout the rest of 2012 and early 2013, Ntaganda's political and military base within the M23 continued to crumble.[248] In 2013, the Rwandan government, which had supported Ntaganda, told him they could no longer do so, since the U.S. had pressed Rwanda to cut its ties and offered a reward for Ntaganda's capture.[249] In early March 2013, Sultani Makenga and his allies, within the now-factionalized M23, forced Ntaganda and his dwindling allies to flee to Rwanda.[250] Once in Rwanda, Ntaganda turned himself into the U.S. Embassy in Kigali, where, according to U.S. Department of State spokeswoman Victoria Nuland, he specifically asked to be transferred to the ICC.[251]

While it is likely that Ntaganda's request to be transferred to the ICC was to avoid being killed by the Rwandan government or Makenga's forces,[252] the evidence outlined above demonstrates that the splintering of the M23 and Ntaganda's surrender were likely also caused by the ICC warrant for Ntaganda's arrest and the associated social stigmatization of Ntaganda. After Ntaganda surrendered to the U.S. Embassy in Kigali, over 750 M23 combatants loyal to Ntaganda fled to Rwanda and over 240 M23 combatants surrendered in the

245. *Id.*

246. Michael Broache, *Beyond Deterrence: The ICC Effect in the DRC*, OPEN DEMOCRACY (Feb. 19, 2015), https://www.opendemocracy.net/en/openglobalrights-openpage/beyond-deterrence-icc-effect-in-drc/.

247. *Ntaganda Case*, *supra* note 173.

248. Marlise Simons, *War Crimes Trial Opens for Bosco Ntaganda, Congolese Rebel Leader*, N.Y. TIMES (Sept. 2, 2015), http://www.nytimes.com/2015/09/03/world/africa/bosco-ntaganda-congo-international-criminal-court.html.

249. *Id.*

250. *Defeated Congo Rebels Surrender*, GULF TIMES (Mar. 16, 2013), http://www.gulf-times.com/africa/243/details/345710/defeated-congo-rebels-surrender%20race.

251. Jeffrey Gettleman, *Wanted Congolese Rebel Leader Turns Himself in to U.S. Embassy*, N.Y. TIMES (Mar. 18, 2013), https://www.nytimes.com/2013/03/19/world/africa/wanted-congolese-rebel-leader-turns-himself-in.html?action=click&contentCollection=Africa&module=RelatedCoverage&region=Marginalia&pgtype=article.

252. *See id.*

DRC.[253] Additionally, the number of civilian killings committed by the M23 decreased, as the group was debilitated.[254] The M23 continued to degrade until, in November 2013, Sultani Makenga surrendered, with around 1,700 remaining M23 fighters, in Mgahinga National Park, Uganda.[255] Thus, despite a short-term increase in hostilities by the M23 following its defection from the FARDC, the ICC actions against Ntaganda likely contributed to the debilitation of the group and the long-term prevention of ICL violations. Like the situation of the LRA, the case of the M23 illustrates how the OTP's choice to not defer prosecutions in the interests of justice and victims might lead to the stigmatization of target actors, the target group's loss of support, its consequent military debilitation, incapacitation, and an associated long-term decrease in ICL violations. The cases of the LRA and M23 therefore demonstrate that, even if pursuing prosecutions leads to a short-term escalation in ICL violations, ICC prosecutions may still serve the interests of justice and victims by promoting the long-term prevention of ICL violations.

c. The ICC as an Exit Option

Despite the possibility of a short-term escalation in ICL violations, empirical evidence further demonstrates that the OTP may promote the interests of justice and victims by pursuing prosecutions, because prosecutions may lead to the incapacitation of target actors when their armed groups are weak, by providing an attractive exit option for target individuals. The cases of Dominic Ongwen and Ntaganda demonstrate this conclusion. Following the launch of the African Union-led Regional Task Force (AU-RTF) and the deployment of U.S. Special Forces to Uganda, the CAR and the DRC, who were to act as advisors to the regional forces in 2011, the LRA was scattered among the CAR, South Sudan, and the DRC, with numbers dwindling to approximately 200 to 300 individuals by 2015.[256] Corresponding to the reduction in the LRA's total number of combatants, the best estimate of the LRA's

253. Broache, *supra* note 246.

254. *See* Broache, *supra* note 178, at 23.

255. *DR Congo's M23 Rebel Chief Sultani Makenga 'Surrenders'*, BBC NEWS (Nov. 7, 2013), http://www.bbc.com/news/world-africa-24849814.

256. *How Goes the Hunt for Joseph Kony and the LRA?*, THE NEW HUMANITARIAN (June 23, 2015), http://www.thenewhumanitarian.org/fr/node/255400.

intentional civilian killings decreased from a reported 1394 fatalities in 2009 to 30 fatalities in 2015.[257] With his ranks diminishing and many of his forces deserting,[258] Ongwen surrendered to the Seleka rebels during January 2015 in CAR, who transferred him to U.S. Special Forces in the region, subsequently remanding him to the custody of the ICC to stand trial.[259] Shortly after his arrest, Ongwen reportedly stated, "I did not want to die in the bush, so I decided to follow the right path and listen to the calling of the ICC."[260] If Ongwen's statement is to be trusted, the ICC offered an exit option for him, or a preferable alternative to death in the field or regional detention, given the ICC's relatively comfortable conditions.[261] Kasande also notes that "[o]ne of the senior ex-combatants interviewed observed that Ongwen's comfortable conditions of detention at the ICC could encourage his subordinates to lay down their arms and surrender in the hope that they will be taken care of, compared to the harsh conditions in the bush."[262] Similarly, the co-founder of the *LRA Crisis Tracker* stated that LRA combatants specifically defected to U.S. forces because they knew, from messaging campaigns conducted by the U.S. military advisors in the region, including the use of leaflet drops and radio broadcasts, that if they surrendered to the U.S. troops, they would be safe.[263] The case of the LRA therefore supports the conclusion that, if a group has been debilitated and is close to defeat, the OTP's pursuit of a prosecution may serve to promote the incapacitation of target actors by offering them an attractive alternative to death at the hands of their enemies or detention in prison conditions worse than those found in The Hague.

The case of the M23 and Ntaganda presents a similar situation, supporting the conclusion that ICC prosecutions may serve the interests of justice by providing an exit option for target combatants. As elaborated upon above,[264] by early 2013, Ntaganda's political and military support within the M23 were

257. One-Sided Violence Dataset, *supra* note 117.

258. *See* ARIEFF ET AL., *supra* note 207, at 3.

259. *See* Kasande, *supra* note 191, at 215; Associated Press, *Surrendered LRA Officer Says He Didn't Want to Die in Bush*, DAILYMAIL (Jan. 19, 2015), https://www.dailymail.co.uk/wires/ap/article-2916764/Central-African-Republic-rebels-seek-US-reward-Ongwen.html.

260. Associated Press, *supra* note 259.

261. Kasande, *supra* note 191, at 216.

262. *Id.*

263. ARIEFF ET AL., *supra* note 207, at 12.

264. *See supra* Section IV.B.ii.b.

crumbling.[265] Ntaganda lost the support of the Rwandan government,[266] and Sultani Makenga and his allies within the M23 compelled Ntaganda and his allies to flee to Rwanda.[267] Ntaganda subsequently turned himself into the U.S. Embassy in Kigali and specifically asked to be transferred to the ICC.[268] By the time Ntaganda turned himself in, Ntaganda and other ex-CNDP officers who formed the M23 were aware of the Lubanga verdict announced in 2012 and the arrest warrants against Ntaganda.[269] Ntaganda's awareness of the possibility of arrest and detention by the ICC, coupled with his request to be transferred to the ICC, demonstrates that, as in the case of Ongwen, ICC detention may have presented Ntaganda with an attractive alternative to dying in the bush after continuing to fight Makenga's forces, thus promoting Ntaganda's incapacitation and the prevention of further ICL violations by him and his followers.[270] Accordingly, the Ntaganda situation presents another case in which, if a target actor's forces have been debilitated, the OTP promotes the interests of justice and victims by pursuing prosecutions and instigating the incapacitation of a target individual by offering an attractive exit option.

The case of the demobilization of the Colombian paramilitary forces offers another situation in which ICC investigations may promote the incapacitation of individuals and the long-term prevention of ICL violations. However, unlike the Ntaganda and Ongwen cases, the evidence from Colombia elaborated above[271] demonstrates that, instead of viewing the ICC as an attractive exit option, Colombian paramilitary forces viewed surrender to Colombian law enforcement institutions as an attractive alternative to prosecution by the ICC.[272] While deferral to Colombian prosecutions may have ultimately instigated the demobilizations of the paramilitaries, the OTP's continued pursuit of a preliminary examination may have

265. Simons, *supra* note 248.
266. *Id.*
267. *Defeated Congo Rebels Surrender*, *supra* note 250.
268. Gettleman, *supra* note 251.
269. Broache, *supra* note 174, at 29–30.
270. *See id.* at 34.
271. *See supra* Section III.
272. *See* Éadaoin O'Brien et al., *supra* note 108, at 28 (Eduardo Pizarro citing as one of the paramilitary leaders' main motivating factors for their voluntary disarmament "the desire to serve any prison sentences in Colombia rather than in an unknown country following an ICC indictment and trial.").

encouraged the paramilitaries to demobilize to avoid ICC prosecutions.[273] The three cases discussed above therefore support a policy through which the OTP pursues preliminary examinations, investigations and prosecutions, especially at a time when a target group is weak, in order to promote the perception of an exit option for the target individual, leading to a target's incapacitation and an associated prevention of future ICL violations.

C. PSYCHOLOGICAL CONSIDERATIONS IN PURSUING INVESTIGATIONS AND PROSECUTIONS

Several psychological factors are involved in conflict contexts which might inhibit or skew combatants' rational cost-benefit analyses and consequently limit the deterrent and escalatory effects of ICL enforcement measures. These factors include the dehumanization of the perceived enemy, the presence of an overpowering authority, the use of child soldiers and drugs, and traumatic stress. The presence of these factors in conflict situations supports the OTP's aggressive pursuit of investigations and prosecutions in the interests of justice in order to incapacitate defendants and prevent their future ICL violations.

As discussed above,[274] conscious-choice deterrence theory presumes that decisionmakers rationally weigh the expected costs of a decision against the expected benefits to be gained by the decision, choosing a course of conduct through which the expected benefits outweigh the expected costs.[275] If an actor is contemplating committing a violation of ICL, the deterrence hypothesis provides that the actor will choose not to violate ICL if the expected loss incurred through the conduct, for example the incapacitation of the actor or the individual's loss of political power, outweighs the expected benefit to be gained.[276] In contrast, the escalation hypothesis provides that an actor will elect to take an action that violates ICL if the expected benefits gained by the decision outweigh the expected costs incurred.[277] Certain psychological factors involved in conflict scenarios,

273. *Id.*

274. *See supra* Section IV.A.

275. *See* DIEULIIS & GIORDANO, *supra* note 133, at 10; Akhavan, *supra* note 133, at 12.

276. *Id.*

277. *See* Grono, *supra* note 167.

elaborated upon below, may inhibit an actor's ability to rationally weigh the expected costs and benefits of the individual's actions, minimizing any predicted deterrent or escalatory effect that ICL enforcement actions would have on a target individual. The lack of any deterrent or escalatory effect of signaling the prospect of ICL enforcement actions supports the expeditious pursuit of prosecutions, in order to promote the incapacitation of target individuals and the prevention of their future ICL violations. Nonetheless, because the different psychological factors present in conflict scenarios may have differing effects on the cost-benefit analyses of individuals, it is important to examine the potential effects of each factor in turn.

1. Dehumanization

The dehumanization of perceived enemies, resulting in many cases from the fomentation of ethnic hatred, may skew the weight actors give to the expected costs and benefits of their actions. Specifically, dehumanization may have the effect of eliminating feelings of empathy and compassion towards a dehumanized target and preventing the application of ICL norms to the individual. This effect may result in reducing the expected costs of harming the target individual that would have deterred an actor from committing an ICL violation.

Infrahumanization theory provides that full human perception, which involves inferring another person's mind, elicits within the perceiver exclusively social emotions, such as empathy and pity, which occurs only in the actual, imagined or implied presence of other human beings.[278] In contrast, dehumanized perception involves perceiving members of an outgroup as less human than members of an ingroup, failing to spontaneously consider their minds, and elicits in the perceiver non-exclusively social emotions such as disgust, which occurs in the presence of people, animals or objects.[279] In addition, infrahumanization theory supports the hypothesis that subjects judge members of dehumanized outgroups as not experiencing complex social emotions to the same extent as members of the perceived ingroup.[280] These hypotheses have been confirmed by fMRI studies. Specifically, fMRI scans have demonstrated that

278. *See* Harris 2014, *supra* note 137, at 145–46; Harris & Fiske 2007, *supra* note 138, at 45–46.

279. *See* Harris & Fiske 2007, *supra* note 138, at 45–46.

280. *Id.*

there is reduced mPFC activation in subjects perceiving target actors who are members of dehumanized outgroups, including homeless people and drug addicts, who elicit disgust in a subject, as compared to mPFC activation in subjects perceiving actors who are members of perceived ingroups.[281] The mPFC is activated during social cognition tasks, which involve considering what is in another person's mind, and thus these studies indicate that there is reduced social cognition involved in the perception of dehumanized outgroups, suggesting a perception that the dehumanized outgroups do not experience complex social emotions.[282]

Furthermore, fMRI studies have demonstrated a negative correlation between the warmth with which subjects view a social target and the activation of the anterior insula, which is implicated in disgust, pain and punishment.[283] This finding suggests that increased insula activation, and thus increased feelings of disgust, may facilitate dehumanization, which involves perceiving someone with little warmth.[284] In addition, fMRI studies have shown that the more subjects perceive a social target actor as human, the less their anterior cingulate cortex (ACC) activates.[285] The ACC is involved in cognitive control or conflict resolution, and thus these observations suggest that greater conflict resolution in subjects perceiving less humanity in target actors results from the need to override the fact that the target actors are obviously human beings.[286] Altogether, these findings suggest that subjects may not perceive ICL norms which apply to interactions with other human beings as applying to dehumanized targets.[287]

Dehumanization may therefore reduce the expected cost of inflicting an ICL violation on a dehumanized target by inhibiting the subject actor's ability to empathize with the pain that a target individual might endure as a result of the subject's actions and limiting the subject actor's ability to determine that ICL norms govern the subject's interactions with the dehumanized target. As a result, dehumanization skews the subject actor's expected total value incurred in committing an ICL violation.

281. *Id.* at 49–50.
282. *Id.* at 45–46.
283. Harris & Fiske 2011, *supra* note 142, at 179.
284. *Id.*
285. *Id.* at 180.
286. *Id.*
287. *See id.* at 180–81.

Signaling ICL enforcement measures may therefore lack a deterrent effect in situations involving dehumanization because combatants may not perceive their actions as violative of ICL and may not determine the expected costs of ICL violations to outweigh the expected benefits. Empirical evidence from the Holocaust, Rwanda, and the former Yugoslavia confirms this association between the presence of dehumanization in an armed conflict scenario and the commission of ICL violations undeterred.

History is riddled with examples of dehumanization associated with the commission of ICL violations. Perhaps the most famous case is the dehumanization of the Jews, experienced throughout Nazi Germany. This dehumanization was epitomized by the publication of the antisemitic newspaper *Der Stürmer* by Julius Streicher, which reached a circulation of 600,000 by 1935,[288] likening Jews to rats, spiders, worms, and vermin.[289] After World War II, Streicher was tried by the International Military Tribunal (IMT) at Nuremburg, found guilty of crimes against humanity, for inciting the murder of Jews through his publications, and executed.[290] In its Judgment, the IMT observed that Streicher "termed the Jew a germ and a pest, not a human being, but a parasite, an enemy, an evil-doer, a disseminator of diseases who must be destroyed in the interest of mankind."[291] The IMT mentioned that Streicher "published a letter from one of *Der Stürmer*'s readers which compared Jews with swarms of locusts which must be exterminated completely."[292] The IMT then found that "[s]uch was the poison Streicher injected into the minds of thousands of Germans which caused them to follow the National Socialist policy of Jewish persecution and extermination."[293] The IMT concluded that "Streicher's incitement to murder and extermination at the time when Jews in the East were being killed under the most horrible conditions clearly constitutes persecution on political and racial grounds in connection with War Crimes, as defined by the

288. Trial of the Major War Criminals, Judgment of Julius Streicher, at 302 (Int'l Mil. Trib., Nuremberg, Oct. 1, 1946), https://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-I.pdf.

289. *See Caricatures from Der Stürmer: 1927-1932*, CALVIN UNIV.: GER. PROPAGANDA ARCHIVE, https://research.calvin.edu/german-propaganda-archive/sturm28.htm (last visited Jan. 22, 2020).

290. *See* Trial of the Major War Criminals, *supra* note 288288.

291. *Id.* at 302.

292. *Id.*

293. *Id.*

Charter, and constitutes a Crime against Humanity."[294] Thus, the IMT linked the dehumanization of the Jews propagated by Streicher with the commission of ICL violations against the group by the Nazis.

In a chilling parallel to the dehumanization experienced in Nazi Germany, in the 1990s, the world witnessed dehumanization associated with the commission of genocide and other ICL violations, committed at Srebrenica, Bosnia-Herzegovina, and throughout Rwanda. As introduced above,[295] RTLM, launched in July 1993 as a talk radio station, played a powerful role in communicating information to the Rwandan population, for whom radio was then the most important form of mass media.[296] The International Criminal Tribunal for Rwanda (ICTR) found that "[r]adio was the medium of mass communication with the broadest reach in Rwanda. Many people owned radios and listened to RTLM—at home, in bars, on the streets, and at the roadblocks."[297] RTLM also dispersed racist propaganda against the Tutsi minority in the country. In echoes of *Der Stürmer* during the Holocaust, by May 1994, RTLM broadcasts explicitly called for the extermination of Tutsis.[298] Further, from 1993 through 1994, RTLM broadcasts, conducted by individuals including Ferdinand Nahimana and Kantano Habimana, repeatedly referred to the Tutsi as *Inyenzi*, the Kinyarwanda word for cockroach.[299] The ICTR observed that "[t]he *Interahamwe* and other militia listened to RTLM and acted on the information that was broadcast by RTLM. RTLM actively encouraged them to kill, relentlessly sending the message that the Tutsi were the enemy and had to be eliminated once and for all."[300] Ultimately, the ICTR found Nahimana and Jean-Bosco Barayagwiza, the directors of the RTLM, guilty of genocide, among several other ICL violations, for their involvement in the RTLM broadcasts.[301] Thus, the ICTR recognized a link between the RTLM broadcasts and the

294. *Id.* at 304.

295. *See supra* Section IV.A.

296. *See* Elizabeth L. Paluck, *Reducing Intergroup Prejudice and Conflict Using the Media: A Field Experiment in Rwanda*, 96 J. PERSONALITY & SOC. PSYCHOL. 574, 575–76 (2009).

297. *Prosecutor v. Nahimana*, Case No. ICTR-99-52-T, Judgement and Sentence, ¶ 488 (Dec. 3, 2003).

298. *Id.* ¶ 483.

299. *See id.* ¶¶ 357, 481, 483.

300. *Id.* ¶ 488.

301. *Id.* ¶ 356.

commission of ICL violations in the country.

Similar to the situation in Rwanda, by the early 1990s, Slobodan Milošević, then-president of the Republic of Serbia, took control of media networks in the country, including Radio Television of Serbia (RTS). Milošević used the television station as a propaganda mouthpiece, whipping up anti-opposition sentiments amongst the Serb population and fueling support for the Yugoslav Wars.[302] As Payam Akhavan has noted, "[r]esurrecting the specter of the 'Turkish hordes' and the Serb defeat at the 1389 battle of Kosovo Polje, Milošević took his people on yet another odyssey of collective infantile regression."[303] Serbian propaganda thus reinforced the ethnic divisions present in the former Yugoslavia and the tribalistic perception of ingroups and outgroups, underlying dehumanization, during the Yugoslav Wars. On July 11, 1995, the consequences of these ethnic divisions were horrifically illustrated when the Bosnian Serb Army of Republika Srpska, under the command of Ratko Mladić, massacred over 8,000 Bosniak Muslim men and boys at Srebrenica.[304]

The presence of dehumanization in the former Yugoslavia, which may have facilitated the Srebrenica massacre, was demonstrated most thoroughly through the ICRC survey conducted in Bosnia-Herzegovina following the Yugoslav Wars.[305] In interviews conducted in Bosnia-Herzegovina, citizens stated the following, concerning the idea of "humanness" in the context of the rules governing armed conflict:

> It breaks human rules – and the Geneva Conventions. But if a man is not human, there are no conventions he would obey.
>
> . . .
>
> We might use those prisoners for exchange. It is not

302. *See Serbia State TV Apologises for Milosevic-Era Propaganda*, GUARDIAN (May 24, 2011, 8:57 AM), https://www.theguardian.com/world/2011/may/24/serbia-state-tv-apologises-propaganda.

303. Akhavan, *supra* note 133, at 11.

304. *See* Armin Rosen & Alex Lockie, *Here's the Awful Story of the Worst European Massacre since World War II*, BUS. INSIDER (July 11, 2019), https://www.businessinsider.com/ratko-mladic-srebrenica-massacre-bosnia-war-2017-11.

305. *See* ICRC Survey, *supra* note 147, at 17.

> human to kill.
>
> . . .
>
> My personal opinion is that we are not cattle, and a normal person wouldn't treat even cattle like that.
>
> I know prisoners should be treated as human beings and not as animals.
>
> . . .
>
> And it is not human to torture a human being.
>
> . . .
>
> Anyone on the opposite side is a potential enemy. Naturally, one has to act in accordance with this. There is the animal side in every one of us. Man is some kind of social animal, and it is up to everyone to fight for himself against it, to prevent himself from inflicting evil on any one, even in war.
>
> . . .
>
> [Killing a captured combatant who killed somebody close to you.] God forbid! I think that we are not on the level of such savages.[306]

These interviews suggest that, in the former Yugoslavia, there was a perception that it is not human to commit ICL violations, and ICL norms only apply to interactions with human beings. Likewise, these interviews indicate that the actual or perceived commission of ICL violations by enemy outgroups may have facilitated the dehumanization of the enemies in the former Yugoslavia.

The ICRC survey also reported that, as compared to respondents who did not support a side, those who supported a side in the Yugoslav conflict—constituting 75% of the respondents in Bosnia-Herzegovina—were over three times more likely to accept attacks on civilians who voluntarily provide

306. *Id.* at 5–6 (citations omitted).

food and shelter to the enemy, 13 percentage points more likely to accept depriving civilians of food, medicine or water in order to weaken the enemy, 22 percentage points more likely to accept attacks on the enemy in populated areas, and 27 percentage points more likely to accept the use of landmines near civilians in order to weaken the enemy.[307] Furthermore, 80% of respondents in Bosnia-Herzegovina had heard of the Geneva Conventions, of whom 89% roughly knew of their meaning.[308] These statistics suggest that it was the sidedness, as opposed to the lack of knowledge of International Humanitarian Law (IHL) or ICL, that promoted acceptance of what might constitute the commission of ICL violations. Considering the neuroscience research outlined above, these statistics support the conclusion that sidedness, involving the perception of the enemy population as an outgroup, may have facilitated the dehumanization of perceived enemies in the former Yugoslavia. The dehumanization of perceived enemies may have caused a failure to empathize with them and a failure to determine ICL norms apply to interactions with them, facilitating the commission of ICL violations in the former Yugoslavia, such as the Srebrenica massacre, undeterred.

Accordingly, the cases of Nazi Germany, Rwanda, and the former Yugoslavia provide empirical support for the conclusion that the dehumanization of perceived enemy outgroups, resulting from the fomentation of ethnic hatred, may inhibit combatants' abilities to view ICL norms as applying to perceived enemies and hinder their abilities to empathize with the suffering of the perceived outgroups. As a result, in situations involving dehumanization, signaling the prospect of ICL actions alone may lack a deterrent effect. Therefore, in such situations, the OTP should pursue investigations and prosecutions as expeditiously as possible, in order to incapacitate targets and prevent their future ICL violations, in the interests of justice.

2. Authority and Child Soldiers

Like dehumanization, the presence of an overpowering authority directing a combatant's conduct may skew the individual's cost-benefit calculation involved in deciding whether to commit an ICL violation. This effect may be

307. *Id.* at 17.
308. *Id.* at 23.

exacerbated if a combatant is a child soldier and if the individual is compelled to commit an ICL violation or face serious repercussions. These psychological factors may inhibit any escalatory or deterrent effect of signaling ICL enforcement actions, supporting the OTP's expeditious pursuit of investigations and prosecutions in order to promote the incapacitation of target individuals and prevent their future commission of ICL violations.

Citing social psychologist Stanley Milgram in his work on the deterrent effect of international prosecutions, David Wippman has noted that "[t]he natural human tendency to obey authority is compounded by military training, propaganda vilifying members of the opposite community, a belief in the justice of one's cause, and the threat of penalties, including execution, for failure to comply with orders."[309] When faced with the prospect of execution, the expected cost incurred if a combatant refuses to obey an order that calls for the commission of an ICL violation may outweigh any expected benefit of not being subject to ICL prosecutions. Consequently, the presence of an overpowering authority may nullify the deterrent or escalatory effect of ICL enforcement actions.

An overpowering authority's ability to facilitate the commission of ICL violations has been witnessed most acutely in the case of the LRA. As elaborated upon above,[310] the LRA has become infamous over the past three decades for its widespread violations of ICL, its recruitment of child soldiers, and its abductions of villagers. Moreover, the LRA likely used the ICC actions against its leadership as pretext for prolonging the peace process and the associated ceasefire, while it strengthened its forces in anticipation of its escalation of hostilities in 2008 and 2009.[311] Thus, empirical evidence has shown that ICC actions against the LRA may have had neither a deterrent nor an escalatory effect on the LRA's commission of ICL violations.

Interviews with abductees and former LRA combatants elucidate the fact that many times the LRA commanders presented two decisions to the individuals: to commit an ICL violation or to be killed.[312] These interviews accordingly confirm

309. Wippman, *supra* note 5, at 479.

310. *See supra* Section IV.B.i.

311. *See supra* Section IV.B.ii.a.

312. Elisabeth Schauer & Thomas Elbert, *The Psychological Impact of Child Soldiering*, *in* TRAUMA REHABILITATION AFTER WAR AND CONFLICT 311, 311–12 (Erin Martz ed., 2010).

why ICL enforcement actions have neither a deterrent nor an escalatory effect in cases involving an overpowering authority, including the situation of the LRA.

In their study of the psychological impact of child soldiering, psychologists Elisabeth Schauer and Thomas Elbert conducted diagnostic interviews of formerly abducted children and former child soldiers of the organized armed groups in Northern Uganda and the DRC.[313] Relevant excerpts from their interviews with former LRA child soldiers provide the following:

> Then he recruited two people, Okello and me and he said: 'Cut off their necks or I will kill you.' I was trembling with fear. I knew that those who don't kill will be killed themselves . . . . Everybody had a gun, except me . . . .The commander gave me the hapanga and told me to kill the man. Okello was given the woman . . . . I cut hard and through the bones in the back.[314]

> They told my uncles to lie down on their stomachs face down about three meters apart. They gave me a big stick and told me to kill them: 'hit them on the back of their heads.' I was starting to shake. I threw the stick away and said: 'I cannot do that. I have never killed anybody.' I was so frightened my body was gripped by fear. They picked the stick back up and handed it to me: 'You hit or you will be killed first.' There was no escape. The gun was pointed at me. I aimed and closed my eyes. I started hitting the back of my uncles' heads.[315]

Interviews conducted by Human Rights Watch have corroborated the fact that the LRA regularly compelled abductees to commit ICL violations.[316] For instance, a former LRA abductee stated the following:

> They put us in a circle around the boys, and then we each had to take turns hitting them on the head with a club. We passed the club between us hitting them one at a time until they were dead. You could not refuse or you would

313. *Id.*
314. *Id.* at 328.
315. *Id.* at 329.
316. *See The Christmas Massacres*, *supra* note 187, at 25–26.

be killed as well.[317]

These accounts render incredible the premise that either the combatants commanding the executions or the abductees performing the killings considered potential punishments, pursuant to ICL enforcement measures, when deciding whether to commit the described ICL violations. However, these interviews demonstrate that, even if the abductees considered the potential costs incurred by ICL enforcement measures, the expected gain of not imminently losing one's life by committing the ICL violation likely vastly outweighs any expected cost of possibly being detained at some point in the future. As a result, the presence of ICL enforcement actions may not make a measurable impact on the decision whether to commit an ICL violation. Thus, ICL enforcement actions likely do not have an escalatory or deterrent effect in such situations. Nonetheless, psychological research explains why factors unique to child psychology may exacerbate the effect of authority on decision-making, further explaining the lack of an observed deterrent or escalatory effect in the situation of the LRA.

Throughout its operation, the LRA gained notoriety for its widespread abduction and recruitment of children as soldiers. As one captured LRA combatant explained to Human Rights Watch, the LRA combatants "targeted the younger ones, those under 15, as they are much easier to teach and don't yet have fixed ideas."[318] Similarly, Schauer and Elbert found, through interviews with child soldiers and commanders, that a motivating factor for the recruitment of child soldiers is that they "are more malleable and adaptable, and hence easier to indoctrinate" and that "[t]hey stick more to authorities without questioning them."[319] Schauer and Elbert noted that "[m]oral and personality development is not yet completed in children, reducing their inhibition against performing crimes against humanity."[320] They also observed that children might be preferred by commanders because of their fearlessness, resulting from their "limited ability to assess risks, feelings of invulnerability, and short-sightedness."[321] Specifically, they noted that "[c]hildren have little knowledge and understanding

317. *Id.* at 26.
318. *Id.* at 20.
319. Schauer & Elbert, *supra* note 312, at 316.
320. *Id.*
321. *Id.*

of the mid- and long-term consequences of their actions."[322] Traumatic events regularly experienced as child soldiers may further limit the children's abilities to assess the risks associated with their actions, because such events "can hamper children's healthy development and their ability to function fully . . . ."[323]

Thus, the malleability of children, their reduced ability to question authority, their limited inhibition to committing ICL violations, their restricted ability to assess risks and understand the consequences of their actions which is worsened by traumatic experiences, exacerbate the effect that the presence of authority might have on child soldiers' commission of ICL violations. In these circumstances, it is unlikely that young combatants give a meaningful amount of weight to the prospect of suffering consequences through ICL enforcement measures, if they even have the ability to conduct reasoned cost-benefit analyses, when deciding to commit conduct that may amount to an ICL violation. These findings explain the apparent lack of either a deterrent or escalatory effect of the ICC's actions on the LRA. In such situations, the OTP should expeditiously pursue investigations and prosecutions of targets in order to promote their incapacitation and prevent their future commission of ICL violations.

3. Drug Use and PTSD

The use of drugs and the presence of post-traumatic stress disorder (PTSD) may also hamper combatants' abilities to rationally assess the expected costs and benefits of their actions, limiting the deterrent or escalatory effects that ICL enforcement measures have in such situations. Drug abuse by combatants has been recorded in major conflicts over the last century, from the Allies' widespread use of amphetamine during World War II[324] to the American military's use of amphetamines, steroids, and heroin in the Vietnam conflict.[325] Systematic drug abuse by

322. *Id*. at 319.

323. *Id*. at 314.

324. *See* Nicolas Rasmussen, *Medical Science and the Military: The Allies' Use of Amphetamine during World War II*, 42 J. INTERDISC. HIST. 205, 206 (2011).

325. *See* Lukasz Kamienski, *The Drugs that Built a Super Soldier*, ATLANTIC (Apr. 8, 2016), https://www.theatlantic.com/health/archive/2016/04/the-drugs-that-built-a-super-soldier/477183/; Alvin M. Shuster, *G.I. Heroin Addiction Epidemic in Vietnam*, N.Y. TIMES (May 16, 1971), https://www.nytimes.com/1971/05/16/archives/gi-heroin-addiction-epidemic-in-vietnam-gi-heroin-

combatants, including the use of crack cocaine, heroin, ephedrine, benzodiazepines, khat, and marijuana, has additionally been observed across Africa.[326] While used to reduce fatigue and to increase a combatant's courage,[327] amphetamine use is associated with increased aggression, criminal violence, and paranoia.[328] These effects have been specifically observed in the context of amphetamine use by combatants. For instance, Vietnam veterans reported that amphetamine use increased their aggression, and when the effects of the amphetamines wore off, "they were so irritated that they felt like shooting 'children in the streets.'"[329] Intake of the amphetamine-like khat drug by combatants in Somalia has also been linked to increased paranoia.[330] Further, in its judgment against the directors of RTLM for inciting the crime of genocide, the ICTR noted how "Kantano Habimana directly encouraged those guarding the trenches against the *Inyenzi* to take drugs," quoting Habimana as follows:

> The thing you gave me to smoke . . . it had a bad effect on me. I took three puffs. It is strong, very strong, but it appears to make you quite courageous. So guard the trench well so to prevent any cockroach [*Inyenzi*] passing there tomorrow. Smoke that little thing, and give them hell.[331]

By increasing aggressive impulses and paranoia, the use of drugs, such as amphetamines, may inhibit combatants' abilities to rationally weigh the expected costs and benefits of their actions, limiting any deterrent or escalatory effect that ICL enforcement actions may have on drug-abusing combatants.

Similar to the use of amphetamines, PTSD is associated with difficulty in controlling aggressive impulses.[332] PTSD is

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addiction-is.html.

326. Schauer & Elbert, *supra* note 312, at 332–33.

327. *See* Kamienski, *supra* note 325.

328. *See* Mary-Lynn Brecht & Diane Herbeck, *Methamphetamine Use and Violent Behavior: User Perceptions and Predictors*, 43 J. DRUG ISSUES 468 (2013).

329. Kamienski, *supra* note 325.

330. Schauer & Elbert, *supra* note 312, at 333.

331. *Prosecutor v. Nahimana*, Case No. ICTR-99-52-T, Judgement and Sentence, ¶ 433 (emphasis in original).

332. Schauer & Elbert, *supra* note 312, at 335 ("Research shows that former child soldiers have difficulties in controlling aggressive impulses and have little

also linked to decreased cognitive function among child soldiers, including the inability to concentrate and memory loss.[333] As in the case of drug use, increased aggressive impulses and reduced cognitive function resulting from PTSD may inhibit combatants' abilities to conduct reasoned cost-benefit analyses, minimizing any deterrent or escalatory effect that ICL enforcement actions have on the combatants. Accordingly, in conflict contexts in which there is widespread drug use and the presence of PTSD, the OTP should expeditiously pursue investigations and prosecutions in the interests of justice, as merely signaling the prospect of ICL enforcement measures will likely lack a deterrent effect, and pursuing investigations and prosecutions may lack a causal link to any escalation in ICL violations. Nonetheless, given the multiplicity and complexity of the psychological factors involved in conflict contexts globally, and their varying effects on combatants' willingness to commit ICL violations, more research must be done to investigate these effects.

V. CONCLUSION

In light of the purpose of the Rome Statute, the ICC must hold the prevention of future ICL violations as one of its principal objectives. When determining whether to pursue prosecutions, the ICC must consider whether its ICL enforcement measures would instigate an escalation in hostilities, and an associated increase in ICL violations, or would prevent future atrocities. To support this analysis, the ICC must take a nuanced approach to international prosecutions. Reviewing the empirical evidence drawn from the experiences in ICC situations over the past two decades, this article has distilled a number of factors the ICC should consider when implementing actions under the Rome Statute. First, the case of the demobilization process in Colombia offers a prime example of a situation in which the OTP should defer to domestic prosecutions, under the positive complementarity analysis, because the deferral promoted accountability for ICL violations, while leading to the prevention of atrocities in the country. In determining whether to defer an investigation or prosecution, considering the interests of justice and victims, the ICC and

skills for handling life without violence.").

333. *Id.* at 337–38.

UNSC must take into account the timing of ICC actions, the power dynamics, and the psychological factors involved in a situation under review. Specifically, if conflict is at its earliest stages, signaling the prospect of ICL enforcement measures may de-escalate hostilities, thus serving the interests of justice. If a situation is in the midst of conflict and the individual subject to ICC prosecution is relatively powerful, ICC actions may cause a short-term escalation in hostilities and ICL violations. Nonetheless, ICC prosecutions may lead to the stigmatization of defendants, their incapacitation, and thus the long-term prevention of their ICL violations. Accordingly, pursuing prosecutions may serve the interests of justice, despite causing a short-term escalation in ICL violations by a target defendant's armed group. Finally, psychological factors, including dehumanization, the presence of an overpowering authority and child soldiers, and the use of drugs and PTSD may skew or inhibit combatants' rational cost-benefit analyses, upon which criminal deterrence and escalation theories depend. The presence of these psychological factors in conflict situations therefore supports the OTP's expeditious prosecution of target combatants, in order to promote the incapacitation of the actors and the prevention of their future ICL violations. While this article hopefully serves as one more step towards elucidating the effects that ICL enforcement measures have in different contexts, more empirical research must be done in this area, to enhance the predictability of the responses to ICC actions.