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Unequal Enforcement of the Law: Targeting Aggressors for Mass Atrocity Prosecutions

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It is a central tenet of the laws of war that they apply equally to all parties to a conflict. For this reason, a party that illegally launches a war benefits from all the same rights as a party that must defend against the illegal aggression. Countless philosophers have shown that this so-called equal application doctrine is morally indefensible and that defenders should have more rights and fewer responsibilities than aggressors. The equal application doctrine retains the support of legal scholars, however, because they reasonably fear that applying different rules to different warring parties will substantially reduce overall compliance with the international humanitarian law system as a whole. My Article seeks to bridge these divides. It does so by shifting focus from the application of international humanitarian law rules to the enforcement of these rules. Although a vast body of scholarship has centered on the equal application doctrine, none of it considers the way in which that doctrine intersects with post-conflict enforcement of international humanitarian law. On the one hand, such neglect is unsurprising because, historically, there was no post-conflict enforcement of international humanitarian law violations. However, in the last 25 years, a series of international criminal tribunals have been established to prosecute large-scale violations of international humanitarian law, among other crimes. The creation of these tribunals provides a powerful opportunity to reconceptualize and refashion the equal application doctrine. Specifically, this Article advocates unequally enforcing international humanitarian law as a means of bridging the divide between the moral imperatives that excoriate the equal application doctrine and the practical imperatives that maintain it.

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“Any branch of law whose prescriptions go too far beyond the common notions of the society it purports to regulate runs the risk of becoming alien to it and therefore neglected by it.”¹

“The dualism of *jus ad bellum* and *jus in bello* is at the heart of all that is most problematic in the moral reality of war.”²

INTRODUCTION

In 2007, in a somewhat obscure case before a somewhat obscure international criminal tribunal, a little-known judge dissented to the defendants' convictions on grounds considered heretical in international law circles. The case was *Prosecutor v. Fofana and Kondewa*.³ The tribunal was the Special Court for Sierra Leone (SCSL). And the judge was Sierra Leonean jurist Bankole Thompson. Judge Thompson's heresy was his suggestion that, although the defendants had engaged in the criminal acts charged in the indictment, they nonetheless should be acquitted because they committed the crimes in order to repress a rebellion and

1. GEOFFREY BEST, HUMANITY IN WARFARE 22 (1980).
 2. MICHAEL WALZER, JUST AND UNJUST WARS 21 (5th ed. 1977).
 3. The case is more popularly known as the “CDF” case.

restore the democratically elected government to power.⁴ Or as one commentator put it, Judge Thompson maintained that the defendants “should be acquitted of committing atrocities because they were on the right side.”⁵ Judge Thompson’s suggestion was greeted with widespread scholarly criticism,⁶ largely because it contravened a bedrock principle of international humanitarian law (IHL): the equality of combatants—a doctrine that provides that combatants from both sides to an armed conflict must comply with the same rules governing the conduct of the armed conflict.⁷

The equality-of-combatants doctrine is a necessary corollary of another foundational principle of IHL: the strict separation between the *jus ad bellum*, which is the law governing the initiation of the use of force, and the *jus in bello*, which is the law governing the conduct of hostilities.⁸ Although both bodies of law govern aspects of warfare, they are considered to operate in completely distinct spheres.⁹ Therefore, even though the *jus ad bellum* might denominate one party to be in violation of the laws governing the initiation of the use of force, that violation has no bearing on the application of the laws governing the conduct of warfare. For this

4. Prosecutor v. Fofana, Case No. SCSL-04-14J, Separate Concurring and Partially Dissenting Opinion of Hon. Justice Thompson, ¶¶ 62–97 (Aug. 2, 2007).

5. William A. Schabas, *Prosecutorial Discretion v. Judicial Activism at the International Criminal Court*, 6 J. INT’L CRIM. JUST. 731, 750 (2008).

6. *Id.* (referring to it as a “bizarre dissent”); Milan Marković, *International Criminal Trials and the Disqualification of Judges on the Basis of Nationality*, 13 WASH. U. GLOBAL L. REV. 1, 35–38 (2014); Valerie Oosterveld & Andrea Marlowe, *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara & Santigie Borbor Kanu. Case No. SCSL-04-16-T. at <http://www.sc-sl.org/afrc.html>. Special Court for Sierra Leone, Trial Chamber II, June 20, 2007. Prosecutor v. Moinina Fofana & Allieu Kondewa. Case No. SCSL-04-14-T. at <http://www.sc-sl.org/cdf.html>. Special Court for Sierra Leone, Trial Chamber I, August 2, 2007*, 101 AM. J. INT’L L. 848, 856 (2007).

7. This principle is sometimes referred to as the “symmetry principle.” See David Rodin, *The Moral Inequality of Soldiers: Why Jus in Bello Asymmetry is Half Right*, in JUST AND UNJUST WARRIORS: THE MORAL AND LEGAL STATUS OF SOLDIERS 44 (David Rodin & Henry Shue eds., 2008). As will be discussed below, the principle per se applies only in international armed conflicts, and the war in Sierra Leone has been held to be a noninternational armed conflict. Prosecutor v. Sesay, Case No. SCSL-04-15-T, Judgement, ¶ 977 (Mar. 2, 2009), <http://www.rscsl.org/Documents/Decisions/RUF/1234/SCSL-04-15-T-1234-searchable.pdf>. But Judge Thompson’s dissent, and even parts of the Trial Chamber majority’s sentencing opinion, have nonetheless been criticized on the basis of this principle or its analogue.

8. This principle is sometimes referred to as the “independence principle.” Rodin, *supra* note 7, at 44. David Rodin points out that the symmetry principle and the independence principle, though related, are not identical. *Id.* For instance, even if the *jus in bello* and *jus ad bellum* were not independent, the *jus in bello* norms could apply symmetrically in a conflict if both sides were fighting an unjust war. *Id.* Conversely, *jus in bello* rights might be applied asymmetrically but not because the *jus in bello* is dependent on *jus ad bellum* status. *Id.*

9. J.H.H. Weiler & Abby Deshman, *Far Be It from Thee to Slay the Righteous with the Wicked: An Historical and Historiographical Sketch of the Bellicose Debate Concerning the Distinction between Jus ad Bellum and Jus in Bello*, 24 EUROPEAN J. INT’L L. 25, 26 (2013) (noting “the mainstream among moral thinkers and legal theorists has held fast to a complete separation between the *jus in bello* and *jus ad bellum*”).

reason, states illegally initiating a war benefit from all the rights provided by the *jus in bello*, while states defending against the unlawful use of force must comply with all the same rules to which aggressor states are subject.¹⁰ Due to the strict separation between the two bodies of law, a state may be understood to violate the *jus ad bellum* by launching an illegal war, while complying with all relevant *jus in bello* rules during the conduct of that war. Likewise, a state defending against an illegal war might be in compliance with *jus ad bellum* principles but violate *jus in bello* doctrines in the course of its self-defense.

This separation between the *jus ad bellum* and the *jus in bello* has garnered many names.¹¹ This Article will adopt Christopher Greenwood's and Adam Roberts's terminology and call it the "equal application doctrine" or the "equality doctrine."¹² But whatever its name, the doctrine is unquestionably counterintuitive. After all, why should the soldiers of a state that is launching an illegal, aggressive war benefit from all the same rights as the army of the state that is forced to defend against the illegal aggression?

Legal scholars have spilled considerable ink in answering that question.¹³ Some scholars point to case law or treaties that adopt the equal application doctrine as governing law.¹⁴ Others appeal to policy arguments predicated on human rights or criminal law principles. And still others invoke the structure and features of IHL itself in defense of the doctrine.¹⁵ But although legal scholars start from divergent points, they inevitably reach the same conclusion; namely, that the equal application doctrine reduces the harm caused by warfare. Specifically, commentators maintain that if the equal application doctrine did not exist, then soldiers would be dramatically less likely to comply with the *jus in bello* rules.¹⁶ The equal application doctrine, then, is crucial for the maintenance of the IHL system as we know it.

Although legal scholars take many paths to this conclusion, perhaps the most common one begins from the premise that compliance with the laws of war requires reciprocity. That is, Army A will be willing to comply with rules requiring them to treat Army B's civilians and captured soldiers humanely only because the same rules require Army B to treat Army A's civilians and captured soldiers humanely. If, however, the application of those rules were predicated on the legality

10. Adam Roberts, *The Equal Application of the Laws of War: A Principle Under Pressure*, 90 INT'L REV. RED CROSS 931, 932 (2008).

11. Some scholars describe it as "the principle of autonomy of *jus in bello* with regard to *jus ad bellum*," François Bugnion, *Jus ad Bellum, Jus in Bello and Non-International Armed Conflicts*, 6 Y.B. INT'L HUM. L. 167, 168 (2003), whereas others call it the "dualistic axiom." Robert D. Sloane, *The Cost of Conflation: Preserving the Dualism of Jus ad Bellum and Jus in Bello in the Contemporary Law of War*, 34 YALE J. INT'L L. 47, 56–61 (2009).

12. Christopher Greenwood, *The Relationship Between Jus Ad Bellum and Jus in Bello*, 9 REV. INT'L STUD. 221, 225 (1983); Roberts, *supra* note 10, at 931.

13. See Weiler & Dushman, *supra* note 9 (canvassing scholarship on the equal application doctrine).

14. See *infra* notes 51–57 and accompanying text.

15. See *infra* notes 59–80 and accompanying text.

16. See *infra* notes 70–74 and accompanying text.

of a state's use of force, then the reciprocity that currently drives compliance with IHL rules would no longer exist. The soldiers of the defending state would not be obliged to comply with *jus in bello* rules, and the soldiers of the aggressor state, though still legally obliged to comply, would be unlikely to do so because their own soldiers and civilians would gain no benefit from their compliance. As Yoram Dinstein put it: "No State (least of all a State which, through its aggression, has already perpetrated the supreme crime against international law) will abide by the strictures of the *jus in bello* if it knew that it was not going to derive reciprocal benefits from the application of the norms."¹⁷ The inevitable results would be the widespread flouting of *jus in bello* restrictions and the concomitant dramatic increase in the brutality of warfare.

Although legal scholars uniformly defend the equal application doctrine, scholars from other disciplines have been less supportive. Certainly, political philosopher Michael Walzer defended the doctrine in his iconic 1977 book, *Just and Unjust Wars*. However, in recent times, most philosophy scholars have deemed the doctrine morally indefensible.¹⁸ Moreover, at the same time that scholars of various disciplines support or critique the equal application doctrine in books and articles, diplomats and states engage with it in positive law and on the battlefield, and we find similar tensions in these realms. When it comes to international law doctrine, the equality principle is firmly established. It appears in universally ratified treaties, such as the 1949 Geneva Conventions,¹⁹ in almost universally ratified treaties, such as Protocol I to the 1949 Geneva Conventions,²⁰ and in oft-cited post-World War II case law.²¹ As for states, they generally accept the principle as a matter of law and proclaim their adherence thereto, but their practice sometimes suggests a less-than-firm commitment. In particular, an examination of recent conflicts indicates that states' interpretations of certain foundational *jus in bello* rules are sometimes contingent on the justness of the states' cause during the conflict.²² Said differently, the more that states are convinced that their cause is just, the more they are willing to violate *jus in bello* rules in their effort to prevail.

The foregoing analysis suggests that the equal application doctrine creates a series of divides: at a minimum, it divides legal reasoning from moral reasoning, and it divides legal doctrine from state practice. This Article will flesh out and analyze these divides in more detail below, but we can summarize this Article's conclusions by saying that they stem largely from the divide between principle and

17. YORAM DINSTEIN, *WAR, AGGRESSION, AND SELF-DEFENCE* 157 (2005).

18. See *infra* text accompanying notes 87–101.

19. The rule is understood to appear, for instance, in Common Article 1 of the 1949 Geneva Conventions, which provides that the High Contracting parties "undertake to respect and to ensure respect for the present Convention *in all circumstances*." Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 1, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (emphasis added).

20. See Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts, Preamble, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I].

21. See *infra* notes 56–60 and accompanying text.

22. See *infra* notes 102–15 and accompanying text.

practice. At a basic moral level, we know that the aggressive and genocidal goals of Nazi soldiers should have been profoundly relevant to the way in which the law of war regulated their conduct. But we likewise recognize that it is counterproductive to insist on abstract moral principles when the application of those principles—in the real and flawed world in which we live—will lead to more suffering. Christopher Kutz puts it well when he acknowledges the equality principle to be “compelling” but notes that it “leave[s] a bad taste in the philosophical mouth . . . [because] it elevates function over reason, means over ends, and creates an entrenched normative structure that is fundamentally incoherent with the structures that govern our lives in the realm of private violence.”²³ Put differently, the equality principle is founded not on what is right but on what is possible; as a consequence, it highlights in stark relief the yawning divide between the world as it should be and the world as it is.

My Article seeks to bridge these divides. It does so by shifting focus from the application of IHL rules to the post-conflict enforcement of those rules. Although a vast quantity of scholarship has centered on the equal application doctrine, none of that scholarship considers the way in which that doctrine intersects with post-conflict enforcement of IHL. On the one hand, such neglect should come as no surprise given that, historically, there was no post-conflict enforcement of IHL rules.²⁴ Lack of adequate enforcement continues to plague both international law in general and IHL in particular. However, in the last 25 years, a series of international criminal tribunals have been created to prosecute large-scale violations of IHL, among other crimes. The existence of these tribunals creates a powerful opportunity to reconceptualize and refashion the equal application doctrine. In particular, this Article argues that allocating international criminal prosecutions at least partially on the basis of aggressor status would help to bridge the divide between the moral imperatives that excoriate the equal application doctrine and the practical imperatives that maintain it.

This Article is organized as follows: Part I describes the equal application doctrine and the scholarship and practice it has generated. It shows that the principle has been subject to widespread theoretical criticism but persists because we expect that its abandonment would damage, if not destroy, the IHL regulatory system. Part II acknowledges the practical necessity of applying *jus in bello* rules equally across all groups, but it suggests that that equal application need not extend into the realm of enforcement. That is, Part II contends that the enforcement of IHL violations should be allocated *unequally* across different groups of combatants. Such an unequal allocation of enforcement, I argue, will ameliorate the counterintuitive and

23. Christopher Kutz, *Fearful Symmetry*, in JUST AND UNJUST WARRIORS: THE MORAL AND LEGAL STATUS OF SOLDIERS 69, 70 (David Rodin & Henry Shue eds., 2008).

24. See, e.g., John Dugard, *Bridging the Gap Between Human Rights and Humanitarian Law: The Punishment of Offenders*, 324 INT'L REV. RED CROSS 445, 453 (1998) (noting that “national courts have a poor record when it comes to the prosecution of war crimes and other international crimes”); Rod Rastan, *Comment on Victor’s Justice and the Viability of Ex Ante Standards*, 43 J. MARSHALL L. REV. 569, 589 (2010) (“Victims may number in the tens or hundreds of thousands or, in the case of displacement, millions In the face of large-scale violence, by contrast, it remains an uncomfortable reality that not every act of killing, rape, or torture will be investigated or face judicial sanction, even where evidence is readily available and perpetrators identifiable.”).

morally distasteful aspects of the equal application doctrine without giving rise to the deleterious consequences that prevent us from abandoning the doctrine altogether.

My proposal would impact the international criminal tribunals currently charged with enforcing IHL violations, so Part III considers how it would alter and improve their existing practice. In Part III, we learn that although neither past nor present international tribunals have expressly considered aggressor status when determining whom to prosecute, their statutes and precedents easily allow them to do so. In addition, Part III invokes philosophical literature, psychology research, domestic criminal law practice, and the experiences of the international criminal tribunals themselves to argue that allocating prosecutions, at least in part on the basis of aggressor status, better aligns the tribunals' practices with fundamental moral intuitions and, as a consequence, enhances the tribunals' ability to advance many of their core penological goals.

I. THE EQUALITY PRINCIPLE: DOCTRINE, RATIONALE, AND SCHOLARLY DIVISIONS

As a historical matter, the equal application doctrine is of relatively recent vintage because it is only in the last century that international law has governed both the initiation of warfare and its conduct. That is, for most of history, commentators had no reason to consider the relationship (or need for separation) between the *jus ad bellum* and the *jus in bello* because, for most of history, only one or the other of those bodies of law existed.

The *jus ad bellum* has a much lengthier history in that it derives from just war notions that originated in the Roman Empire and evolved over many subsequent centuries.²⁵ During these many centuries, scholars and commentators refined and elaborated the principles governing the initiation of warfare, but they paid scant attention to the conduct of hostilities once the war had begun.²⁶ The Romans, for instance, imposed no restraints on the means and methods of warfare.²⁷ Scholars in later centuries did occasionally condemn the infliction of unnecessary suffering on civilians during warfare,²⁸ and norms of chivalry generated certain narrow restrictions on certain kinds of weapons in conflicts between certain sets of combatants.²⁹ However, these notions were underdeveloped, and to the extent they

25. DINSTEN, *supra* note 17, at 65.

26. See Sloane, *supra* note 11, at 50; Christopher Greenwood, *Self-Defence and the Conduct of International Armed Conflict*, in INTERNATIONAL LAW AT A TIME OF PERPLEXITY: ESSAYS IN HONOUR OF SHABTAI ROSENNE 273, 274 (Yoram Dinstein & Mala Tabory eds., 1989) (noting that the traditional just war theory imposed no limits on the amount of force that could be used in a conflict) [hereinafter Greenwood, *Self-Defence*].

27. Judith Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT'L L. 391, 395 (1993) (“[O]nce the cause was just, any means to achieve the end was permissible.”); Sloane, *supra* note 11, at 57.

28. John Finnis, *The Ethics of War and Peace in the Catholic Natural Law Tradition*, in CHRISTIAN POLITICAL ETHICS 202–03 (John Coleman ed., 2007) (describing St. Thomas Aquinas’s condemnation of willful killing of civilians).

29. Sloane, *supra* note 11, at 58–59.

existed at all, they were viewed as inextricably linked to the just war principles that governed the conflict's initiation.³⁰ For instance, St. Thomas Aquinas believed that “the justness of the resort to war determined to a large extent the limits on the conduct of war.”³¹

It was not until the nineteenth century that states began to develop a body of rules to apply to the conduct of warfare.³² Seeking to reduce the barbarity that so often accompanies warfare, states concluded a series of treaties that restricted their actions in a variety of war-related activities—from their selection of weapons,³³ to their targeting decisions,³⁴ to their treatment of the victims of warfare.³⁵ However, by the time that those treaties were concluded, *jus ad bellum* norms were no longer considered a part of international law. Indeed, by the nineteenth century, just war theories no longer held sway, as positivism had replaced both natural law and theology as the foundation for the laws of nations.³⁶ By then, secular international law had developed to govern numerous aspects of international relations, but it was not understood to regulate the use of force.³⁷ Rather, war-making was considered an attribute of sovereignty³⁸ that could be employed as a legal instrument of national policy.³⁹ Thus, the initiation of warfare was understood to be a legal activity.⁴⁰ As a

30. See Gregory M. Reichberg, *Just War and Regular War: Competing Paradigms*, in *JUST AND UNJUST WARRIORS: THE MORAL AND LEGAL STATUS OF SOLDIERS* 193, 193 (David Rodin & Henry Shue eds., 2008).

31. ROBERT KOLB & RICHARD HYDE, *AN INTRODUCTION TO THE INTERNATIONAL LAW OF ARMED CONFLICTS* 22 (2008); Gardam, *supra* note 27, at 395.

32. A few of these rules had ancient antecedents. See *2 Kings* 6:21–23; *THE LAW CODE OF MANU* 112–13 (Patrick Olivelle ed. & trans., 2004); LESLIE C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 20–23 (2d ed. 2001).

33. See, e.g., Declaration Prohibiting Launching of Projectiles and Explosives from Balloons (Hague, IV), July 29, 1899, 32 Stat. 1839.

34. See, e.g., Convention No. IV Respecting the Laws and Customs of War on Land and its Annex, Regulation, Concerning the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277.

35. See, e.g., Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Aug. 22, 1864, 22 Stat. 940; Convention Relating to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021.

36. Sloane, *supra* note 11, at 61–62.

37. See, e.g., ROBERT W. TUCKER, *THE LAW OF WAR AND NEUTRALITY AT SEA* 3 (1955) (“According to the generally accepted theory, the act of resorting to war was interpreted, save in exceptional circumstances, as being neither legal nor illegal, but simply a fact, situation or event which occurred periodically in the relations among states.”).

38. François Bugnion, *Guerre juste, guerre d'agression et droit international humanitaire*, 84 INT'L REV. RED CROSS 523, 527 (Sept. 2002), translated in INT'L COMMITTEE RED CROSS 7 (Sept. 30, 2002), <https://www.icrc.org/en/doc/assets/files/other/irrc-847-2002-bugnion-ang.pdf>.

39. Gardam, *supra* note 27, at 396; Yoram Dinstein, *Comments on War*, 27 HARV. J. L. & PUB. POL'Y 877, 878 (2004) [hereinafter Dinstein, *Comments on War*].

40. Hersch Lauterpacht, *The Limits of the Operation of the Law of War*, 30 BRIT. Y.B. INT'L L. 206, 210 (1953) (“For under the law then in force every war was, legally, just; every war was legal.”); see also Krzysztof Skubiszewski, *Use of Force by States, Collective*

consequence, just as in the preceding centuries, there was no basis for evaluating the relationship between the *jus in bello* and the *jus ad bellum* because, again, only one body of law—at this point, the *jus in bello*—existed.

By the mid-twentieth century, however, international law had come to regulate both the *jus in bello* and the *jus ad bellum*.⁴¹ *Jus ad bellum* regulation began to re-emerge during the early decades of the twentieth century⁴² and culminated in the United Nations (UN) Charter, which prohibits the use of force except when it is used in self-defense or as a means of collective security authorized by the UN Security Council.⁴³ It was at this point that serious questions arose regarding the relationship between these two legal regimes: the rules governing the initiation of warfare and the rules governing the conduct of warfare. Certainly, when the initiation of an armed conflict was not governed by international law then it was understood that the laws governing the conduct of warfare applied equally to both sides of the conflict.⁴⁴ Indeed, in those days, there would have been no basis for the *jus in bello* rules *not* to apply equally because both sides to the conflict stood on an equal legal footing. Once international law came to restrict the use of force, however, then an argument could be made that the laws governing the conduct of warfare should operate differentially depending on whether the state in question had launched an illegal war or was, by contrast, defending against illegal warfare.⁴⁵

Security, Law of War and Neutrality, in *MANUAL OF PUBLIC INTERNATIONAL LAW* 739, 741–42 (Max Sørensen ed., 1968).

41. See Robert Kolb, *Origin of the Twin Terms Jus Ad Bellum/Jus in Bello*, 37 *INT’L REV. RED CROSS* 553, 558 (1997).

42. Before the conclusion of the UN Charter, the Kellogg-Briand Pact restricted the use of force. Its signatories condemned “recourse to war for the solution of international controversies” and renounced it “as an instrument of national policy.” Kellogg-Briand Pact, art. 1, Aug. 27, 1928, 46 Stat. 2343; *League of Nations Treaty Series*, Vol. 94, at 58–64.

43. U.N. Charter arts. 2, ¶ 4, 24, ¶ 1, 39, 51.

44. See, e.g., Weiler & Dushman, *supra* note 9, at 28.

45. Denise Bindschedler-Robert, *A Reconsideration of the Law of Armed Conflicts*, in *CONFERENCE ON CONTEMPORARY PROBLEMS OF THE LAWS OF ARMED CONFLICTS* 3, 9 (1971) (“The prohibition on the use of force in the Charter of the United Nations has sometimes led to the conclusion that . . . the aggressor would have no [*jus in bello*] rights, while whoever act[ed] in self-defense would have unlimited rights.”).

And that argument was made.⁴⁶ Some scholars, invoking the legal maxim *ex injuria jus non oritur*,⁴⁷ maintained that states that initiated illegal wars should not gain the benefits of the *jus in bello* protections.⁴⁸ Others suggested that because most of the *jus in bello* rules predated the use-of-force restrictions, then those restrictions rendered the *jus in bello* rules superfluous.⁴⁹ That is, if the initiation of armed conflict is illegal in virtually all circumstances, then we have little reason to consider the laws governing warfare. Indeed, some commentators worried that any attention paid to *jus in bello* rules would necessarily—and inappropriately—detract attention from the new *jus ad bellum* restrictions that were designed to prevent wars.⁵⁰ As one scholar put that view: “It is immoral to admit the existence of the law of armed conflicts because this confers a certain legitimacy upon war and detracts from the only real task, its abolition.”⁵¹ Under the sway of this theory, the International Law Commission went so far as to refuse to engage in a codification of the laws of war because “public opinion might interpret its action as showing lack of confidence in the efficiency of the means at the disposal of the United Nations for maintaining peace.”⁵²

Although these arguments have surface appeal, in the end, legal scholars roundly rejected calls for a discriminatory application of the *jus in bello*. Some

46. IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 406 (1963) (“As the illegality and, indeed, criminality of aggressive war became established, some writers began to suggest that the laws of war did not apply in favour of an aggressor, or that at least there should be some discrimination in the application of the laws of war.”); Lauterpacht, *supra* note 40, at 206 (“Others have advanced the opinion that, [in the case of an aggressive war], the accepted rules of war operate only at the option of the States resisting aggression; that such States may modify them at will; and that the aggressor State . . . cannot derive from their initial illegality in any legal rights, including the rights usually associated with the conduct of war.”); Weiler & Deshman, *supra* note 9, at 32 (“The International Community did not have to wait long until the UN Charter provided the sound legal footing necessary to argue seriously that *jus in bello* rights and obligations had been fundamentally altered.”).

47. Translated as “the law does not arise from injustice.” UNITED NATIONS, *Ex injuria jus non oritur*, UN.org: UNTERM, https://unterm.un.org/UNTERM/Display/record/UNHQ/ex_injuria_jus_non_oritur/C40ED8CCD326321A85256A0000075D40 (last visited Feb. 22, 2019).

48. See, e.g., DINSTEIN, *supra* note 17, at 156; Lauterpacht, *supra* note 40, at 212; Jasmine Moussa, *Can Jus ad Bellum Override Jus in Bello? Reaffirming the Separation of the Two Bodies of Law*, 90 INT’L REV. RED CROSS 963, 966 (2008); Marco Sassóli, *Ius ad Bellum and Ius in Bello—The Separation Between the Legality of the Use of Force and Humanitarian Rules to be Respected in Warfare: Crucial or Outdated?*, in INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING THE FAULTLINES 241, 245 (Michael Schmitt & Jelena Pegic eds., 2007).

49. Moussa, *supra* note 48, at 965.

50. Lauterpacht, *supra* note 40, at 206; Greenwood, *supra* note 12, at 221; Sassóli, *supra* note 48, at 245.

51. Bindschedler-Robert, *supra* note 45, at 10.

52. Sassóli, *supra* note 48, at 245.

commentators sought to refute these arguments on their own terms,⁵³ but most invoked independent rationales to defend the equal application doctrine. Indeed, only a few years after the adoption of the UN Charter, Hersch Lauterpacht published an influential article advancing many of the most compelling justifications for the doctrine.⁵⁴ These arguments have been repeated, expanded, and elaborated upon in the succeeding decades. Some arguments appeal to preexisting legal doctrine; others appeal to the purposes animating the law; and still others invoke broad, systemic policy justifications in support of the equal application doctrine.

The doctrinal arguments tend to center on *jus in bello* treaty provisions and post-World War II case law. For instance, a variety of post-World War II precedents rejected efforts to apply *jus in bello* rules differentially on the basis of *jus ad bellum* status.⁵⁵ One such precedent is the *Hostages Trial*, conducted before the U.S. Military Tribunal at Nuremberg. There, the prosecution had argued that, because Germany had waged an illegal war against Greece and Yugoslavia, it was not entitled to invoke the rules of warfare relating to belligerent occupation.⁵⁶ Similarly, the prosecution contended that the inhabitants of the occupied territories were entitled to resist the occupation forces despite the fact that the laws of war would otherwise prohibit such resistance.⁵⁷ The Tribunal rejected the prosecutor's contention. Although it assumed the illegality of Germany's war for the sake of argument, the Tribunal nonetheless concluded:

[I]t does not follow that every act by the German occupation forces . . . is a crime or that any and every act undertaken by the population of the occupied country against the German occupation forces thereby became legitimate defense [I]nternational law makes no distinction between a lawful and unlawful occupant in dealing with the respective duties of occupant and population in

53. For instance, Robert Tucker acknowledged that, if a state wages an unlawful war, the principle *ex injuria jus non oritur* may prevent the state from legitimizing the territorial gains or other concrete benefits it obtained through its illegal use of force. He further stated:

But these considerations are quite independent of the assertion, which is here considered as unwarranted, that the same principle *ex injuria jus non oritur* must be interpreted further to mean that no legal consequence may result from the illegal act or that *no* legal rights of the wrongdoer may come into operation as a result of the act, legal rights specifically provided by law for just this very contingency. (Emphasis in original).

TUCKER, *supra* note 37, at 8–9.

54. Lauterpacht, *supra* note 40.

55. *But see* Michael Mandel, *Aggressors' Rights: The Doctrine of 'Equality Between Belligerents' and the Legacy of Nuremberg*, 24 LEIDEN J. INT'L L. 627, 629 (2011) (arguing, against "the conventional wisdom," that the legal equality of belligerents principle "is not supported by the jurisprudence of the Nuremberg era or developments since").

56. U.S. v. List (The Hostage Case), 11 Trials of War Criminals Before the Nuernberg Military Tribunals 759, 852 (U.S. Gov't Printing Office 1950), https://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-XI.pdf.

57. *See id.*

occupied territory. . . . Whether the invasion was lawful or criminal is not an important factor in the consideration of this subject.⁵⁸

The Tribunal went on to quote Oppenheim, who stated:

Whatever may be the cause of a war that has broken out, and whether or not the cause be a so-called just cause, the same rules of international law are valid as to what must not be done, may be done, and must be done by the belligerents This is so, even if the declaration of war is *ipso facto* a violation of international law.⁵⁹

Other World War II tribunals were equally resistant to arguments that made the application of the *jus in bello* rules in any way contingent upon the warring parties' *jus ad bellum* stance.⁶⁰

It is not only case law but also a variety of *jus in bello* treaty provisions that support the equal application doctrine. Common Article 1 of the 1949 Geneva Conventions, for instance, obligates states parties to adhere to the Conventions' provisions "in all circumstances."⁶¹ The Commentary to the Geneva Conventions explains that the words "in all circumstances" mean that "the application of the Convention does not depend on the character of the conflict. Whether a war is 'just' or 'unjust,' whether it is a war of aggression or of resistance to aggression, the protection and care due to the wounded and sick are in no way affected."⁶² Approximately 30 years later, the drafters of Protocol I to the 1949 Geneva Conventions reaffirmed the equal application doctrine even more clearly in the Protocol's Preamble. It provides that the provisions of the 1949 Geneva Conventions, along with those of Protocol I, apply "in all circumstances to all persons who are protected by those instruments, without any adverse distinction

58. *Id.* at 1247.

59. *Id.*

60. Other American tribunals also affirmed the separation. *See* United States v. Josef Altstoetter (The Justice Case), in 3 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS 1026–27 (Drexel E. Sprecher & John H.E. Fried eds., 1951) (refusing to adopt the view that because the war "was a criminal war of aggression every act which would have been legal in a defensive war was illegal in this one"). Dutch courts followed suit; in the *Christiansen* case, for instance, a Dutch Special Court held that "[t]he rules of international law, in so far as they regulate the methods of warfare and the occupation of enemy territory, make no distinction between wars which have been started legally and those which have been started illegally." *Re Christiansen* (Holland, Special Court, Arnhem, 1948) A.D. 412, 413; *see also* *In re Zuhlke* (Holland, Special Court of Cassation, 1948) A.D. 416, 416; Moussa, *supra* note 48, at 984–85 (discussing two ways in which the tribunal in the High Command case reaffirmed the distinction between the *jus ad bellum* and *jus in bello*); Sassóli, *supra* note 48, at 249 (noting that when the Eritrea-Ethiopia Claims Commission was presented with the issue, it "correctly held that any *ius ad bellum* issues could not affect the applicability of IHL to the conflict").

61. *See, e.g.*, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 1, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

62. The Geneva Conventions of 12 Aug. 1949: Commentary, Vol. I, The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 27 (Jean S. Pictet ed., 1952).

based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict.”⁶³

Underlying the doctrinal commitment to the equal application doctrine are teleological arguments based on the purposes the laws are intended to serve. For instance, Lauterpacht and subsequent commentators pointed out that unequal application of the *jus in bello* rules would frustrate the humanitarian goals that the *jus in bello* rules seek to advance.⁶⁴ As Christopher Greenwood explains, “[t]he purpose of the humanitarian rules which comprise the bulk of the *ius in bello* is not to confer benefits upon the parties to a conflict but to protect individuals and to give expression to concepts of international public policy.”⁶⁵ Similarly, Marco Sassòli notes:

War victims need as much protection against the belligerent fighting in conformity with the *ius ad bellum* as against a belligerent who violated *ius contra bellum*. They are not responsible for ‘their’ State’s violation of international law . . . and they require the same protection regardless of whether they are on the ‘right’ or on the ‘wrong’ side.⁶⁶

Other commentators observe that the *jus in bello* rules not only seek humanitarian ends but also bestow rights on individuals.⁶⁷ Judith Gardam, for instance, considers the aggressor state’s illegality to be irrelevant to the application of the *jus in bello* because *jus in bello* rules “are conferred by international law on individuals, not on states, so that soldiers and civilians are entitled to the benefit of the rules even if the state is engaged in illegal hostilities.”⁶⁸ Yoram Dinstein agrees, noting that a “right afforded by international law on an individual . . . is not rescinded just because his State has acted in contravention of international law.”⁶⁹

63. Protocol I, *supra* note 20, at Preamble.

64. As Lauterpacht put it:

The effects of any differentiation between the aggressor and those opposing him appear even more clearly if it is borne in mind that most rules of warfare are, in a sense, of a humanitarian character inasmuch as their object is to safeguard . . . human life and some other fundamental human rights

Lauterpacht, *supra* note 40, at 214; *see also* Gardam, *supra* note 27, at 411 (“The basis for the equal application of the *jus in bello* in present times is the humanitarian nature of the rules.”); ROBERT KOLB, *ADVANCED INTRODUCTION TO INTERNATIONAL HUMANITARIAN LAW* 30 (2014).

65. Greenwood, *supra* note 12, at 227.

66. Sassòli, *supra* note 48, at 245–46; *see also* Antoine Bouvier, *The Relationship Between Jus ad Bellum and Jus in Bello: An “Orthodox” View*, 100 *ASIL PROCEEDINGS* 109, 111–12 (2006).

67. Christopher Greenwood, *Historical Development and Legal Basis*, in *THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW* 1, 10 (Dieter Fleck ed., 2d ed. 2008) [hereinafter Greenwood, *Historical Development*].

68. Gardam, *supra* note 27, at 411.

69. DINSTEIN, *supra* note 17, at 157; Quincy Wright, *The Outlawry of War and the Law of War*, 47 *AM. J. INT’L L.* 365, 373 (1953) (“[I]nsofar as the international law of war

Finally, and most importantly, legal scholars point to a host of compelling policy considerations that support the equal application doctrine and explain its appearance in treaties and case law. The most prominent line of argumentation is based on the need for reciprocity in the rules of warfare.⁷⁰ In particular, commentators believe that *jus in bello* norms have succeeded in curbing excesses in past conflicts—notwithstanding the usual animosity between the warring states—only because the *jus in bello* norms generated mutual advantages for both sides.⁷¹ A state may not wish to provide humane conditions for captured enemy soldiers in prisoner-of-war camps, for instance, but it must if it wants its opponents to treat its own captured soldiers humanely. For this reason, Dinstein considers the equal application doctrine “first and foremost, a precept of common sense.”⁷² As he puts it: “No state (least of all a State which, through its aggression, has already perpetrated the supreme crime against international law) would abide by the strictures of the *jus in bello* if it knew that it was not going to derive reciprocal benefits from the application of the norms.”⁷³ Or, as Lauterpacht famously stated, “it is impossible to visualize the conduct of hostilities in which one side would be bound by rules of warfare without benefiting from them and the other side would benefit from rules of warfare without being bound by them.”⁷⁴

A second compelling defense of the equal application doctrine is premised on the practical difficulty of determining who—in a given conflict—is the aggressor. Belligerents inevitably view their cause as both just and legal.⁷⁵ Thus, as Dinstein observes, “no aggressor is ever willing to concede that it has indeed acted in breach of the *jus ad bellum*.”⁷⁶ Even obtaining an agreement regarding the legality of a use of force among third parties or international bodies is difficult in the midst of

confers rights upon soldiers and civilians as individuals, they continue to enjoy these rights even though acting in behalf of a state engaged in illegal hostilities.”).

70. KOLB, *supra* note 64, at 30 (“IHL could not work if it was not based on some degree of reciprocity (no State would accept that the adverse party takes liberties with the law of armed conflicts without reciprocating, thus inaugurating a spiralling down).”).

71. *Id.*

72. DINSTEIN, *supra* note 17, at 157; *see also* David Rodin & Henry Shue, *Introduction to JUST AND UNJUST WARRIORS: THE MORAL AND LEGAL STATUS OF SOLDIERS* 1, 2 (David Rodin & Henry Shue eds., 2008) (describing “the strong separation between *jus ad bellum* and *jus in bello*” as forming “the ‘common sense’ ethics of war”).

73. DINSTEIN, *supra* note 17, at 157. As Bugnion said:

It is impossible to demand that an adversary respect the laws and customs of war while at the same time declaring that every one of its acts will be treated as a war crime because of the mere fact that the act was carried out in the context of a war of aggression.

Bugnion, *supra* note 38, at 55; *see also* Moussa, *supra* note 48, at 967.

74. Lauterpacht, *supra* note 40, at 212.

75. SASSÓLI, *supra* note 48, at 246 (“Most belligerents and those who fight for them are convinced their cause is just.”); KOLB, *supra* note 64, at 30; Greenwood, *Self-Defence*, *supra* note 26, at 287 (reporting that both parties to a conflict typically claim to be acting in self-defense); Jeff McMahan, *The Morality of War and the Law of War*, in *JUST AND UNJUST WARRIORS: THE MORAL AND LEGAL STATUS OF SOLDIERS* 19, 28 (David Rodin & Henry Shue eds., 2008) [hereinafter McMahan, *The Morality of War*].

76. DINSTEIN, *supra* note 17, at 157.

conflict,⁷⁷ in part because political allegiances distort objective assessments, and in part because the prevailing legal standards are sufficiently vague that they permit a range of reasonable conclusions.⁷⁸ The UN Security Council has the theoretical authority to determine the legality of a given use of force, but it rarely does so.⁷⁹ Thus, because the international community lacks an authoritative and functional decision-maker, then even if we considered it justifiable to apply *jus in bello* rules differentially, in accordance with the legality of a party's use of force, it would be almost impossible to do so because it would be almost impossible to determine which party was in violation of the *jus ad bellum* rules.⁸⁰

These two policy arguments lead commentators to the same conclusion; namely, any incursion on the equal application doctrine in a given conflict will inevitably lead the parties to that conflict to ignore relevant *jus in bello* norms. Indeed, Bugnion maintains that those who argue for an unequal application of *jus in bello* norms on the basis of *jus ad bellum* status "betray[] a profound lack of understanding of the law of war in general and of international humanitarian law in particular."⁸¹ According to Bugnion, the laws of war consist "of a set of balances between rights and obligations; if these balances are upset, what remains is not the unilateral application of the law but lawlessness and anarchy."⁸² Other scholars wholeheartedly agree. Given the importance of reciprocity, Lauterpacht concludes that any effort to deny the benefits of the *jus in bello* rules to aggressor states "would transform the contest into a struggle which may be subject to no regulation at all."⁸³ That is, "[t]he result would be the abandonment of most rules of warfare."⁸⁴ The

77. Roberts, *supra* note 10, at 956.

78. *Id.*; see Bugnion, *supra* note 38, at 50.

79. DINSTEIN, *supra* note 17, at 157; Bugnion, *supra* note 38, at 15 (noting that a determination that aggression has occurred requires the affirmative vote of all five permanent members and therefore is unlikely to occur); Greenwood, *Self-Defence*, *supra* note 23, at 287. Moreover, as Lauterpacht points out, when the five permanent members of the Security Council are able to agree that a state has launched an illegal war, then "the impact of such a finding will foreshadow a probability of collective action of such overwhelming magnitude and efficacy as to bring about a rapid, if not instantaneous, liquidation of the conflict" such that questions regarding the application of the *jus in bello* will not arise. Lauterpacht, *supra* note 40, at 208.

80. Lauterpacht puts it thus:

The reasons which make it imperative to permit the full application, during the war and as between the belligerents, of the rules of war are especially cogent when it is borne in mind that in the present state of international organization there may be no means, so long as the war lasts, by which an authoritative judgment can be arrived at on the question as to which belligerent side is the aggressor.

Lauterpacht, *supra* note 40, at 220.

81. Bugnion points out that "the purpose of the laws and customs of war is not to confer subjective rights on belligerents with no corresponding obligations or vice versa. On the contrary, it is to protect the individual by establishing objective rules which impose both rights and obligations on all belligerents." Bugnion, *supra* note 38, at 16.

82. *Id.* at 17.

83. Lauterpacht, *supra* note 40, at 212.

84. *Id.*

absence of authoritative decision-making on the international plane leads other commentators to the very same conclusion.⁸⁵ As noted, the lack of an authoritative decision-maker enables belligerents to charge their opponents with aggression.⁸⁶ If, on the basis of that charge, each belligerent felt free to deny its enemies the benefit of the *jus in bello*, then it is “unlikely that any country would ever pay heed to international humanitarian law.”⁸⁷ Indeed, Dinstein pessimistically predicts that, if the equal application doctrine were abandoned, “[m]ankind might simply slide back to the barbaric cruelty of war in the style of Genghis Khan.”⁸⁸

These policy arguments have unquestionably carried the day among legal scholars. Commentator after commentator has described the equal application doctrine as nothing less than dogma.⁸⁹ Some have called it “a cardinal principle,”⁹⁰ others deem it a “fundamental tenet,”⁹¹ still others label it “axiomatic,”⁹² and Yoram Dinstein describes it as “one of the most basic principles of modern international law.”⁹³ For this reason, Adam Roberts summed up the view of many when he asserted that it is “a cardinal principle of *jus in bello* that it applies in cases of armed conflict whether or not the inception of the conflict is lawful under *jus ad bellum*, and applies equally to all belligerents.”⁹⁴

But it is not only legal scholars and practitioners who have opined about the equal application doctrine. Philosophers have also weighed in, and their views have been both more nuanced and more critical. To be sure, political philosopher

85. For example, Greenwood states:

Moreover, since in most armed conflict there is no authoritative determination by the Security Council of which party is the aggressor, both parties usually claim to be acting in self-defense, . . . [and] any attempt to make the rules of humanitarian law distinguish between the standards of treatment to be accorded to prisoners of war or civilians belonging to the aggressor and those belonging to the state which was the victim of aggression would thus almost certainly lead to a total disregard of humanitarian law.

Greenwood, *Historical Development*, *supra* note 67, at 10–11.

86. See *supra* note 80 and accompanying text.

87. DINSTEIN, *supra* note 17, at 157.

88. *Id.*; see also Gardam, *supra* note 27, at 394 (arguing that any retreat from the equality principle will lead to reduced *jus in bello* standards).

89. Sloane, *supra* note 11, at 49; Louise Doswald-Beck, *International Humanitarian Law and the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons*, 37 INT’L REV. RED CROSS 35, 53 (1997); Sassóli, *supra* note 48, at 246 (describing as “absolute dogma” the notion that “under the *ius in bello*, both sides have to always comply with exactly the same rules”).

90. Nathaniel Berman, *Privileging Combat, Contemporary Conflict and the Legal Construction of War*, 43 COLUM. J. TRANSNAT’L L. 1, 12 (2004); Roberts, *supra* note 10, at 936; Adam Roberts, *The Principle of Equal Application of the Laws of War*, in JUST AND UNJUST WARRIORS: THE MORAL AND LEGAL STATUS OF SOLDIERS 230 (David Rodin & Henry Shue eds., 2008).

91. Greenwood, *supra* note 12, at 225.

92. Sloane, *supra* note 11, at 50.

93. Dinstein, *Comments on War*, *supra* note 39, at 881.

94. Roberts, *supra* note 10, at 936.

Michael Walzer offers an eloquent and compelling defense of the doctrine in his influential book, *Just and Unjust Wars*,⁹⁵ but even he acknowledges the moral tensions to which it gives rise.⁹⁶ Moreover, in more recent times, so-called revisionist philosophers have subjected the doctrine to a particularly skeptical gaze.⁹⁷ Jeff McMahan is perhaps the leading voice in this body of critical scholarship. His critiques span many articles and book chapters and address a variety of doctrinal issues,⁹⁸ so my brief summary will not do his work justice. However, for our purposes, it is enough to articulate a few of McMahan's contentions as well as his ultimate conclusion.

Standard IHL rules permit a combatant to attack other combatants, and due to the equal application doctrine, that right is bestowed on combatants from both parties to a conflict. That is, pursuant to the equal application doctrine, combatants from aggressor states are just as entitled to attack combatants from defender states as vice versa. However, McMahan shows that—morally speaking—combatants from aggressor states are not entitled to attack combatants from defender states because the latter are innocent “in the relevant sense,”⁹⁹ and they specifically retain a right not to be attacked.¹⁰⁰ Reasoning from this proposition, McMahan asserts that attacks by combatants from aggressor states always violate various cardinal *jus in bello* rules, including those requiring that attacks be proportional and necessary.¹⁰¹ For instance, McMahan maintains that “a war can satisfy the requirement of necessity only if it is necessary for the achievement of a just cause.”¹⁰² Similarly, although the proportionality requirement is conventionally understood to be satisfied when the harm caused by a military action is proportional to the military advantage achieved, McMahan asserts that “one cannot weigh the bad effects that one would cause against the contributions one's act would make to the end of victory without having some sense of what the good effects of victory would be.”¹⁰³ In particular, “[i]f one's cause is unjust, the value of the event—victory—would

95. WALZER, *supra* note 2, at 21–47.

96. *Id.* at 21 (“The dualism of *jus ad bellum* and *jus in bello* is at the heart of all that is most problematic in the moral reality of war.”).

97. See Weiler & Deshman, *supra* note 9, at 52.

98. See, e.g., Jeff McMahan, *The Ethics of Killing in War*, 114 ETHICS 693, 708–18 (2004) [hereinafter McMahan, *The Ethics of Killing in War*]; Jeff McMahan, *On the Moral Equality of Combatants*, 14 J. POL. PHIL. 377, 379 (2006); McMahan, *The Morality of War*, *supra* note 75; Jeff McMahan, *Innocence, Self-Defense and Killing in War*, 2 J. POL. PHIL. 193, 208–09 (1994); Jeff McMahan, *Just Cause for War*, 19 ETHICS & INT'L AFF. 1 (2005); Jeff McMahan, *The Sources and Status of Just War Principles*, 6 J. MIL. ETHICS 91 (2007); see also Henry Shue, *Do We Need a 'Morality of War'?*, in JUST AND UNJUST WARRIORS: THE MORAL AND LEGAL STATUS OF SOLDIERS 87, 88 (David Rodin & Henry Shue eds., 2008) (describing McMahan's “intellectually provocative series of essays now stretching over decades”).

99. McMahan, *The Ethics of Killing in War*, *supra* note 98, at 706; McMahan, *On the Moral Equality of Combatants*, *supra* note 98, at 379.

100. McMahan, *The Ethics of Killing in War*, *supra* note 98, at 706.

101. *Id.* at 702–22.

102. *Id.* at 708.

103. *Id.* at 715.

presumably be negative, not positive.”¹⁰⁴ In sum, McMahan concludes that, “as a matter of basic morality, the principles of *jus in bello* cannot be independent of those of *jus ad bellum* [because] it is simply not morally permissible to fight in a war with an unjust cause.”¹⁰⁵ Other philosophers have quibbled with,¹⁰⁶ refined, and elaborated¹⁰⁷ on McMahan’s critiques, but most agree with his conclusion that—as a matter of basic morality—the equal application doctrine cannot be defended.¹⁰⁸ As Christopher Kutz puts it, “[i]f death and destruction matter, as they do, and if reasons matter morally, as they do, then differences in combatants’ reasons for bringing about death and destruction must also matter morally.”¹⁰⁹

Although revisionist philosophy scholars generally agree that the equal application doctrine is morally indefensible, they are also troubled by the likely practical consequences of its elimination, so many have constructed theories that ameliorate the consequences of their moral conclusions. For instance, even though Henry Shue acknowledges that the equal application doctrine violates ordinary moral principles, he minimizes the impact of that conclusion by maintaining that “[t]he circumstances of war are so different from the context of ordinary life” that “different specific standards from the specific standards that apply to ordinary life . . . apply inside war.”¹¹⁰ Similarly, Christopher Kutz seeks to reduce the tension between the equal application principle and ordinary morality by offering “a modest form of skepticism about the role individualized normative principles can play in assessing conduct during wartime.”¹¹¹ Finally, Judith Lichtenberg, though “granting the arguments” against the equal application doctrine as a general matter, develops the claim that the violent acts of some unjust combatants can nonetheless be justified.¹¹²

States and jurists, for their parts, approach the doctrine with similar ambivalence. As noted above, considerable post-World War II case law supports the doctrine. However, the International Court of Justice (ICJ), in its blockbuster *Nuclear Weapons Advisory Opinion*, called the doctrine into question by suggesting that, although the use of nuclear weapons was generally inconsistent with *jus in bello* norms, the court could not “reach a definitive conclusion as to the legality or

104. *Id.*; McMahan, *On the Moral Equality of Combatants*, *supra* note 98, at 379.

105. Jeff McMahan, *Morality, Law and the Relations Between Jus ad Bellum and Jus in Bello*, 100 ASIL PROCEEDINGS 112, 113 (2006); *see also* Thomas Hurka, *Proportionality in the Morality of War*, 33 PHIL. & PUB. AFF. 34, 35 (2005).

106. *See, e.g.*, Rodin, *supra* note 7, at 47–48 (contending that McMahan’s position regarding the liability of noncombatants to attack is “unfounded”); Shue, *supra* note 90, at 88 (arguing that there is “less similarity than McMahan assumes between ordinary life and war, and therefore, less analogy between the specific standards respectively appropriate to each”).

107. *See, e.g.*, Judith Lichtenberg, *How to Judge Soldiers Whose Cause is Unjust*, in JUST AND UNJUST WARRIORS: THE MORAL AND LEGAL STATUS OF SOLDIERS 112, 113–14 (David Rodin & Henry Shue eds., 2008) (finding McMahan’s arguments “compelling” but dissecting their implications for unjust combatants); Kutz, *supra* note 20, at 69.

108. Kutz, *supra* note 23, at 69.

109. *Id.*

110. Shue, *supra* note 98, at 87.

111. Kutz, *supra* note 23, at 70.

112. Lichtenberg, *supra* note 107, at 113–14.

illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake.”¹¹³ This conclusion blends *jus in bello* and *jus ad bellum* concerns by suggesting that the legality of a weapon under the *jus in bello* is in some degree contingent on the parties’ *jus ad bellum* status. This feature of the ICJ’s decision garnered considerable criticism,¹¹⁴ but it also reflects the ambivalence that we see exhibited by nonlegal scholars and also by states.

To be fair, some states have shown no ambivalence about the equal application doctrine but rather have rejected it entirely. During the negotiations regarding Protocols I and II to the Geneva Conventions, for example, the Democratic Republic of Vietnam argued that states that committed acts of aggression should not be allowed to benefit from the provisions of humanitarian law.¹¹⁵ Similarly, it was official doctrine in the Soviet Union that the victim of aggression was not bound by humanitarian law.¹¹⁶ Finally, states have frequently sought to justify defensive acts that violate *jus in bello* norms by invoking their opponents’ *jus ad bellum* violations.¹¹⁷

Whereas these efforts to blur the distinction between the *jus ad bellum* and the *jus in bello* can be dismissed as blatantly self-serving, it is unquestionable that the equal application doctrine creates legitimate tensions in certain kinds of conflicts. Most notably, the doctrine has been called into question in conflicts in which the international community clearly favors one of the parties (often because the other party has violated the *jus ad bellum*), and the equality doctrine is viewed as hamstringing the favored party’s efforts to prevail in the conflict. The equal application doctrine was questioned during the 1970s, for instance, with respect to conflicts involving foreign colonial powers and the fighters who sought to overthrow

113. On the Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶97 (July 8).

114. See, e.g., Terry Gill, *The Nuclear Weapons Advisory Opinion of the International Court of Justice and the Fundamental Distinction Between the Jus ad Bellum and the Jus in Bello*, 12 LEIDEN J. INT’L L. 613, 621–22 (1999); Sloane, *supra* note 11, at 51; Achilles Skordas, *Epilegomena to a Silence: Nuclear Weapons, Terrorism, and the Moment of Concern*, 6 J. CONFLICT & SEC. L. 191, 219, 222 (2001); Daniel Warner, *The Nuclear Weapons Decision by the International Court of Justice: Locating the raison behind raison d’état*, 27 MILLENNIUM J. INT’L STUD. 299, 312 (1998); Dapo Akande, *Nuclear Weapons, Unclear Law? Deciphering the Nuclear Weapons Advisory Opinion of the International Court*, 68 BRIT. Y.B. INT’L L. 165, 209 (1998); Weiler & Dushman, *supra* note 9, at 46 (describing the critical scholarship).

115. Greenwood, *Historical Development*, *supra* note 67, at 10.

116. Bugnion, *supra* note 11, at 10. Bugnion points out that, from the Marxist-Leninist viewpoint, aggression “was by definition an attribute of capitalist states.” *Id.* So, by eliminating the distinction between the *jus in bello* and *jus ad bellum*, “the Soviet Union maintained the possibility of claiming the protection of international humanitarian law for itself while refusing from the outset to grant the benefits afforded by the law to its enemies.” *Id.*; see also Bouvier, *supra* note 66, at 111 (noting that some socialist states “have argued that in a case of aggression, IHL should not apply to either of the belligerents and, at a minimum, the aggressor state should not be allowed to invoke any rights under IHL”).

117. Roberts, *supra* note 10, at 947.

them because the latter operated at such a comparative disadvantage.¹¹⁸ As a consequence, Protocol I included provisions that reduced certain *jus in bello* requirements for guerrilla forces fighting against colonial powers in wars of national liberation.¹¹⁹ Not surprisingly, these provisions generated considerable controversy because they blurred the otherwise strict separation between the *jus in bello* and the *jus ad bellum*.¹²⁰

Adherence to the equal application doctrine also has suffered in more recent conflicts where the international community clearly views one party to be acting illegally. Consider, for instance, conflicts in which the UN Security Council authorizes the use of force to repel an illegal attack. In past decades, some questioned whether the equal application doctrine even applied to such conflicts.¹²¹ Currently, the weight of scholarly opinion suggests that it does;¹²² however, the practice of states may call that conclusion into question. For instance, Judith Gardam examined Operation Desert Storm, in which the UN Security Council authorized coalition forces to wage war in response to Iraq's illegal invasion and annexation of Kuwait. Admittedly, the coalition forces did not expressly claim authority to deviate from *jus in bello* norms on the basis of their Security Council authorization.¹²³ Nonetheless, after carefully examining the coalition forces' actions during the conflict, Gardam concludes that they were willing to employ certain legally questionable tactics and tolerate large-scale civilian casualties only due to "the consensus that Iraq's action had no legal or moral basis."¹²⁴

Other conflicts that put pressure on the equal application doctrine are clear instances of self-defense along with humanitarian interventions. Many commentators have suggested, for instance, that the humanitarian goals motivating NATO's 1999 air strikes against Serbia influenced the means by which NATO conducted its warfare as well as the international community's assessment of those

118. See William V. O'Brien, *The Jus in Bello in Revolutionary War and Counterinsurgency*, 18 VA. J. INT'L L. 193, 206–07 (1978).

119. Protocol I, *supra* note 20, at arts. 43 & 44.

120. For an explication of the operation of the provisions, see George H. Aldrich, *Prospects for U.S. Ratification of Additional Protocol I to the 1949 Geneva Conventions*, 85 AM. J. INT'L L. 1, 8–10 (1991). For a critique of the provisions, see Abraham D. Sofaer, *The Rationale for the United States Decision*, 82 AM. J. INT'L L. 784 (1988); Guy B. Roberts, *New Rules for Waging War: The Case Against Ratification of Additional Protocol I*, 26 VA. J. INT'L L. 107, 127–34 (1985); Douglas J. Feith, *Law in the Service of Terror-The Strange Case of Additional Protocol No. I*, NAT'L INTEREST, Fall 1985, at 36.

121. DINSTEIN, *supra* note 17, at 161–62 (reporting that, in 1952, a committee of the American Society of International Law concluded that a UN force has a different status from the armed forces of a state, and when acting to check aggression, it need not feel bound by the laws of war); Walter Gary Sharp, *Protecting the Avatars of International Peace and Security*, 7 DUKE J. INT'L AND COMP. L. 93 (1996).

122. Roberts, *supra* note 10, at 953–55.

123. *Id.* at 953 ("Statements from the U.S. leadership of the coalition reflected the explicit assumption that the laws of war applied to coalition operations."); Gardam, *supra* note 27, at 411 ("At no stage was it suggested that the illegality of [Iraq's invasion] relieved opposing states of the necessity of complying with the law of armed conflict.")

124. Gardam, *supra* note 27, at 411–12.

means.¹²⁵ Indeed, Robert Sloane carefully analyzed the tactics used during the NATO air campaign, the 2006 Israel/Hezbollah conflict, and the U.S. War on Terror, and he concludes that these and other examples “reflect a trend in contemporary international law . . . to allow *ad bellum* considerations to influence and, at times, even to vitiate the *jus in bello*.”¹²⁶ Sloane maintains that, despite nominal consensus regarding the equal application doctrine,

[I]nternational law tends to tolerate more incidental civilian harm (“collateral damage”) if the alleged *casus belli* is either (1) widely perceived as legal (for example, a clear and unassailable case of self-defense) or (2) formally illegal but still perceived as legitimate, meaning that it furthers broadly shared international values: preserving minimum order, halting human rights atrocities, and so forth.¹²⁷

The foregoing suggests that the equal application doctrine enjoys widespread theoretical support, but somewhat less actual adherence. This state of affairs should not be surprising. On the one hand, the resistance to the equal application doctrine is predictable given that philosophers have capably shown that the doctrine is inconsistent with ordinary morality.¹²⁸ It is likewise deeply counterintuitive at a basic level. The notion that a state can blatantly violate international law by launching a war of aggression—a war that will inevitably cause widespread destruction and loss of life—and nonetheless benefit from all the same humanitarian law rules that assist the states that must defend against the illegal aggression is plainly unsatisfying. Nathaniel Berman puts his dissatisfaction thus:

Personally, I never want Nazis to be privileged combatants, whether they are organized as an army of a state or as an insurgent group against a democracy. In my view, killing in the name of Nazism should never be immunized from the most severe criminal penalties. And I always want anti-Nazis to be able to fight Nazis with the combatants’ privilege, whether they are organized as a state army, a guerrilla force, or individual snipers. But the rules as they are currently structured—in their aspiration to separate *jus ad bellum* from *jus in bello*—seek to block this goal.¹²⁹

At the same time, the practical arguments that support the doctrine have lost little force since Lauterpacht first articulated them. As recently as 2006, Antoine Bouvier simply, yet compellingly, defended the equal application doctrine by

125. Sloane, *supra* note 11, at 50–51; Weiler & Deshman, *supra* note 9, at 44; Tania Voon, *Pointing the Finger: Civilian Casualties of NATO Bombing in the Kosovo Conflict*, 16 AM. U. INT’L L. REV. 1083, 1112–13 (2001). *But see International Criminal Tribunal for the Former Yugoslavia (ICTY): Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia* (June 8, 2000), reprinted in 39 I.L.M. 1257, 1273 (2000) (rejecting the notion that the cause of the conflict had any bearing on the application of IHL principles).

126. Sloane, *supra* note 11, at 52, 96.

127. *Id.* at 54–55.

128. *See supra* text at notes 95–112.

129. Berman, *supra* note 90, at 56.

invoking two very practical concerns. When asked why the doctrine should be maintained, Bouvier said first “because there is no alternative system available!” and second “because otherwise IHL simply doesn’t work!”¹³⁰ As noted above, philosophers have sought to bridge the principle/practical divide by advancing abstract theories. This Article seeks the same end, but through a much more practical means: differential application of post-conflict enforcement. Indeed, although this Article does not adopt Judge Thompson’s radical notion that fighting for a just cause absolves soldiers from liability for their atrocities, it does breach orthodoxy by suggesting that the equality principle should not apply to post-conflict enforcement of IHL violations. The following Part develops my proposal.

II. REFASHIONING THE EQUALITY PRINCIPLE: UNEQUAL POST-CONFLICT ENFORCEMENT OF IHL RULES

The foregoing description of the historical genesis and current status of the equal application doctrine reveals that it stands as a well-established, if distasteful, feature of the IHL landscape. It is well established because it appears in case law and treaties and has the uniform support of legal scholars and commentators. It is distasteful because it is inconsistent with ordinary morality and is counterintuitive on its face. It is well established—despite its distastefulness—because its elimination would create far more negative consequences than does its continuation. In particular, we have reason to believe that its elimination would lead to a substantial decline in compliance with IHL rules. These concerns are sufficiently troubling—and plausible—that neither scholars nor states wish to abandon the doctrine, but states frequently behave in ways that surreptitiously undermine it in conflicts where they are convinced that their cause is just.

Summarizing the previous Part in this way allows us to see that the equal application doctrine exists primarily because the international legal system in general and the IHL system, in particular, are profoundly underdeveloped. Specifically, because the international legal system traditionally has lacked systematic enforcement mechanisms, the primary way to motivate states to comply with international legal rules has been to reward compliance with reciprocal benefits.¹³¹ Unequal application of *jus in bello* norms would eliminate the reciprocal benefits that states can expect to receive from their compliance with IHL rules, so scholars and commentators assume it thereby would undermine, if not destroy, the IHL system as a whole.

That assumption was a reasonable one when Hersch Lauterpacht first made it in 1953, and it is still reasonable today, as lack of adequate enforcement continues to bedevil all aspects of the international legal system.¹³² To be sure, the enforcement

130. Bouvier, *supra* note 66, at 111–12.

131. *See supra* Part I.

132. *See, e.g.*, Symposium, *The Nuremberg Symposium an International Legal Symposium on the Nuremberg Laws and the Nuremberg Trials*, 39 LOY. L.A. INT’L & COMP. L. REV. 319, 412 (2017) (remarks of Justice Rosalie Silberman Abella of the Supreme Court of Canada); *see also* Gerald G. Fitzmaurice, *The Foundations of the Authority of International Law and the Problem of Enforcement*, 19 MOD. L. REV. 1 (1956) (observing that enforcement

of IHL violations has marginally improved in the last 25 years. Domestic prosecutions of IHL violations may be more prevalent than they used to be; moreover, and as particularly relevant here, the international community has created a number of international criminal tribunals to prosecute and punish war crimes, along with other international criminal violations.¹³³ However, the establishment of these tribunals does not alter the fundamental need for reciprocity to motivate compliance with IHL rules.¹³⁴ As will be discussed below, international criminal tribunals can prosecute only a tiny proportion of IHL violators, so their existence does not change the basic cost-benefit analysis that maintains the equal application doctrine. The introduction of international criminal tribunals can, however, provide a morally grounded basis for distinguishing between just and unjust combatants without incurring the negative practical consequences that would arise from the unequal application of *jus in bello* rules. That is, this Article suggests that the way to bridge the divide between moral principle and practical reality described in Part I is through the unequal enforcement of IHL rules. More specifically, this Article contends that international criminal tribunals should consider suspects' *jus ad bellum*/aggressor status when deciding whom to prosecute.¹³⁵

To convincingly advance that proposal, this Article must defend or establish a number of propositions. First, differentially enforcing substantive rules that apply uniformly across classes of persons is generally considered inappropriate.¹³⁶ So, Section A explains why—when it comes to the differential enforcement of IHL rules—it is justified. Next, this Article must establish that the differential enforcement of IHL rules will not lead to the same negative consequences that the differential application of IHL rules would produce. That discussion takes place in Section B. There, I acknowledge that some forms of differential enforcement would undermine the IHL regulatory system, but I argue that an appropriately calibrated differentiation scheme will ameliorate the counterintuitive and morally distasteful aspects of the equal application doctrine

is generally regarded as one of the most difficult subjects in the whole field of international law and relations).

133. In the 1990s, the UN Security Council established international criminal tribunals to prosecute those committing international crimes in the former Yugoslavia and Rwanda. Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, (Sept. 2009), http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf [hereinafter ICTY Statute]; S.C. Res. 955, (Nov. 8, 1994) [hereinafter ICTR Statute]. Subsequently, the UN partnered with domestic authorities to create international tribunals to address crimes in Sierra Leone and Cambodia. Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, ECCC Doc. No. NS/RKM/1004/006 (Oct. 27, 2004) [hereinafter ECCC Statute]; Statute of the Special Court for Sierra Leone, U.N. Doc. S/2002/246, App. II Attachment (Mar. 8, 2002) [hereinafter SCSL Statute]. And in 1998, the international community established the International Criminal Court (ICC), a permanent body with prospective jurisdiction over international crimes. Rome Statute of the International Criminal Court, opened for signature July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

134. See Kutz, *supra* note 23, at 74.

135. In a subsequent piece, I will develop a proposal for considering convicted defendants' *jus ad bellum*/aggressor status when formulating their sentence.

136. See *infra* Section II.A.

without reducing adherence to *jus in bello* rules. Finally, Section C will address two potential objections to my proposal. The first addresses the fact that most of the violations that have become subject to international criminal prosecutions in recent years have taken place during noninternational armed conflicts; that is, during conflicts that are not subject to the UN Charter's prohibition on the use of force or other *jus ad bellum* restrictions. The second considers the way in which likely information deficits will complicate efforts to take aggressor status into account in prosecutorial allocations.

A. Preliminary Issues: Justifying Differential Enforcement as an Abstract Proposition

As noted, this Article maintains that even though IHL rules apply in the same way to combatants from aggressor states as combatants from defender states, when those rules are violated their enforcement should turn in some part on the aggressor status of the violator. Before developing that thesis further, however, I must acknowledge that any proposal to differentially enforce substantive rules on the basis of distinctions that do not appear in the substantive law is a proposal that needs justification. Certainly, in most domestic law contexts, there is a presumption that, if it is deemed desirable to apply a substantive rule differently to different categories of people, then those distinctions should appear in the substantive statute. For instance, minors may be exempt from the reach of certain criminal laws, but they are exempt not because the criminal laws are not enforced as to them but because the substantive laws themselves do not apply to the conduct of minors.¹³⁷ In other words, due to the wording of the substantive statutes, the conduct in question *is* criminal if engaged in by some people (adults) but *not* criminal if engaged in by other people (minors). By contrast, if the substantive statute does not draw any such distinctions, then it applies equally to all persons within the jurisdiction, and we presume that it should be enforced equally against all persons within the jurisdiction. Indeed, when generally applicable laws are not enforced uniformly against all persons in a domestic legal system, we consider such differential enforcement to violate the rule of law¹³⁸ and (often) antidiscrimination norms. If we determine, for instance, that the Internal Revenue Service is targeting Republicans for audits,¹³⁹ or that prosecutors are more likely to indict persons of

137. See, e.g., CAL. PENAL CODE § 26 (West 2008); N.Y. PENAL LAW § 30.00 (McKinney 2007).

138. *Yick Wo v. Hopkins*, 118 U.S. 356, 373–74 (1886) (“Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.”).

139. TREASURY INSPECTOR GEN. FOR TAX ADMIN., NO. 2013-10-053, INAPPROPRIATE CRITERIA WERE USED TO IDENTIFY TAX-EXEMPT APPLICATIONS FOR REVIEW, at 5–6 (May 14, 2013), <https://www.treasury.gov/tigta/auditreports/2013reports/201310053fr.pdf>.

color,¹⁴⁰ then we consider such differential enforcement to be both illegal and immoral.

The differential enforcement of international law rules could give rise to the same rule-of-law and antidiscrimination concerns. International law realists contend that, in practice, international law is enforced differentially depending on the size, wealth, and power of the state in question,¹⁴¹ but scholars and policymakers generally try to combat such unequal enforcement, not expand it. Moreover, the equal application doctrine itself might seem specifically to argue against differential enforcement in the IHL context. After all, the doctrine mandates the *equal application* of *jus in bello* rules; that is, it mandates that *no* distinctions be made in the application of *jus in bello* rules on the basis of *jus ad bellum* status. So, given that the whole point of the doctrine is to ensure that both sides to a conflict are subject to the same *jus in bello* rights and obligations, how can it be justifiable to treat those parties differently when it comes to enforcing violations of those obligations?

Two answers emerge, both of which stem from the underdeveloped nature of the international legal system in general and the rarity of post-conflict enforcement of IHL rules in particular. In a domestic law context, a law that applies equally across a class of persons does so because the drafters of the law determined that there were no relevant distinctions between different classes of persons when it comes to the conduct governed by the law. For instance, laws that prohibit driving while under the influence of alcohol do not apply differently to male and female drivers because, when enacting the law, lawmakers concluded that such distinctions were not relevant to the aims they were seeking to achieve with the prohibition. On the face of it, the laws of war are similar to such equally applicable domestic laws because the laws of war have been determined to apply equally to all combatants. However, the reasons for their equal application are entirely different. As just noted, in a well-functioning domestic law context, laws that apply equally across classes of persons do so because distinctions between persons are considered irrelevant to the purposes the laws seek to advance.

By contrast, when it comes to the laws of war, their equal application stems not from a principled determination that no distinctions between the combatants are relevant. To the contrary, as Part I recounted, scholars and commentators often consider the *jus ad bellum* status of the combatants to be highly relevant to the appropriate application of the *jus in bello* rules; indeed, philosophers maintain that common morality not only permits distinctions in the application of *jus in bello* rules on the basis of their *jus ad bellum* status but requires them.¹⁴² Thus, if the laws of

140. Studies have found, for instance, “that Hispanics are prosecuted more often than blacks, who are prosecuted more often than Anglos. And in each ethnic group males have a higher rate of prosecution than females.” Cassia Spohn et al., *The Impact of the Ethnicity and Gender of Defendants on the Decision to Reject or Dismiss Felony Charges*, 25 *CRIMINOLOGY* 175, 184 (1987).

141. See Richard H. Steinberg & Jonathan M. Zasloff, *Power and International Law*, 100 *AM. J. INT’L L.* 64, 64, 76 (2006); Jack Goldsmith, *Sovereignty, International Relations Theory, and International Law*, 52 *STAN. L. REV.* 959, 963 (2000) (reviewing *SOVEREIGNTY: ORGANIZED HYPOCRISY*).

142. See *supra* text at notes 98–109.

war operated in a well-functioning domestic legal system, they likely *would* feature distinctions based on *jus ad bellum* status. They do not feature such distinctions, however, because international law is not part of a well-functioning legal system; that is, a legal system in which appropriate enforcement of violations can be presumed. Thus, we have justifiable fears that introducing distinctions—even highly relevant ones—will reduce overall compliance with the law. But the fact that distinctions among combatants in the application of IHL rules are at least theoretically justified (if not preferable) means that their failure to appear in the substantive law should not preclude their appearance in enforcement decisions. In other words, so long as differential *enforcement* of IHL rules on the basis of *jus ad bellum* status does not lead to the same untoward practical consequences that the differential *application* of IHL rules would produce, then we need not be worried about violating rule-of-law or antidiscrimination norms. Those norms are implicated when enforcement authorities contravene the intent of lawmakers to apply rules uniformly. When it comes to the laws of war, there is no similar principled preference for uniform application, so differential enforcement raises no rule-of-law or antidiscrimination concerns.

Another even more compelling reason that we need have no concerns about differential enforcement of IHL rules stems from the scarcity of that enforcement. To be sure, recent years have seen a significant increase in international enforcement of IHL rules with the creation of various international criminal tribunals. However, the sad reality is that these tribunals can prosecute only the tiniest proportion of violators. So, whether we like it or not, IHL violations *are* differentially enforced—and will continue to be for the foreseeable future. Or, put differently, because only a small percentage of violations can become subject to any enforcement measures, difficult decisions must be made as to which violations they will be. Indeed, a vast literature already surrounds case selection at the international tribunals, with some scholars recommending the adoption of guidelines for determining how to allocate scarce enforcement resources,¹⁴³ others suggesting that certain penological goals should drive case selection,¹⁴⁴ and still others explaining case selection on the basis of *realpolitik* factors.¹⁴⁵ However, even though scholars disagree about which principles do and should guide the allocation of enforcement measures, they all

143. See, e.g., Avril McDonald & Roelof Haveman, *Prosecutorial Discretion—Some Thoughts on ‘Objectifying’ the Exercise of Prosecutorial Discretion by the Prosecutor of the ICC*, ICC-OTP, at 5 (Apr. 15, 2003), https://asp.icc-cpi.int/iccdocs/asp_docs/library/organs/otp/mcdonald_haveman.pdf; Allison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 AM. J. INT’L L. 510 (2003); Philippa Webb, *The ICC Prosecutor’s Discretion Not to Proceed in the “Interests of Justice,”* 50 CRIM. L. Q. 305 (2005).

144. See, e.g., Margaret M. deGuzman, *Choosing to Prosecute: Expressive Selection at the International Criminal Court*, 33 MICH. J. INT’L L. 265 (2012) (advocating emphasis on expressivism in case selection).

145. See, e.g., Schabas, *supra* note 5, at 745; Cale Davis, *Political Considerations in Prosecutorial Discretion at the International Criminal Court*, 15 INT’L CRIM. L. REV. 170, 176–78 (2015) (arguing that ICC prosecutors should take political considerations into account when deciding which situations to investigate and which cases to prosecute).

recognize that the scarcity of enforcement necessitates the adoption of some process or principle to guide its allocation. In other words, I have not yet made the case that the aggressor status of combatants should be a factor relevant in determining whom to prosecute, but there is no question that some factors must be consulted and that some differential enforcement of IHL violations must occur. The only question is on what basis it should occur. In the following Sections, I will develop the claim that one relevant basis is the aggressor status of the defendant's party to the conflict.¹⁴⁶

B. Equal Application but Unequal Enforcement: Obtaining the Benefits Without the Costs

As we have seen, the equal application doctrine persists largely because we are convinced that the unequal application of *jus in bello* rules would lead to more *jus in bello* violations and would generally undermine the IHL regulatory system.¹⁴⁷ In this Article, I propose retaining the equal *application* of *jus in bello* rules but differentially *enforcing* violations of those rules. However, my proposal is beneficial only if it does not produce the same negative consequences that the differential application of *jus in bello* rules would produce.

What sort of consequences will result from the unequal enforcement of *jus in bello* rules depends on the level of inequality that the enforcement system practices. Assume, for instance, an enforcement scheme that prosecuted only combatants whose party was the aggressor in the conflict.¹⁴⁸ If that were the only enforcement scheme available to punish IHL violators in that conflict, then we might reasonably fear that it would generate most of the same unfortunate results that would ensue if we eliminated the equal application doctrine because such an enforcement scheme, if known ahead of time, would be tantamount to eliminating the equal application doctrine.¹⁴⁹ That is, an enforcement scheme that can be utilized

146. As I will discuss in Section C of this Part, in an international armed conflict, it will mean considering which party breached the use-of-force rules, and in a noninternational armed conflict it will mean considering which party wrongfully began the conflict.

147. Julian M. Lehmann, *All Necessary Means to Protect Civilians: What the Intervention in Libya Says About the Relationship Between the Jus in Bello and the Jus Ad Bellum*, 17 J. CONFLICT & SEC. L. 117, 128 (2012) (“Arguments supporting the separation of the *jus ad bellum* and the *jus in bello* are all of the teleological nature rather than being logic based, and are aimed at increasing compliance with the *jus in bello*.”).

148. The Nuremberg and Tokyo tribunals stand as examples of that sort of enforcement scheme because the jurisdiction of those tribunals extended only over Axis defendants. See Charter of the International Military Tribunal, annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis art. 6, Aug. 8, 1945, art. 6, 59 Stat. 1544, 82 U.N.T.S. 279; Charter of the International Military Tribunal for the Far East, art. 5, Jan. 19, 1946, T.I.A.S. No. 1589, reprinted in U.S. Dep’t of State, Trial of Japanese War Criminals 39 (1946).

149. To be sure, combatants may be more likely to ignore *jus in bello* rules when they are told that the rules do not apply to them than when they are told that an international court subsequently will not prosecute them for their violation of those rules. That distinction might be particularly salient when multiple enforcement mechanisms exist, so that defending combatants know that they remained susceptible to prosecution by one or more institutions, even if other institutions exempted them from prosecution. However, even if exempting a

against only one party to the conflict in effect exempts the other party from the reach of the substantive rules governing the conflict. Because such an exemption effectively eliminates the equal application doctrine, we can expect it to produce most, if not all, of the negative consequences that the equal application doctrine is designed to prevent.

For that reason, along with others, we would not want an enforcement regime that wholly exempted from prosecution combatants from defending parties. But what about an enforcement regime that did not exempt those combatants but rather prosecuted a smaller proportion of them as compared with combatants of aggressor parties? Or, in the terminology of international criminal law case selection, what if an international tribunal treated a suspect's aggressor status as one among a series of factors weighing in favor of the suspect's prosecution? That sort of partially differentiated enforcement scheme is far less likely to reduce compliance with IHL rules. We expect that compliance with IHL rules will plummet if those rules are determined not to apply to one party to the conflict because that party will not comply with the rules, and its opponent will be far less likely to comply because its soldiers will not reap any reciprocal benefits from their compliance. But if the rules continued to apply to both parties, and if the enforcement scheme did subject defenders to some prosecutions—albeit at a lower rate than that applied to aggressors—then we should expect little or no impact on compliance with *jus in bello* rules. Already, combatants know that post-conflict punishment of violations is rare. Therefore, so long as defenders recognize that they remain vulnerable to prosecution, the specifics of the enforcement regime are not likely to substantially impact their decisions regarding compliance with *jus in bello* rules. Said differently, we reasonably fear that combatants will systematically ignore *jus in bello* rules when those rules apply only to one party to the conflict or when the rules are self-evidently enforced against only one party to the conflict. But an enforcement scheme that applies to both parties but allocates a higher proportion of prosecutions to one of those parties should not substantially reduce either party's compliance with *jus in bello* rules. The desire for reciprocity will continue to motivate some compliance, as will the fear of enforcement mechanisms. Admittedly, that fear should be somewhat reduced when it comes to defenders, but because combatants have no way to accurately assess their risk of punishment *ex ante*, any differential in enforcement is not apt to encourage violations. To analogize to the domestic context, studies show that African Americans are disproportionately prosecuted for drug offenses as compared with Caucasian Americans, but we have no reason to believe that Caucasians are consequently more likely to violate the drug laws as a result of that differential.

That differential enforcement can be practiced without undermining compliance with *jus in bello* rules should make it attractive to many scholars who have previously held their noses while endorsing the equal application doctrine. In particular, legal scholars who support the equal application doctrine because they fear undermining IHL compliance should approve of my proposal because it will

party from international criminal prosecution does not provide the same assurances as exempting the party from application of the rules themselves, it likely provides enough assurances to severely undermine compliance with IHL rules.

not cause the negative practical consequences they seek to avoid. Likewise, my proposal should gain the support of philosophy scholars who deem the equal application doctrine inconsistent with ordinary morality because my proposal distinguishes between unjust and just combatants in just the way that those scholars deem morally required. Finally, at a functional level, my proposal charts a more morally intuitive and practically feasible course than the proposals of previous scholars who have called the equal application doctrine into question.

Indeed, some philosophers take their critique of the equal application doctrine to its logical conclusion, which can lead to troubling proposals. For instance, some philosophers who oppose the equal application doctrine maintain that the laws of war should provide defender combatants with more rights than aggressor combatants: Jeff McMahan and Richard Arneson, in particular, argue that defender combatants should be entitled to target the civilians of aggressor states for attack.¹⁵⁰ Other scholars, such as David Rodin and Christopher Kutz, stop short of advocating additional rights for defender combatants (to target civilians, for instance) but rather suggest eliminating certain rights that the equal application doctrine bestows on aggressor combatants.¹⁵¹ Specifically, *jus in bello* rules bestow on combatants the privilege of attacking opposing combatants,¹⁵² and pursuant to the equal application doctrine, aggressor as well as defender combatants possess this privilege. However, Rodin would eliminate the combatants' privilege for aggressor combatants and would consequently subject them to post-*bellum* punishment for killing opposing combatants during warfare.¹⁵³

Proposals such as these from the philosophical literature are theoretically defensible, and in fact, flow directly from their authors' justified critiques of the equal application doctrine. Yet they have little to recommend them in practice. Permitting the targeting of civilians is problematic even when confined to the specific and limited circumstances that some scholars delineate, because information is hard to come by during warfare and combatants always call doubts in their own favor. Thus, any incursion on the prohibition against targeting civilians will inevitably lead to a substantial increase in innocent civilian deaths. Likewise, proposals to hold combatants from aggressor states responsible for the deaths of all enemy combatants may have theoretical merit, but they face insurmountable logistical difficulties.¹⁵⁴ Not least, in a world in which the vast majority of mass

150. See, e.g., Richard J. Arneson, *Just Warfare Theory and Noncombatant Immunity*, 39 CORNELL INT'L L.J. 663, 670 (2006). Jeff McMahan, for his part, contends that civilians can be targeted for an attack if they "bear a high degree of responsibility for a wrong that constitutes a just cause for war, if attacking them would make a substantial contribution to the achievement of the just cause, and if they can be attacked without disproportionate harm to those who are genuinely innocent." McMahan, *The Morality of War*, *supra* note 98, at 22; see also McMahan, *The Ethics of Killing in War*, *supra* note 98, at 725–29. For a rebuttal of this position and a compelling defense of the position that killing noncombatants is almost always worse than killing combatants, see SETH LAZAR, SPARING CIVILIANS (2015).

151. See, e.g., Rodin, *supra* note 7, at 44–45; Kutz, *supra* note 23, at 72.

152. Rule 1. *The Principle of Distinction between Civilians and Combatants*, ICRC, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter1_rule1 (last visited Feb. 12, 2019).

153. Rodin, *supra* note 7, at 45; see also Arneson, *supra* note 150, at 674.

154. See, e.g., Kutz, *supra* note 23, at 74; Lichtenberg, *supra* note 107, at 129.

atrocities perpetrated against self-evidently innocent civilians go unsanctioned, there is no reason to believe that resources will materialize to prosecute and punish combatants from aggressor states for nothing more than attacking opposing combatants from defending states. My proposal has all of the advantages of the philosophers' proposals, but it is eminently more feasible in the world in which we actually live. My proposal, like those of the philosophers, is consistent with ordinary moral intuitions because it draws the distinction that those intuitions require—between combatants fighting for aggressor parties and combatants fighting in defense against aggression. However, my proposal is eminently more feasible than those of the philosophers because it draws the relevant distinctions between the two groups only in the realm of enforcement, a realm in which severe scarcity compels us to draw some distinctions whether we want to or not.

This Section has shown that unequally enforcing IHL violations is not likely to lead to the deleterious consequences that require us to equally apply *jus in bello* rules. The following Section, however, addresses two possible objections to my proposal.

C. Addressing Potential Objections: Noninternational Armed Conflicts and Information Deficits

In Part III, I will develop my proposal in more detail, but here I highlight two possible objections or concerns. The first pertains to the reach of my proposal. As noted in Part I, the equal application doctrine arose only after international law prohibited the use of armed force. Indeed, it was the ability to label one party to a conflict an *illegal* aggressor that generated the first calls for the unequal application of *jus in bello* rules. However, those use-of-force restrictions apply only to interstate conflicts, and indeed the equal application doctrine and the copious scholarship surrounding it contemplate conflicts between two states. For that reason, it goes without saying that my proposal to differentially enforce *jus in bello* rules is intended to apply to *jus in bello* violations occurring during international armed conflicts. But should it also apply to *jus in bello* violations occurring during noninternational armed conflicts? The question is an important one because the majority of *jus in bello* violations that have become subject to international criminal prosecutions in recent years have occurred during noninternational armed conflicts.¹⁵⁵

A reasonable argument can be made that my proposal *should* be limited to the enforcement of *jus in bello* violations in international armed conflicts precisely because it is only in international armed conflicts that we have a *legal* basis on which to distinguish between combatants. That basis for distinguishing—the UN's use-of-force prohibition—simply does not apply to combatants in noninternational armed conflicts.¹⁵⁶ Thus, because it is not illegal under IHL to launch a noninternational armed conflict, there is no *illegal* aggressor among the parties to a noninternational

155. See Eliav Lieblich, *Internal Jus ad Bellum*, 7 HASTINGS L.J. 687, 689 (2015) (reporting that “[o]f the 254 armed conflicts recorded between 1946 and 2013 by a leading database, only twenty-four have been categorized as interstate conflicts, while a staggering number of 153 *intrastate* conflicts were recorded” and the rest were mixed conflicts).

156. See Jens David Ohlin, *The Common Law of War*, 58 WM. & MARY L. REV. 493, 520 (2016).

armed conflict, and there is no *jus ad bellum* status on which to base differential enforcement.

Although that argument has surface appeal, I maintain that my proposal can and should also be applied to IHL violations occurring during noninternational armed conflicts. Noninternational armed conflicts admittedly are exempt from the UN Charter's use-of-force prohibition, but their exemption stems not from a principled determination that launching a civil war *should* be legal under international law but from states' traditional (and much criticized) unwillingness to relinquish their sovereign prerogatives.¹⁵⁷ Thus, we should not view the international community's failure to extend the use-of-force prohibition to noninternational armed conflicts as its endorsement of the current legal regime. Rather, the distinction in legal treatment between international and noninternational armed conflicts simply reflects the prevailing political realities. Moreover, the equal application doctrine is unjustified not primarily because it fails to draw relevant *legal* distinctions between combatants, but because it fails to draw relevant *moral* distinctions. Indeed, the philosophers who oppose the equal application doctrine generally make no reference to legal standards¹⁵⁸ but instead claim that the moral distinction between aggressors and defenders justifies (if not requires) the application of different rules governing the conduct of hostilities.¹⁵⁹

Thus, although a party to a noninternational armed conflict is not acting illegally when it launches the conflict, it may well be acting wrongfully—in the ordinary moral sense. Few would dispute, for instance, that the Revolutionary United Front (RUF) was a wrongful aggressor when it initiated the brutal civil war in Sierra Leone by “terroriz[ing] the villages of Bomaru and Sienga.”¹⁶⁰ Likewise,

157. Most discussions of these sovereignty concerns relate to states' reluctance to extend *jus in bello* regulations to noninternational armed conflicts. *See, e.g.*, Dapo Akande & Lawrence Hill-Cawthorne, *The Lieber Code and the Regulation of Civil War in International Law*, 53 COLUM. J. TRANSNAT'L L. 638, 645–47 (2015); Laurie R. Blank & Benjamin R. Farley, *Identifying the Start of Conflict: Conflict Recognition, Operational Realities, and Accountability in the Post-9/11 World*, 36 MICH. J. INT'L L. 467, 483–86 (2015); Drew R. Atkins, *Customary International Humanitarian Law and Multinational Military Operations in Malaysia*, 16 PAC. RIM L. & POL'Y J. 79, 83–85 (2007). States have little need to press for an international law prohibition on the launching of a civil war because such acts are invariably criminal under the states' domestic laws. These domestic criminal laws provide states with the legal authority to prosecute nonstate actors who raise arms against the state. For that reason, states have no concomitant incentive to develop international law rules that would limit their power to initiate armed force against their citizens.

158. *See, e.g.*, Tom Dannenbaum, *Why Have We Criminalized Aggressive War*, 126 YALE L.J. 1242, 1258 (2017) (noting that Christopher Kutz “does not link [his moral theory to the law]”).

159. *See supra* Part I.

160. Peter Penfold, *The Special Court for Sierra Leone: A Critical Analysis*, in RESCUING A FRAGILE STATE: SIERRA LEONE 2002–2008, 53, 59 (Lansana Gberie ed., 2009); *see also* REPORT OF THE TRUTH AND RECONCILIATION COMMISSION, WITNESS TO TRUTH, Vol. 2, Chapter 2, ¶¶ 69–74 (2004) [hereinafter SIERRA LEONE TRC REPORT]; Lansana Gberie, *War and Peace in Sierra Leone: Diamonds, Corruption and Lebanese Connection*, at 2, 3,

it is incontestable that Bosnian Serbs acted (morally) wrongfully when they initiated the civil war in that country by launching attacks against Bosnian Croats and Muslims following the 1991 independence referendum.¹⁶¹ In fact, it was the Serbs' aggression in the Bosnian war that motivated legal scholar Ruth Wedgwood to advocate extending the UN Charter's prohibition on the use of force to noninternational armed conflicts,¹⁶² and other scholars have made similar observations and proposals.¹⁶³ Indeed, Eliav Lieblich recently advanced a novel theory of "internal *jus ad bellum*"; that is, a law governing the use of force that can be applied to both governments and opposition groups engaged in noninternational armed conflicts.¹⁶⁴ In sum, although salient distinctions unquestionably can be drawn between the launching of an international and a noninternational armed conflict, those distinctions are largely irrelevant for the purposes of my proposal. In particular, to the extent that we consider it justified to weigh aggressor status in favor of prosecutions, then it should weigh in favor of prosecutions for violations of *jus in bello* rules occurring during both international and noninternational armed conflicts.

The second concern that I anticipate relates to our ability to determine which party is the aggressor in a given conflict. In particular, if an international tribunal is going to take aggressor status into account when determining whom to prosecute, then it must have sufficient facts about the conflict and the parties' actions therein to be able to identify aggressors with reasonable confidence. We have good

(2017), <https://impacttransform.org/wp-content/uploads/2017/09/2002-Nov-War-and-Peace-in-Sierra-Leone-Diamonds-Corruption-and-the-Lebanese-Connection.pdf>.

161. See, e.g., Prosecutor v. Naletilić and Martinović, Case No. IT-98-34-T, Judgment, ¶ 14 (Mar. 31, 2003) ("Following the declaration of independence, the [Bosnian] Serbs attacked different parts of Bosnia and Herzegovina."). Human Rights Watch reported: [A]fter the referendum of Bosnia, [the Serbs] just gathered technical equipment in preparation for war. These preparations were done in all municipalities in Bosnia and Hercegovina, especially in municipalities where Serbs formed half or more of the population, knowing that Bosniaks did not have any weapons at all, and with promises of assistance from Milosevic and the JNA. They rejected a dialogue and decided to fight a war.

"A Closed Dark Place": Past and Present Human Rights Abuses in Foca, HUMAN RIGHTS WATCH (July 1, 1998), <https://www.hrw.org/legacy/reports98/foca/>.

162. Ruth Wedgwood, *The Use of Force in Civil Disputes*, ISRAEL Y.B. HUMAN RIGHTS 239, 245 (1996).

163. See, e.g., Kirsti Samuels, *Jus Ad Bellum and Civil Conflicts: A Case Study of the International Community's Approach to Violence in the Conflict in Sierra Leone*, 8 J. CONFLICT & SEC. L. 315, 315 (2003) (suggesting that the international community's practice seems to be evolving "towards the emergence of *jus ad bellum* norms governing the recourse to violence in internal disputes"); Bugnion, *supra* note 11; Lieblich, *supra* note 155; Nico Schrijver, *The Use of Force Under the U.N. Charter: Restrictions and Loopholes* 4 (2003), https://acuns.org/wp-content/uploads/2012/09/WebPageSchrijver_UseofForce.pdf. These proposals are also consistent with scholarship advocating recognition of the third-generation human right to peace. For a discussion of that right, see DOUGLAS ROCHE, *THE HUMAN RIGHT TO PEACE* (2003); Patrick Hayden, *A Defense of Peace as a Human Right*, 21 S. AFRICAN J. PHIL. 147 (2002).

164. See generally Lieblich, *supra* note 155.

reason to fear that it will not. Accurate information—about all subjects—is hard to come by during warfare.¹⁶⁵ Moreover, accurate information about aggressor status may be particularly difficult to acquire. As noted in Part I, most warring parties label their opponents aggressors and proclaim themselves to be acting in self-defense.¹⁶⁶ Some such claims are patently ridiculous,¹⁶⁷ but others raise close questions, particularly while the conflict is ongoing. The United States, for instance, suggested that its 2003 invasion of Iraq could be justified as self-defense, ostensibly to eliminate the threat from weapons of mass destruction.¹⁶⁸ Some commentators found that claim persuasive,¹⁶⁹ whereas others accused the United States of violating *jus ad bellum* norms.¹⁷⁰ And the subsequent failure to find weapons of mass destruction added further complexity to the analysis.¹⁷¹

The difficulty of ascertaining facts relevant to determining aggressor status is exacerbated by the vagueness and contentiousness that have historically surrounded the standards governing the initiation of warfare. Selecting a standard by which to measure aggressor status is itself a controversial proposition, and it is a question that I will examine in considerable detail in a future work.¹⁷² Suffice it to say here that when determining whether a party is an aggressor for purposes of prosecutorial allocations, the tribunals might look to the UN Charter's use-of-force rules or the ICC's newly minted definition of "aggression."¹⁷³ Or they might eschew existing legal standards altogether and instead apply a standard informed more

165. See Frederiek de Vlaming, *Selection of Defendants*, in INTERNATIONAL PROSECUTORS 542, 551 (Luc Reydam's et al. eds., 2012). As the old maxim goes, the first casualty of war is truth. Indeed, it is not just the aggressor status of the parties that is subject to serious contestation. In the midst of the Bosnian war, for example, it was believed that 200,000 had been killed and 50,000 raped. After the war, those estimates were reduced to 97,000 and 20,000, respectively. *Id.*

166. See, e.g., *supra* notes 75–80.

167. For instance, Russia justified its armed intervention into Ukraine by claiming the need for self-defense, a claim that many commentators found highly implausible. See Peter M. Olson, *The Lawfulness of Russian Use of Force in Crimea*, 53 MIL. L. & L. WAR REV. 17, 18, 34–35 (2014); see also Christian Marxsen, *The Crimea Crisis from an International Law Perspective*, 2 KYIV-MOHYLA L. & POL. J. 13, 17–19 (2016).

168. Miriam Sapiro, *Iraq: The Shifting Sands of Preemptive Self-Defense*, 97 AM. J. INT'L L. 599, 599 (2003); Donald Nungesser, *United States' Use of the Doctrine of Anticipatory Self-Defense in Iraqi Conflicts*, 16 PACE INT'L L. REV. 193, 193–94 (2004).

169. See John Yoo, *International Law and the War in Iraq*, 97 AM. J. INT'L L. 563, 574 (2003).

170. See Sean D. Murphy, *Assessing the Legality of Invading Iraq*, 92 GEO. L.J. 173, 175–76 (2004).

171. See Daniel R. Strecker, *The Catholic Just War Tradition and the War in Iraq: Just Pre-emptive War, Just Humanitarian Intervention?*, 51 J. CATH. LEGAL STUD. 77, 104 (2012); Jorge Alberto Ramirez, *Iraq War: Anticipatory Self-Defense or Unlawful Unilateralism*, 34 CAL. W. INT'L L.J. 1, 23–24 (2003).

172. In a future publication, I will provide a detailed examination of the implementation of my proposal and additionally will consider its application to sentencing.

173. Rome Statute of the International Criminal Court, art. 8 bis, July 17, 1998 U.N.T.S. 38544 (entered into force July 1, 2002).

directly by ordinary morality.¹⁷⁴ But whatever standard is selected will be difficult to apply—and particularly so at an early stage in the prosecution. The UN’s use-of-force rules are notoriously contested,¹⁷⁵ for instance, and the ICC’s definition of aggression has not yet come into force, let alone been applied in an actual case.¹⁷⁶

The foregoing suggests that considering the parties’ aggressor status in prosecutorial allocation decisions will be factually and legally fraught in many cases. Indeed, it is reasonable to assume that prosecutors will be unable to consider aggressor status in their case selection decisions in some cases because that status will not be ascertainable with sufficient certainty. However, just because it might be difficult, or even impossible, to determine which party was the aggressor in some conflicts does not mean that aggressor status should be ignored where the determination is straightforward. Admittedly, the provenance of the conflict in the Democratic Republic of the Congo is complex and uncertain,¹⁷⁷ but the provenance of the conflict in Bosnia is far less so; thus, there is no reason to ignore the aggressor status of the Serbs even if we may be unable to ascertain that of the Hema and Lendu with sufficient certainty. Finally, the fact that enforcement of IHL violations typically occurs long after the conflict has come to an end¹⁷⁸ is apt to ameliorate information deficiencies to some degree.

III. INTRODUCING AGGRESSOR STATUS TO CASE SELECTION AT THE INTERNATIONAL CRIMINAL TRIBUNALS

In the previous Parts, I have advocated weighing aggressor status as a factor in favor of prosecutions when enforcement resources are scarce, and difficult selection decisions must, in any event, be made. My proposal constitutes a substantial contribution to the scholarly discussion surrounding the equal application doctrine because it provides a practically feasible path between

174. For instance, although armed force used to advance humanitarian needs often satisfies moral requirements, it is generally understood to violate *jus ad bellum* prohibitions. Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EUR. J. INT’L L. 1, 2–5 (1999); Albrecht Randelzhofer & Oliver Dörr, *Article 2(4)*, in *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 200, 223 (Bruno Simmis et al. eds., 3d ed. 2012). In this way, the legal rules governing the initiation of warfare might be considered in tension with relevant moral standards, so an international tribunal may conclude that a *jus ad bellum* violation stemming from a humanitarian intervention should not weigh in favor of prosecution.

175. The UN’s use-of-force rules are difficult to apply. Thomas M. Franck, *Who Killed Article 2(4) or: Changing Norms Governing the Use of Force by States*, 64 AM. J. INT’L L. 809, 816, 820 (1970).

176. It was only in 2010 that the ICC’s Assembly of States Parties adopted a definition of “aggression,” and the provision could not come into force until 2017, after 30 states ratified it. See Ryan J. Vogel, *Challenges for the United States with the Rome Statute’s “Crime of Aggression,”* 1 UVU J. NAT’L SEC. 7, 27 (2017). The article has received the requisite ratifications, but it has not yet been promulgated. See *id.* at 27.

177. Jean-François Maystadt et al., *Mineral Resources and Conflicts in DRC: A Case of Ecological Fallacy?*, 66 OXFORD ECON. PAPERS 721, 724 (2014) (“The causes of the Congo wars are multiple, complex, and intermingled.”).

178. Alex Whiting, *International Criminal Prosecutions, Justice Delayed Can Be Justice Delivered*, 50 HARV. INT’L L.J. 323, 328 (2009).

supporters of the doctrine—who fear the deleterious consequences that would attend its elimination—and its critics. But in order to comprehensively evaluate my proposal, we must also explore its impact on the work of the bodies that prosecute grave IHL violations. For many centuries, when any post-conflict punishment occurred at all, the punishment was imposed by the victors against their vanquished,¹⁷⁹ so the difficult case selection questions that will be discussed here did not arise. One-sided prosecutions of IHL violations still take place in many domestic criminal justice systems,¹⁸⁰ but in recent years, international criminal tribunals have been created with jurisdiction over both parties to the relevant conflict.¹⁸¹ However, these tribunals must determine how to allocate their scarce prosecutorial resources among a too-large body of cases. In this Part, I show that taking account of aggressor status in prosecutorial allocation decisions is not only consistent with the precedent and practice governing case selection at these international tribunals, but it also has the potential to improve those practices in both tangible and intangible ways.

Section A explores the way in which my proposal would interact with existing law and practice on case selection at the international criminal tribunals. It shows that taking account of aggressor status fits easily within that body of law. Section B makes the normative case for considering aggressor status in prosecutorial allocation decisions. It maintains that disproportionately prosecuting aggressors not only accords with our moral intuitions but also has the potential to enhance the tribunals' ability to advance some of their most compelling goals.

A. Exploring Current Case Selection Practices at the International Criminal Tribunals

Over the last 25 years, the international community has created several ad hoc international tribunals and a permanent international criminal court, and it has charged these bodies with prosecuting grave violations of IHL, among other international crimes.¹⁸² However, unlike domestic criminal justice systems, which are expected to prosecute all serious crimes within their jurisdictions, these international tribunals have the resources to prosecute only a very small proportion

179. See GARY JONATHAN BASS, *STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS* 8–9 (3d ed. 2002).

180. See, e.g., HUMAN RIGHTS WATCH, *JUSTICE COMPROMISED: THE LEGACY OF RWANDA'S COMMUNITY-BASED GACACA COURTS*, <https://www.hrw.org/report/2011/05/31/justice-compromised/legacy-rwandas-community-based-gacaca-courts> (“One of the *gacaca* law’s most serious shortcomings is that it does not cover war crimes and crimes against humanity committed by the [Rwandan Patriotic Front] as it sought to end the genocide between April and July 1994 and consolidated its control on the country in the months that followed.”).

181. Occasionally, domestic criminal justice systems also prosecute both sides to the conflict, but such evenhandedness is rare and often results from pressure brought by the international community. The domestic prosecutions carried out by Serbia and Croatia, for instance, were motivated by such pressure.

182. See sources cited *supra* note 133.

of such crimes.¹⁸³ So, one of the most important—and controversial—tasks that the international tribunals must perform is case selection. Specifically, the tribunals must determine which crimes and defendants to prosecute among a sea of “worthy” contenders.¹⁸⁴ My analysis of the equal application doctrine, appearing in previous Parts, has led me to propose that enforcement of IHL violations be allocated unequally between aggressors and defenders. Because I do not advocate a ban on the prosecution of defenders, then in practical terms, I am suggesting that international tribunals weigh the aggressor status of their suspects as a factor in favor of their prosecution.

My proposal is a novel one, in that the international tribunals have not, up until now, expressly considered aggressor status when making prosecutorial allocations; however, this Section shows that their law and precedents unquestionably allow them to do so. In particular, although all of the international tribunals were established by statutes that delineate their various jurisdictions,¹⁸⁵ neither those statutes nor any other positive law provides much guidance on how—and against whom—those jurisdictions should be exercised. As a consequence, international tribunal prosecutors have had virtually limitless discretion in determining whom to charge. Occasionally, defense counsel have claimed that the prosecution abused its discretion by engaging in discriminatory or selective prosecutions, but these claims have uniformly been rejected.¹⁸⁶ The tribunals have thereby maintained expansive prosecutorial discretion in case selection.

Although tribunal prosecutors possess virtually unfettered *legal* discretion to select cases, their case selection decisions are nonetheless constrained by political realities, and those constraints should be expressly acknowledged. At present, the Extraordinary Chambers in the Courts of Cambodia (ECCC) are providing a particularly blatant, real-time example of case selection that is dramatically constrained by the political desires of the state where the crime took place,¹⁸⁷ but it is by no means the only tribunal to have faced such challenges. Indeed, although the International Criminal Tribunal for the former Yugoslavia’s (ICTY’s) first

183. William A. Schabas, *Victors’ Justice: Selecting Situations at the International Criminal Court*, 43 J. MARSHALL L. REV. 535, 542 (2010).

184. International prosecutors not only must decide which individuals to indict, but they also must decide which crimes committed by those individuals to charge, because the tribunals typically lack the resources to prosecute all of the crimes allegedly committed by the individuals they indict. My proposal does not impact that latter selection.

185. ICTY Statute, *supra* note 133, at arts. 1–6, 8–10; ECCC Statute, *supra* note 133, at ch. II; SCSL Statute, *supra* note 133, at arts. 1–10; Rome Statute, *supra* note 133, at arts. 1, 5–8, 11–21; ICTR Statute, *supra* note 133, at arts. 1–9.

186. See Hassan B. Jallow, *Prosecutorial Discretion and International Criminal Justice*, 3 J. INT’L CRIM. JUST. 145, 156–57 (2005) (describing ICTR and ICTY cases); Prosecutor v. Brima et al., Case No. SCSL-2004-16-A, Judgement, ¶¶ 280–81 (Feb. 22, 2008).

187. Cambodia staunchly opposes the ECCC’s efforts to prosecute Cases No. 003 and 004 and thus far has been able to prevent the prosecutions from moving forward. See *Cambodia: Stop Blocking Justice for Khmer Rouge Crimes*, HUMAN RIGHTS WATCH (Mar. 22, 2015), <https://www.hrw.org/news/2015/03/22/cambodia-stop-blocking-justice-khmer-rouge-crimes>.

prosecutor, Richard Goldstone, may have desired to advance any number of theoretically consistent, empirically grounded case selection principles when he assumed his position at the ICTY, his practical choices were significantly limited by the fact that his tribunal was established during an ongoing conflict, which prevented him from conducting on-site investigations.¹⁸⁸ Given these political realities, Goldstone understandably focused his early indictments against lower-level suspects who were already in custody.¹⁸⁹ The same political constraints did not exist at the International Criminal Tribunal for Rwanda (ICTR), however, so the same Prosecutor—Richard Goldstone—was immediately able to indict high-level members of the ousted Rwandan government allegedly responsible for the genocide.¹⁹⁰ At the same time, the new Tutsi-led government of Rwanda effectively blocked the ICTR from issuing indictments against members of the Rwandan Patriotic Front (RPF) who allegedly killed tens of thousands of Hutu as they won the war and stopped the genocide.¹⁹¹ This discussion serves to acknowledge, therefore, that a tribunal's ability to consider aggressor status, or any other factor in case selection, will always be subject to the political forces that invariably shape and constrain the relevant tribunals' operations.

Because the ICC is the only extant international tribunal currently engaged in substantial case selection, its law and practice deserve a closer examination. However, that examination reveals that, although the ICC's jurisdictional and admissibility requirements are considerably more complex than those of the ad hoc tribunals, they provide the prosecution no additional guidance on case selection, nor do they impose additional restrictions on the ICC Prosecutor's discretion to select defendants and cases from those situations that are before the court.¹⁹² At the same time, the ICC's prosecutors have been somewhat more transparent than the prosecutors of the ad hoc tribunals about the principles that underlie their selection of cases.¹⁹³ A brief look at those principles confirms that they allow for significant

188. de Vlaming, *supra* note 165, at 549–50.

189. *See id.* at 550. Or, phrased in the inimitable words of Bill Schabas, in the early years, the ICTY had “to settle for any villain they could get their hands on no matter how insignificant the individual might have been in the general scheme of atrocity.” Schabas, *supra* note 183, at 543.

190. Margaret M. deGuzman & William A. Schabas, *Initiation of Investigations and Selection of Cases*, in *INTERNATIONAL CRIMINAL PROCEDURE: PRINCIPLES AND RULES* 131, 138–39 (Göran Sluiter et al. eds., 2013).

191. Victor Peskin, *Victor's Justice Revisited: Rwandan Patriotic Front Crimes and the Prosecutorial Endgame at the ICTR*, in *REMAKING RWANDA: STATE BUILDING AND HUMAN RIGHTS AFTER MASS VIOLENCE* 173, 177–78 (Scott Strauss & Lars Waldorf eds., 2011). Indeed, the ICTR's third prosecutor, Carla Del Ponte, allegedly lost her position at the ICTR largely because she sought to indict members of the RPF. *Id.*

192. Paige Casaly, *Al Mahdi Before the ICC*, 14 *J. INT'L CRIM. JUST.* 1199, 1215 (2016).

193. *See* Kai Ambos & Ignaz Stegmiller, *Prosecuting International Crimes at the International Criminal Court: Is There a Coherent and Comprehensive Strategy?*, 58 *CRIME, L. & SOC. CHANGE* 415, 416 (2013) (noting that, unlike the ad hoc tribunals used to prosecute international crimes in Rwanda and Yugoslavia, the ICC initiated a process of public consultations to develop consistent and transparent case selection criteria); *see also* de

prosecutorial discretion and therefore would easily accommodate my proposal to weigh aggressor status in favor of prosecutions.

In September 2016, the ICC's Prosecutor issued a policy paper on case selection, and therein she identified "gravity" as the prosecution's predominant case selection criterion.¹⁹⁴ According to the policy paper, the gravity of a crime includes both quantitative and qualitative elements and is assessed by evaluating, among other things, the scale, nature, manner of commission, and impact of the crimes.¹⁹⁵ The policy paper provides a summary description of each of these factors, but even a cursory examination of these descriptions shows that they do not constrain the Prosecutor's discretion in any meaningful way. For one thing, the Prosecutor could withdraw the policy paper or abandon the criteria it identifies at any time. But even if the Prosecutor continues ostensibly to adhere to the standards set out in the policy paper, she still retains the freedom to charge whomever she pleases because those standards do not restrict her choices in any way. Indeed, in many cases, the policy paper does not even provide much guidance. For instance, it states that the "scale" of a crime may be assessed in light of, among other things, the crimes' "geographical or temporal spread (high intensity of the crimes over a brief period or low intensity of crimes over an extended period)."¹⁹⁶ But it offers no opinion on whether the Prosecutor should prioritize cases involving a brief, high-intensity set of crimes over cases involving a longer-lasting, low-intensity set of crimes or vice versa. Moreover, the policy paper is silent regarding the way in which various factors should weigh against one another when one points toward the prosecution of one set of crimes or defendants, and another points toward the prosecution of another set of crimes or defendants. For instance, the policy paper indicates that the Prosecutor should consider the vulnerability of victims when selecting cases and defendants,¹⁹⁷ but it also suggests that the Prosecutor should consider the number of victims.¹⁹⁸ Yet, the paper provides no guidance as to whether to prioritize crimes featuring a larger number of less vulnerable victims over crimes featuring a smaller number of more vulnerable victims or vice versa.

More broadly, the policy paper sheds no light on any of the most compelling questions that international criminal law scholars and commentators repeatedly raise about case selection. Should prosecutors prioritize traditionally

Vlaming, *supra* note 165, at 563 (observing that the SCSL prosecutor "chose not to convey his policy aims [regarding case selection] publicly").

194. Office of the Prosecutor, Policy Paper on Case Selection and Prioritisation, ¶ 6, (Sept. 15, 2016), https://www.icc-cpi.int/itemsdocuments/20160915_otp-policy_case-selection_eng.pdf [hereinafter Policy Paper on Case Selection]; Office of the Prosecutor, Report on Prosecutorial Strategy, at 5, (Sept. 14, 2006) https://www.icc-cpi.int/nr/rdonlyres/d673dd8c-d427-4547-bc69-2d363e07274b/143708/prosecutorialstrategy20060914_english.pdf; *see also* Regulations of the Office of the Prosecutor, Regulation 29(2), ICC-BD/05-01-09, (Apr. 23, 2009), <https://www.icc-cpi.int/nr/rdonlyres/fff97111-ecd6-40b5-9cda-792bcbe1e695/280253/iccbd050109eng.pdf>.

195. Policy Paper on Case Selection, *supra* note 194, at ¶¶ 35, 37.

196. *Id.* ¶ 38.

197. *Id.* ¶ 41.

198. *Id.* ¶ 38.

under-prosecuted crimes, such as those involving sexual violence, at the expense of crimes that arguably feature greater and more lasting harm, such as murder?¹⁹⁹ Should prosecutors always prioritize the prosecution of defendants whose crimes primarily target persons over defendants whose crimes primarily target property, even if the relevant property holds tremendous cultural and historical significance?²⁰⁰ How should prosecutors allocate cases when both parties to the conflict committed crimes but one side committed a disproportionate share of the gravest crimes?²⁰¹ And finally, what is the case selection relevance of a suspect's official position or status?²⁰² The policy paper, citing the ICC Regulations, instructs the Prosecutor to ensure that charges are brought "against those persons who appear to be the most responsible for the identified crimes," but the same paragraph goes on to authorize prosecutions against low-level, mid-level, and high-level offenders, depending on the circumstances.²⁰³

Although the foregoing description of the ICC's pronouncements on case selection might appear critical, I am in fact keenly aware of and sympathetic to the difficult value judgments that case selection requires. Thus, the conclusion I derive from an examination of the ICC's policy paper is not that the policy paper should have reached hard, pat answers to the questions that have vexed international criminal law scholars and commentators for decades. Rather, I maintain only that the proposal I advance in this Article fits comfortably within the existing law and practice of the ICC. As my description of the policy paper amply shows, the ICC's multifaceted notion of gravity is sufficiently flexible and capacious to encompass consideration of a suspect's aggressor status, among other factors.

B. The Normative Case for Considering Aggressor Status When Allocating International Criminal Prosecutions

The previous Section revealed that the laws and precedents of the international tribunals permit them to consider aggressor status as a factor weighing

199. See Kimberly Carson, *Note: Reconsidering the Theoretical Accuracy and Prosecutorial Effectiveness of International Tribunals' Ad Hoc Approaches to Conceptualizing Crimes of Sexual Violence as War Crimes, Crimes Against Humanity, and Acts of Genocide*, 39 FORDHAM URB. L.J. 1249, 1278 (2012) (noting that under prevailing case selection standards "crimes of sexual violence are often sidelined in favor of crimes of murder or extermination, which are perceived as more important, more egregious, or easier to prosecute").

200. See, e.g., Casaly, *supra* note 170, at 1215; Shiva Jayaraman, *The Destruction of Cultural Property at the International Criminal Court: the Prosecutor v. Al Mahdi* (U. Chi. Law Sch. Int'l Immersion Program Papers, Working Paper No. 50, 2017), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1049&context=international_immersion_program_papers; Owen Bowcott, *ICC's First Cultural Destruction Trial to Open in the Hague*, GUARDIAN (Feb. 26, 2016), <https://www.theguardian.com/law/2016/feb/28/iccs-first-cultural-destruction-trial-to-open-in-the-hague> (quoting Mark Ellis, Chief Executive of the International Bar Association: "[T]here will be those who will question why Bensouda is focusing on ancient sites rather than going after rape, torture and murder convictions, but destruction of cultural heritage is not a second-rate crime.").

201. See, e.g., Rastan, *supra* note 24, at 592.

202. *Id.*

203. Policy Paper on Case Selection, *supra* note 194, at ¶ 42

in favor of prosecutions. In this Section, I advance a series of normative arguments for doing so. These arguments rely on psychology research, domestic criminal law practice, and the aims driving international criminal prosecutions, among other things. This body of law, practice, and scholarship together suggests that we can improve international criminal law case selection by including aggressor status among the factors that prosecutors consider when deciding whom to prosecute. Subsection 1 of this Section harkens back to the earlier pages of this Article and presents the primary and most obvious reason to weigh aggressor status in favor of prosecutions; namely, it is consistent with our moral intuitions to prosecute a larger proportion of defendants committing crimes on behalf of aggressors than defendants committing crimes on behalf of defenders. Subsection 2 suggests that putting that intuition into practice may enhance international criminal law's ability to advance many of its penological goals.

1. *Case Selection and our Moral Intuitions*

Although this Section is billed as presenting the normative case for weighing aggressor status in favor of prosecutions, in fact, much of that case has already been made in the earlier parts of this Article. In particular, our survey of revisionist philosophical literature in Part I showed that the equal application of *jus in bello* rules is inconsistent with principles of ordinary morality because a party's goals in initiating warfare are morally relevant to the way in which the rules governing the conduct of warfare should apply to that party. Although these philosophical insights are largely uncontested, they have not carried the day because the unequal application of *jus in bello* rules—in the real-world context in which those rules operate—would undermine and maybe destroy the IHL system as a whole.

Indeed, it is as a result of those concerns that I have proposed differentially enforcing *jus in bello* rules on the basis of aggressor status because that level of differentiation can be accomplished without incurring the deleterious practical consequences that would attend the differential application of those rules. But the normative insights that underlie proposals to unequally apply *jus in bello* rules just as compellingly support my proposal to unequally enforce *jus in bello* rules. In other words, if ordinary moral principles support the unequal application of *jus in bello* rules, they will likewise support the unequal enforcement of those rules.

We need not rest our normative conclusions about ordinary morality solely on the realm of abstract moral philosophy, however, because numerous psychology studies, along with the real-world experiences of a variety of criminal justice systems, provide additional support for the philosophers' conclusions. Turning first to the psychology studies, we find that a large body of research shows that people evaluate whether violence is justified largely by means of the ends to which that violence is aimed; specifically, people consider the use of force to be most justified when it is used to repel a violent attack and least justified when it is employed aggressively.²⁰⁴ Indeed, the findings of this research are so robust and consistent

204. See J. Martin Ramirez et al., *Justification of Aggression in Several Asian and European Countries with Different Religious and Cultural Background*, 31 INT'L J.

across various countries and cultures that one of the leading scholars in this field suggests that the relevant moral intuitions—including the comparatively high acceptance of the use of force in response to provocation—“may have some biological roots”²⁰⁵ or reflect a “universal moral code, common to all humanity.”²⁰⁶ This psychology research then, considered together with the philosophical literature detailed in Part I, compellingly suggests that disproportionately enforcing IHL rules against aggressors accords with ordinary moral intuitions.

These intuitions manifest themselves not only in the pages of scholarly journals but also in criminal justice systems throughout the world. For instance, prosecutors in domestic criminal justice systems often elect not to prosecute those who used violence ostensibly in self-defense, even when the putative defendant’s belief in the need for self-defense was erroneous or the use of force was excessive.²⁰⁷ In making these decisions, prosecutors may be motivated by the moral intuitions discussed throughout this Article, but even if they themselves are not, they know that juries will be. Time and again, jurors have refused to convict defendants who seemingly used excessive or unnecessary force against those who threatened them.²⁰⁸ Indeed, the American public—and its legislative representatives—is so opposed to punishing those who have any arguable claim of self-defense that recent years have seen the widespread and enthusiastic enactment of “Stand Your Ground” laws.²⁰⁹ These laws not only expand the right to use force in defense of one’s person

BEHAVIORAL DEV. 9 (2007) [hereinafter Ramirez et al., *Justification of Aggression*]; Kirsti M. J. Lagerspetz & Martin Westman, *Moral Approval of Aggressive Acts: A Preliminary Investigation*, 6 AGGRESSIVE BEHAV. 119, 125 (1980); Adam Fraczek, *Moral Approval of Aggressive Acts A Polish-Finish Comparative Study*, 16 J. CROSS-CULTURAL PSYCH. 41 (1985); J. Martin Ramirez, *Acceptability of Aggression in Four Spanish Regions and a Comparison with Other European Countries*, 19 AGGRESSIVE BEHAV. 185, 190 (1993); J. Martin Ramirez, *Similarities in Attitudes Toward Interpersonal Aggression in Finland, Poland, and Spain*, 131 J. SOC. PSYCH. 737, 738–39 (1991); Takehiro Fujihara, Takaya Kohyama, J. Manuel Andreu & J. Martin Ramirez, *Justification of Interpersonal Aggression in Japanese, American, and Spanish Students*, 25 AGGRESSIVE BEHAV. 185, 188–89 (1999).

205. Luis Millana & J. Martin Ramirez, *Justification of Aggression in Young Reoffenders*, 4 OPEN CRIMINOLOGY J. 61, 67 (2011).

206. See Ramirez et al., *Justification of Aggression*, *supra* note 204, at 14.

207. Renee Lettow Lerner, *The Worldwide Popular Revolt Against Proportionality in Self-Defense Law*, 2 J.L. ECON. & POL’Y 331, 340 (2006) (observing that prosecutors rarely indict those who defend themselves against intruders); see also Carolyn B. Ramsey, *The Discretionary Power of “Public” Prosecutors in Historical Perspective*, 39 AM. CRIM. L. REV. 1309, 1387–89 (2002) (discussing the historical reluctance to prosecute in self-defense cases because “a lethal response to an insult or minor physical assault . . . resonated deeply with nineteenth-century conceptions of masculine honor”).

208. HARRY KALVEN, JR. & HANS ZEISEL, AMERICAN JURY 221–41 (1966). For more recent examples, see Caroline Forell, *What’s Reasonable?: Self-Defense and Mistake in Criminal and Tort Law*, 14 LEWIS & CLARK L. REV. 1401, 1406–20 (2010); Brian Rogers et al., *Joe Horn Cleared by Grand Jury in Pasadena Shootings*, HOUS. CHRONICLE (June 30, 2008), <http://www.chron.com/neighborhood/pasadena-news/article/Joe-Horn-cleared-by-grand-jury-in-Pasadena-1587004.php>.

209. See, e.g., ALA. CODE § 13A-3-23(b) (2018); FLA. STAT. § 776.012(2) (2014); GA. CODE ANN. § 16-3-21 (2018); IDAHO CODE § 18-4009 (2018); KAN. STAT. ANN. § 21-

and property,²¹⁰ but they also provide immunity from arrest and prosecution for those with even a colorable self-defense claim.²¹¹ As Renee Lettow Lerner observed, prosecutions of those who claim self-defense are rare in any event, but Stand Your Ground advocates “want no risk of them at all.”²¹² And the immunity provisions embedded in Stand Your Ground laws have in fact largely eliminated that risk.²¹³ Citizens of other countries have also sought to expand their rights of self-defense. In the United Kingdom, for instance, widespread public outrage greeted the prosecution of a Norfolk man who shot and killed a 16-year-old burglar—as *he was fleeing*—and spurred efforts to enact a new, more expansive right of self-defense.²¹⁴ Belgians likewise have lodged vehement opposition when prosecutors have brought charges against defendants who engaged in arguably excessive uses of force.²¹⁵

The moral intuitions that drove the expansion of domestic self-defense rules and grants of immunity have also been on display at the international criminal courts, and most notably, at the SCSL, which prosecuted international crimes that occurred during Sierra Leone’s decade-long civil war.²¹⁶ It is widely accepted that

522(c) (2018); KY. REV. STAT. ANN. § 503.055(3) (2006); LA. STAT. ANN. § 14:20(C) (2014); OKLA. STAT. tit. 21 § 1289.25(D) (2018); S.C. CODE ANN. § 16-11-440(C) (2018).

210. See, e.g., LA. STAT. ANN. § 14:20 (2014); FLA. STAT. § 776.031 (2017); ALA. CODE § 13A-3-23(a)(3) (2006).

211. ALA. CODE § 13A-3-23(d); FLA. STAT. § 776.032; see Tamara F. Lawson, *A Fresh Cut in an Old Wound—A Critical Analysis of the Trayvon Martin Killing: The Public Outcry, The Prosecutors’ Discretion, and the Stand Your Ground Law*, 23 U. FLA. J.L. & PUB. POL’Y 271, 287–88 (2012) (discussing operation of the immunity provisions); Jennifer Randolph, *How to Get Away With Murder: Criminal and Civil Immunity Provisions in “Stand Your Ground” Legislation*, 44 SETON HALL L. REV. 599, 623–24 (2014) (same); Mary Elizabeth Castillo, *Florida’s Stand Your Ground Regime: Legislative Direction, Prosecutorial Discretion, Public Pressures, and the Legitimization of the Criminal Justice System*, 42 J. LEGIS. 66, 76–78 (2016); Jason W. Bobo, *Following the Trend: Alabama Abandons the Duty to Retreat and Encourages Citizens to Stand Their Ground*, 38 CUMB. L. REV. 339, 363 (2007).

212. Lerner, *supra* note 207, at 340. She goes on to note:

[Stand Your Ground Law supporters] do not want citizens to live in fear of a prosecutor’s decision, and all the expense and disruption that a criminal case entails They therefore want a clear rule to cabin prosecutorial discretion. Similarly, even though juries in this country may rarely convict those with a legitimate claim to self-defense, reform supporters want to limit even that risk.

Id.

213. For instance, Florida prosecutors have reported that Florida’s Stand Your Ground Law has “caused cases not to be filed at all or to be filed with reduced charges.” Randolph, *supra* note 211, at 624.

214. Joyce Lee Malcolm, *Self-Defense in England: Not Quite Dead*, 23 J. FIREARMS & PUB. POL’Y 60, 64–67 (2011); Joshua Getzler, *Use of Force in Protecting Property*, 7 THEORETICAL INQ. L. 131, 139–41 (2005).

215. See Lerner, *supra* note 207, at 349–53 (discussing Belgian outrage at the prosecution of those who shot fleeing burglars and the resulting efforts to expand the privilege of self-defense).

216. SCSL Statute, *supra* note 133.

RUF rebels both began the Sierra Leonean war²¹⁷ and committed the majority of the heinous crimes that occurred during that conflict.²¹⁸ Another group, the Armed Forces Revolutionary Council (AFRC), committed fewer crimes²¹⁹ but was also implicated in some of the worst brutality of the war.²²⁰ Because the SCSL had the capacity to indict only a handful of defendants,²²¹ it would have been eminently justified in prosecuting only RUF fighters or both RUF and AFRC fighters. Instead, in an effort to eliminate any appearance of bias,²²² the SCSL Prosecutor chose to indict three leaders of the RUF, three leaders of the AFRC, and three leaders of the Civil Defense Forces (CDF), the group that had been formed to defend against the rebel attacks.²²³ The Prosecutor's aims may have been laudable, but his indictments against the CDF defendants proved intensely unpopular²²⁴ and delegitimized the

217. MARY KALDOR WITH JAMES VINCENT, UNITED NATIONS DEVELOPMENT PROGRAMME, CASE STUDY, SIERRA LEONE 6 (2006); Penfold, *supra* note 160, at 59; Sierra Leone TRC Report, *supra* note 160, at ¶ 28; Abdul Tejan-Cole, *Sierra Leone's "Not-So" Special Court*, in PEACE VERSUS JUSTICE: THE DILEMMA OF TRANSITIONAL JUSTICE IN AFRICA 223, 223 & n.1 (Chandra Lekha Sriram & Suren Pillay eds., 2009).

218. The Sierra Leone Truth and Reconciliation Commission found that RUF fighters committed approximately 60% of the human rights violations. Sierra Leone TRC Report, *supra* note 160, at ¶ 107.

219. *Id.* ¶ 108.

220. The AFRC, for instance, participated with the RUF in the brutal attack on Freetown, also known as "Operation No Living Thing." See Prosecutor v. Brima, Case No. SCSL-04-16-T, Judgment, ¶¶ 202–05, 946 (June 20, 2007), <http://www.rscsl.org/Documents/Decisions/AFRC/613/SCSL-04-16-T-613s.pdf>.

221. In creating the SCSL, the international community desired an institution with a narrower mandate than the ICTY and ICTR and one that cost considerably less. Kofi Annan, *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, ¶ 29, U.N. Doc. S/2000/915 (Oct. 4, 2000); Charles Chernor Jalloh, *Prosecuting Those Bearing "Greatest Responsibility": The Lessons of the Special Court for Sierra Leone*, 96 MARQ. L. REV. 863, 865 (2013). For that reason, the Statute of the SCSL provided the tribunal jurisdiction only over those "bearing the greatest responsibility" for the atrocities. Statute of the Special Court for Sierra Leone, art. 1, U.N. Doc S/2002/21246 (Mar. 8, 2002). In the end, the SCSL prosecuted ten individuals, as follows: three members from each of the RUF, AFRC, and CDF, along with Charles Taylor.

222. Penfold, *supra* note 160, at 61.

223. de Vlaming, *supra* note 165, at 569.

224. Penfold, *supra* note 160, at 61; Phoebe Knowles, *The Power to Prosecute: The Special Court for Sierra Leone from a Defence Perspective*, 6 INT'L CRIM. L. REV. 387, 408 (2006); James Cockayne, *The Fraying Shoestring: Rethinking Hybrid War Crimes Tribunals*, 28 FORDHAM INT'L L.J. 616, 642 (2005); Tejan-Cole, *supra* note 217, at 240–41; RACHEL KERR & JESSICA LINCOLN, WAR CRIMES RESEARCH GROUP, DEPARTMENT OF WAR STUDIES, KINGS COLLEGE LONDON, THE SPECIAL COURT FOR SIERRA LEONE: OUTREACH, LEGACY AND IMPACT FINAL REPORT 22 (Feb. 2008); William A. Schabas, *A Synergistic Relationship: The Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone*, in TRUTH COMMISSIONS AND COURTS: THE TENSION BETWEEN CRIMINAL JUSTICE AND THE SEARCH FOR TRUTH 43 (William A. Schabas & Shane Darcy eds., 2004) ("Norman's arrest stunned many Sierra Leoneans who see him as a hero for his role in the war against the Revolutionary United Front."). Norman's supporters took up half of the public gallery during his opening statement, cheering, jubilantly waving their arms, and provoking a scolding from

tribunal with much of the country.²²⁵ Although most Sierra Leoneans acknowledged that CDF fighters committed some international crimes,²²⁶ they nonetheless opposed their prosecution because the CDF committed those crimes in an effort to defend the country against rebel attacks and restore Sierra Leone's democratically elected government.²²⁷ Indeed, opposition to the CDF indictments was so intense that the SCSL was forced to undertake special security measures when detaining the lead CDF defendant, Sam Hinga Norman, because it reasonably feared that his detention could lead former CDF fighters to take up arms.²²⁸ To be sure, some international human rights groups praised the Prosecutor's strategy as showing that no one is above the law,²²⁹ but the overwhelmingly negative local reaction to the indictments

the bench. TIM KELSALL, *CULTURE UNDER CROSS-EXAMINATION: INTERNATIONAL JUSTICE AND THE SPECIAL COURT FOR SIERRA LEONE* 49–50 (2009).

225. See JESSICA LINCOLN, *TRANSITIONAL JUSTICE, PEACE AND ACCOUNTABILITY: OUTREACH AND THE ROLE OF INTERNATIONAL COURTS AFTER CONFLICT* 68 (2011); Charles Chernor Jalloh, *The Special Court for Sierra Leone: Achieving Justice?*, 32 MICH. J. INT'L L. 395, 424–25 (2011); BERKELEY WAR CRIMES STUDIES CENTER, *INTERIM REPORT ON THE SPECIAL COURT FOR SIERRA LEONE* 9–10, (Apr. 2005); *You Said It*, AWOKO (2008), <http://awoko.org/2008/05/30/you-said-it-11/>.

226. One Sierra Leonean put it this way: “Wrong is wrong. Kamajors killed people indiscriminately, and they should answer for it. But almost everything I heard said that’s ungratefulness, having him tried, when all he did was stand up to the rebels when even the military was running away.” LYN S. GRAYBILL, *RELIGION, TRADITION AND RESTORATIVE JUSTICE IN SIERRA LEONE* 112 (2017); see also AARON FICHTELBERG, *HYBRID TRIBUNALS: A COMPARATIVE EVALUATION* 94–95 (2015) (“It was widely acknowledged by Sierra Leoneans that the Kamajors were tough fighters who undoubtedly committed criminal acts during the war. . . . However, Norman was widely considered to be a hero by Sierra Leoneans and his prosecution raised objections from many of his countrymen.”); *id.* at 95 (“Few believed that Norman and his forces were innocent, . . . but to suggest a moral equivalence between the crimes of the Kamajors and those committed by the RUF was unacceptable to those who fought against Sankoh in the war.”).

227. Lansana Gberie spoke for many when he described the CDF as having become “the only bulwark against the complete over-running of the country by the RUF—and the main saviors of Sierra Leone’s new experiment in democracy.” Lansana Gberie, *Sierra Leone: The Mysteries of a Special War Crimes Trial*, ZNET (July 6, 2004), <https://zcomm.org/znetarticle/sierra-leone-by-lansana-gberie-1-2/>.

228. INTERNATIONAL CRISIS GROUP, *THE SPECIAL COURT FOR SIERRA LEONE: PROMISES AND PITFALLS OF A “NEW MODEL”* 6 (2003) [hereinafter *PROMISES AND PITFALLS*]; FICHTELBERG, *supra* note 226, at 95. Initially, the SCSL did not disclose the location of Norman’s detention, conducted his first court appearance in camera, and sought to detain him outside of the country until his trial. *PROMISES AND PITFALLS*, *supra* at 6. About nine months after his arrest, the SCSL imposed a two-week ban on all contact between Norman and the outside world after intercepting a phone call that suggested that Norman might be planning to incite civil unrest. *Special Court Accuses Indicted Militia Chief*, GLOBAL POLICY FORUM (Jan. 22, 2004), <https://www.globalpolicy.org/component/content/article/163/29133.html>.

229. HUMAN RIGHTS WATCH, *BRINGING JUSTICE: THE SPECIAL COURT FOR SIERRA LEONE ACCOMPLISHMENTS, SHORTCOMINGS, AND NEEDED SUPPORT* 18 (Sept. 2004), <https://www.hrw.org/report/2004/09/08/bringing-justice-special-court-sierra-leone/accomplishments-shortcomings-and> (“The Special Court’s investigation and indictment of alleged perpetrators from all warring factions to the conflict, particularly those associated with the government-backed CDF militias, sends a strong message that the court operates

showed that most Sierra Leoneans did not want prosecutions to be allocated equally across all warring parties and, in particular, did not want any prosecutions for those who had committed crimes while defending their country against attacks.

It was not only victims and local communities that viewed the CDF indictments through this moral lens but also a sizable component of the SCSL judiciary. As noted in the Introduction, Sierra Leonean Judge Thompson voted to acquit the CDF defendants because they committed their crimes while defending their country.²³⁰ The remaining two (non-Sierra Leonean) trial judges recognized that laudable aims are not a defense to international crimes, so they voted to convict the defendants, but they imposed very lenient sentences,²³¹ swayed by precisely the same factors that led Judge Thompson to believe the defendants should be acquitted. Specifically, the majority considered it highly relevant to sentencing that the defendants were “defending a cause that was palpably just and defensible.”²³² Indeed, although the Trial Chamber labeled the CDF crimes “grave and very serious,” it concluded that, by defeating the rebels who had ousted the legitimate government, the CDF had “in a sense, atone[d] for this vice” and “contributed immensely to reestablishing the rule of law in this country where criminality, anarchy and lawlessness . . . had become the order of the day.”²³³ Admittedly, the SCSL Appeals Chamber subsequently increased the sentences of the CDF defendants and specifically rejected the Trial Chamber’s conclusion that the justness of the defendants’ cause constituted a mitigating factor,²³⁴ but the Sierra Leonean Justice on the Appeals Chamber dissented on this point,²³⁵ and the sentence increases led to further resentment and disillusionment in local communities.²³⁶ Indeed, the fact that a majority of the SCSL judiciary considered the defendants’ just cause to be highly relevant to their convictions and sentences demonstrates the power of the moral intuitions under discussion.

To be sure, the negative local reaction that greeted the SCSL indictments of defending combatants was likely driven not only by the moral intuition that defenders should be held to a different standard than aggressors but also by the fact that the aggressors committed a far greater number of crimes than the defenders.

impartially and independently to prosecute serious crimes.”); PROMISES AND PITFALLS, *supra* note 228, at 5–6 (quoting the National Chairman of the War-affected Amputees Association who praised the CDF indictments); Jalloh, *supra* note 225, at 426.

230. Prosecutor v. Fofana, Case No. SCSL-04-14J, Separate Concurring and Partially Dissenting Opinion of Hon. Justice Bankole Thompson Filed Pursuant to Article 18 of the Statute, ¶¶ 62–97 (Aug. 2, 2007).

231. Fofana was sentenced to six years’ imprisonment whereas Kondewa was sentenced to eight years’ imprisonment. Prosecutor v. Fofana, Case No. SCSL-04-14J, Judgement on the Sentencing of Moinina Fofana and Allieu Kondewa, Disposition (Oct. 9, 2007).

232. *Id.* ¶ 86.

233. *Id.* ¶ 87.

234. Prosecutor v. Fofana, Case No. SCSL-04-14-A, Judgment, ¶ 534 (May 28, 2008).

235. Prosecutor v. Fofana, Case No. SCSL-04-14-A, Partially Dissenting Opinion of Honorable Justice George Gelaga King, ¶¶ 26–31 (May 28, 2008).

236. *See, e.g., You Said It, supra* note 225.

That said, the moral intuitions we have been discussing are unquestionably powerful, and prosecutors ignore them at their peril. The following Subsection examines the way that taking account of those intuitions can assist international criminal tribunals in advancing their goals.

2. *Unequal Enforcement as a Means of Enhancing International Criminal Law's Ability to Advance its Penological Goals*

The previous Subsection suggests that international criminal prosecutors should consider aggressor status when deciding whom to prosecute because doing so accords with deeply held principles of individual morality. This Subsection suggests that, for that reason and others, weighing aggressor status in favor of prosecutions can also enhance international criminal law's ability to advance the aims that it seeks to attain. To be sure, most of the literature surrounding the purposes of international criminal law centers on the way in which the sanctions imposed by criminal bodies advance various penological goals, such as retribution, deterrence, and incapacitation.²³⁷ However, more recently, scholars have recognized that case selection strategies can also promote or inhibit these ends.²³⁸

That said, two caveats are immediately in order. First, there is no general agreement about which aims international criminal law should be pursuing,²³⁹ nor is there consensus that international criminal prosecutions are even capable of advancing any of the penological goals just mentioned.²⁴⁰ This Article cannot settle those debates, and thus it will assume that international criminal law, in general, and the tribunals' case selection decisions, in particular, can advance various penological goals. Second, I must acknowledge that, although many scholars and practitioners make bold claims about the impact of this or that case selection method, most of these claims are supported by little or no empirical evidence. Human rights groups, for instance, have excoriated the ICTR for failing to prosecute members of the RFP, claiming that that failure has "taint[ed] perceptions of the Tribunal's impartiality and undermine[d] its legitimacy for years to come."²⁴¹ Although that sentiment has

237. See Robert D. Sloane, *The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law*, 43 STAN. J. INT'L L. 39 (2007); Immi Tallgren, *The Sensibility and Sense of International Criminal Law*, 13 EUR. J. INT'L L. 561 (2002).

238. deGuzman, *supra* note 144, at 299–300; deGuzman & Schabas, *supra* note 190, at 131.

239. See Mirjan R. Damaška, *What is the Point of International Criminal Justice?*, 83 CHI.-KENT L. REV. 329, 340 (2008).

240. See MARK A. DRUMBL, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW 184 (2007); Julian Ku & Jide Nzelibe, *Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?*, 84 WASH. U. L. REV. 777, 780 (2006); Jack Snyder & Leslie Vinjamuri, *Trials and Errors: Principle and Pragmatism in Strategies of International Justice*, 28 INT'L SECURITY 5, 11–13, 20, 24–25, 28, 43 (2003).

241. Letter to ICTR Chief Prosecutor Hassan Jallow in Response to His Letter on the Prosecution of RPF Crimes, HUMAN RIGHTS WATCH (Aug. 14, 2009), <https://www.hrw.org/news/2009/08/14/letter-ictr-chief-prosecutor-hassan-jallow-response-his-letter-prosecution-rpf>.

been oft repeated,²⁴² it may be inaccurate, and it is certainly lacking in an empirical foundation, as William Schabas convincingly argued.²⁴³ Debates such as these highlight our inability to predict the precise impact of many case selection practices,²⁴⁴ and for that reason, I advance my arguments with due humility.

I start with retribution, which is unquestionably a central aim of international criminal law.²⁴⁵ If prosecutors seek to advance retribution through their case selection decisions, then they must determine who is most deserving of punishment and allocate their prosecutions in accordance with that determination. Although that might sound straightforward, it is no small task to determine who is “most deserving” of punishment because there is no uncontested means of ranking desert in this context. Happily, for present purposes, we have no need to assess the relative heinousness of rape versus deportation, for instance, because it is sufficient to recognize that, all things being equal, a person who commits Crime A in an effort to win a war of aggression is more deserving of punishment than a person who commits the same Crime A in an effort to defend against a war of aggression. Thus, as between these two defendants, prosecutors seeking to enhance retribution would allocate more prosecutions to defendants fighting wars of aggression. To be sure, some such defendants mistakenly believe themselves to be fighting in self-defense, and that mistake may reduce their moral culpability.²⁴⁶ That fact, however, does not undercut the conclusion that weighing aggressor status in favor of prosecutions generally advances retributory goals because some unjust combatants *will* be aware that they are unjust combatants.²⁴⁷ For that reason, taken as a whole, unjust combatants who commit Crime A are more deserving of punishment than just combatants who commit Crime A.

242. See, e.g., Leslie Haskell & Lars Waldorf, *The Impunity Gap of the International Criminal Tribunal for Rwanda: Causes and Consequences*, 34 HASTINGS INT'L & COMP. L. REV. 49, 75–76 (2011) (“Even the former President and former Prosecutor of the ICTR have publicly voiced concern that perceptions of victor’s justice will taint the ICTR’s legitimacy and legacy.”).

243. Schabas, *supra* note 183, at 552.

244. Many commentators acknowledge this reality when they ask—but do not answer—a variety of questions relating to case selection. See, e.g., Rastan, *supra* note 24, at 592–93.

245. Andrew K. Woods, *Moral Judgments and International Crimes: The Disutility of Desert*, 52 VA. J. INT'L L. 633, 634 (2011) (“The international criminal regime is deeply retributive.”); Alexander K.A. Greenawalt, *International Criminal Law for Retributivists*, 35 U. PA. J. INT'L L. 969, 975 (2014) (“Retributivism plays a greater justifying role than is sometimes supposed.”); Jens Ohlin, *Towards a Unique Theory of International Criminal Sentencing*, in INTERNATIONAL CRIMINAL PROCEDURE: TOWARDS A COHERENT BODY OF LAW 373, 375 (Göran Sluiter & Sergey Vasiliev eds., 2009) (“International criminal justice is predicated on retributive notions.”).

246. Rodin, *supra* note 7, at 58–59.

247. McMahan, *The Ethics of Killing in War*, *supra* note 98, at 700 (“[U]njust combatants differ in various relevant respects. Some could not have known that their cause was unjust . . . Still others freely chose, for discreditable reasons, to fight in the knowledge that their cause was unjust.”); *id.* at 701.

The foregoing analysis gives rise to two observations. First, it should go without saying that any defendant who commits an international crime deserves punishment. Indeed, in defending the equal application doctrine, legal scholars frequently observe that civilians need protection against all *jus in bello* violators—those acting on behalf of aggressor parties as well as those acting on behalf of defender parties.²⁴⁸ So, all perpetrators of Crime A should be prosecuted, and in an ideal world, all would be. But where enforcement scarcity precludes the prosecution of most violations, then prosecutors can advance retribution by allocating more enforcement against individuals who commit a particular crime in the service of an illegal or immoral goal—e.g., a war of aggression—than in the service of a laudable goal—e.g., self-defense.

Second, I recognize that my example is somewhat contrived. Although it is incontrovertible that an individual who commits a particular crime as part of an aggressive war is more deserving of punishment than an individual who commits the same crime as part of a defensive war, rarely in the real world do two individuals commit the exact same international crime. Indeed, the crimes that are prosecuted by international tribunals are typically widespread and feature numerous criminal acts that span large geographical regions, occur over long time periods, and harm hundreds or thousands of victims. Thus, because no two international crimes are ever exactly the same, the aggressor status of the defendant will always comprise, at most, one factor to be considered when allocating prosecutions.

In addition to advancing retribution, considering aggressor status in prosecutorial allocations has significant potential to enhance the legitimacy of international criminal tribunals with their core constituencies. Legitimacy has only recently come to the fore as a vital interest of the international criminal tribunals. In the early days of international criminal law, the most pressing challenges facing the nascent discipline were largely practical ones: conducting investigations in conflict zones, obtaining custody over suspects, protecting witnesses from retaliatory violence, and the like. Most of these practical challenges remain, and they impede international criminal tribunals' efforts to conduct fair and efficient trials that reach accurate findings.²⁴⁹ But maintaining credibility and legitimacy among victims and other important constituencies has emerged as another core challenge.

Indeed, a large body of scholarship now surrounds international criminal law's perceived legitimacy crisis. International criminal tribunals are said to impair their legitimacy when they impose sentences that are too long or too short.²⁵⁰ International criminal tribunals are said to undermine their legitimacy when they fail

248. Sassóli, *supra* note 48, at 245–46.

249. See generally Nancy Amoury Combs, *Deconstructing the Epistemic Challenges to Mass Atrocity Prosecutions*, 75 WASH. & LEE L. REV. 223 (2018).

250. See, e.g., Shahram Dana, *The Sentencing Legacy of the Special Court for Sierra Leone*, 42 GA. J. INT'L & COMP. L. 615, 680 (2014); Duncan McCargo, *Politics by Other Means? The Virtual Trials of the Khmer Rouge Tribunal*, 87 INT'L AFF. 613, 624–26 (2011).

to adequately involve local communities.²⁵¹ And, as relevant here, international criminal tribunals are regularly said to undermine their legitimacy through their case selection practices.²⁵² Writing of the ICC, for instance, Meg deGuzman has persuasively argued:

[The Court's] legitimacy depends to a significant degree on whether [relevant] audiences perceive the Court . . . as selecting appropriate crimes and defendants for prosecution. If important constituencies view the Court as making the wrong choices, they are likely to withdraw their support from the Court and possibly even seek its destruction.²⁵³

“Wrong choices” come in many flavors, but the evidence marshaled in Section A compellingly suggests that one set of choices that are widely perceived to be wrong are those that allocate prosecutions while taking no account of the justness of the combatant's cause. These allocations—as we saw in Sierra Leone—are apt to delegitimize the tribunal with local constituencies.

John Darley and Paul Robinson have shown that domestic criminal justice systems lose moral credibility and relevance when their decisions diverge from community norms.²⁵⁴ We can expect international criminal tribunals to suffer the same fate when their decisions—including their case selection decisions—diverge from such norms. Indeed, any loss of moral credibility may be all the more concerning for international tribunals because they frequently command less respect and allegiance from local populations than do domestic criminal justice systems.²⁵⁵ Moreover, international criminal tribunals were established to advance a whole host of goals—including ending the cycle of violence,²⁵⁶ preventing collective blame,²⁵⁷

251. Marlies Glasius, *Do International Criminal Courts Require Democratic Legitimacy?*, 23 EUR. J. INT'L L. 43, 44 (2012).

252. Ambos & Stegmiller, *supra* note 193, at 416 (“The function of the court and its legitimacy stand and fall with [its case selection] decisions.”); Danner, *supra* note 143, at 511; deGuzman & Schabas, *supra* note 190, at 164; Alexander K.A. Greenawalt, *Justice Without Politics: Prosecutorial Discretion and the International Criminal Court*, 39 N.Y.U. J. L. & POL. 583, 588 (2007); Brian Leppard, *How Should the ICC Prosecutor Exercise His or Her Discretion? The Role of Fundamental Ethical Principles*, 43 J. MARSHALL L. REV. 553, 567 (2010); Haskell & Waldorf, *supra* note 242, at 75–76.

253. deGuzman, *supra* note 144, at 268.

254. Paul H. Robinson & John M. Darley, *Intuitions of Justice: Implications for Criminal Law and Justice Policy*, 81 S. CAL. L. REV. 1, 24 (2007).

255. Carsten Stahn, *Between 'Faith' and 'Facts': By What Standards Should We Assess International Criminal Justice?*, 25 LEIDEN J. INT'L L. 251, 258 (2012).

256. Rome Statute of the International Criminal Court, Preamble, *opened for signature* July 17, 1998, 2187 U.N.T.S. 90; MEMUNATU BABY PRATT, CONSULTANT TO THE SPECIAL COURT FOR SIERRA LEONE, NATION-WIDE SURVEY REPORT ON PUBLIC PERCEPTIONS OF THE SPECIAL COURT FOR SIERRA LEONE 25 (Mar. 2007) (on file with author).

257. Thorsten Bonacker & Christoph Safferling, *Introduction*, in VICTIMS OF INTERNATIONAL CRIMES: AN INTERDISCIPLINARY DISCOURSE 1, 2 (Thorsten Bonacker & Christoph Safferling eds., 2013).

and enhancing peace and reconciliation among formerly warring parties²⁵⁸—but each of these crucially depends on community buy-in.²⁵⁹ The SCSL’s experience indicates that that buy-in will not be forthcoming unless the tribunals’ case selection decisions take account of aggressor status.

CONCLUSION

The equal application doctrine is a fundamental tenet of IHL. It appears in treaties, case law, treatises, and lectures. Legal scholar after statesman, diplomat after military commander, has repeatedly declared it crucially important to preserve the equal application of *jus in bello* rules across all parties to the conflict. States at war do not always do so, and nonlegal scholars critique the doctrine on moral grounds, but the equal application doctrine unquestionably advances humanitarian aims, and for that reason, it should be retained. This Article advocates the unequal enforcement of *jus in bello* rules as a path between the moral reasoning that challenges the equal application doctrine and the practical necessities that sustain it. The foregoing Parts have shown that the equal enforcement of *jus in bello* rules is just as morally problematic as is their equal application, but that unequal enforcement will not lead to the humanitarian tragedies that we can expect following unequal application of *jus in bello* rules. Indeed, this Article goes on to contend that differentially enforcing *jus in bello* rules on the basis of aggressor status is apt to enhance the value that IHL enforcement provides to affected societies.

This Article has centered on advancing and defending the following theoretical proposition: the IHL system, as well as the international criminal tribunals, would benefit from the unequal enforcement of *jus in bello* rules. If that theoretical proposition is to be implemented, however, then additional questions must be addressed. Part II highlighted the need to adopt standards for assessing aggressor status, and prosecutors would also need to determine how aggressor status should weigh up against other factors that also point in favor of prosecutions. Because the latter inquiry is intensely fact based, it is not clear that useful guidance—that spans different conflicts, locations, and political context—can be provided. But I will make my best efforts in subsequent work.

For purposes of this Article, the central takeaway is that “who started it” matters. That proposition—so powerful on the elementary school playground—is likewise compelling on the battlefield . . . and in the courtroom.

258. See S.C. Res. 827, ¶ 6, (May 25, 1993) (noting that the creation of the ICTY “would contribute to the restoration and maintenance of peace”); S.C. Res. 955, ¶ 7, (Nov. 8, 1994) (asserting that “in the particular circumstances of Rwanda, the prosecution of persons responsible for serious violations of international humanitarian law . . . would contribute to the process of national reconciliation and to the restoration and maintenance of peace”).

259. Kingsley Chiedu Moghalu, *Image and Reality of War Crimes Justice: External Perceptions of the International Criminal Tribunal for Rwanda*, 26 FLETCHER F. WORLD AFF. 21, 22 (2002) (maintaining that the perception of whether international trials can attain their anticipated goals is “just as important as what happens in the[] courtrooms”); Jo-Anne Wemmers, *Victims and the International Criminal Court (ICC): Evaluating the Success of the ICC with Respect to Victims*, 16 INT’L REV. VICTIMOLOGY 211, 224 (2009) (reporting on an empirical study showing that key staff at the ICC “are very aware that how victims perceive the ICC is important for the success of the Court”).