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Aggressor Status and Its Impact on International Criminal Law Case Selection

Nancy Amoury Combs

AGGRESSOR STATUS AND ITS IMPACT ON INTERNATIONAL CRIMINAL LAW CASE SELECTION

Nancy Amoury Combs*

ABSTRACT[1]

The laws of war apply equally to all parties to a conflict; thus, a party that violates international law by launching a war is granted the same international humanitarian law rights as a party that is required to defend against the illegal war. This doctrine—known as the equal application doctrine—has been sharply critiqued, particularly by philosophers, who claim the doctrine to be morally indefensible. Lawyers and legal academics, by contrast, defend the equal application doctrine because they reasonably fear that applying different rules to different warring parties will sharply reduce states' willingness to comply with the international humanitarian law system as a whole. In the two works on which this symposium contribution is based, I have sought to bridge this divide by shifting focus from the application of international humanitarian law rules to the enforcement of those rules. In particular, I developed "the unequal enforcement doctrine," which would retain the equal application doctrine but would reduce its unfairness by disproportionately prosecuting international criminal offenders from aggressor states. I have developed and defended that doctrine in two full length law review articles, and I have applied the doctrine retrospectively to prosecutorial decisions made in the International Criminal Court ("ICC") situations. As a result of this

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[1] This symposium piece summarizes two of my recent articles: Nancy Amoury Combs, *Unequal Enforcement of the Law: Targeting Aggressors for Mass Atrocity Prosecutions*, 61 ARIZ. L. REV. 155, 155-204 (2019) [hereinafter Combs, *Unequal Enforcement of the Law*]; Nancy Amoury Combs, *Holding Aggressors Responsible for International Crimes: Implementing the Unequal Enforcement Doctrine*, 57 U.C. DAVIS L. REV. (forthcoming 2024) [hereinafter Combs, *Holding Aggressors Responsible for International Crimes*].

analysis, I maintain that although ICC prosecutors did not expressly consider the aggressor status of parties to the conflict when selecting cases, that status has likely been influencing prosecutorial decisions all along, sub silentio. The analysis thus supports my claim that who started a war matters intuitively and profoundly and that the answer to that question has significantly impacted international criminal prosecutions. This piece summarizes my two law review articles.

KEYWORDS

aggressor status, criminal case selection, Russo-Ukrainian War, criminal law, international law, international criminal law

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INTRODUCTION

Russia has been the target of worldwide condemnation for its war in Ukraine.[2] And for good reason. For one thing, Russia launched an unprovoked attack against a neighboring state,[3] thereby committing the crime of aggression[4] and blatantly violating the most fundamental

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[2] *See World leaders condemn Russian invasion of Ukraine: "A turning point in the history of Europe*," CBS NEWS (Feb. 24, 2022, 10:51 AM), https://www.cbsnews.com/news/world-leaders-condemn-russian-invasion-ukraine-turning-point-history-of-europe/ (discussing the responses from world leaders condemning Russia's invasion of Ukraine); *see also At UN General Assembly, leaders condemn Russia's war in Ukraine,* ALJAZEERA (Sept. 21, 2022), https://www.aljazeera.com/news/2022/9/21/at-un-general-assembly-leaders-condemns-russias-war-in-ukraine (discussing the actions world leaders plan to take against Russia for its invasion of Ukraine); *see also* G.A. Res. ES-11/1 (Mar. 2, 2022) (discussing how the United Nations General Assembly has overwhelmingly voted to adopt a resolution condemning the Russian invasion); *see also* Humeyra Pamuk and Jonathan Landay, *U.N. General Assembly in historic vote denounces Russia over Ukraine invasion*, REUTERS (Mar. 2, 2022, 7:25 PM EST), https://www.reuters.com/world/un-general-assembly-set-censure-russia-over-ukraine-invasion-2022-03-02/ (reporting on the UN General Assembly's overwhelming vote to reprimand Russia for its attack on Ukraine); *see also* Dan De Luce, *'Ashamed' Russian diplomat quits over invasion of Ukraine*, NBC NEWS (May 23, 2022, 3:40 PM EST), https://www.nbcnews.com/politics/national-security/ashamed-russian-diplomat-quits-invasion-russia-rcna30125 [hereinafter *Ashamed Russian Diplomat*] (discussing the resignation of a Russian diplomat over Russia's invasion of Ukraine); *see also* Anders Åslund, *Retired Russian Generals Criticize Putin Over Ukraine, Renew Call for His Resignation*, JUST SECURITY (Feb. 9, 2022), https://www.justsecurity.org/80149/retired-russian-generals-criticize-putin-over-ukraine-renew-call-for-his-resignation/ (reporting on various retired Russian generals who criticized Russia's invasion of Ukraine).

[3] *See* Ashamed Russian Diplomat, *supra* note 2; *see also* Lise Morjé Howard, *A Look at the Laws of War—and How Russia is Violating Them,* U.S. INST. OF PEACE (Sept. 29, 2022), https://www.usip.org/publications/2022/09/look-laws-war-and-how-russia-violating-them (discussing the laws of war and the war crimes Russia has committed); *see also What is a war crime and could Putin be prosecuted over Ukraine*? BBC NEWS (Jul. 20, 2022), https://www.bbc.com/news/world-60690688 (discussing international war crimes and alleged war crimes committed by Russia and Putin).

[4] *See* Philippe Sands, *Putin's use of military force is a crime of aggression*, FIN. TIMES (Feb. 28, 2022), https://www.ft.com/content/cbbdd146-4e36-42fb-95e1-50128506652c (explaining how scholars and international bodies alike have classified the attacks by Russia as a crime of aggression); *see also* Statement from the Global Institute For The Prevention Of Aggression on Russia's Invasion of Ukraine: A Crime of Aggression (Mar. 24, 2022), https://crimeofaggression.info/wp-content/uploads/GIPA-Statement_24-March-2022-7.pdf (arguing Russia should face criminal responsibility for their act of aggression toward Ukraine); *see also* Press Release, European Commission, Statement by President von der Leyen on the establishment of the International Centre for the Prosecution for the Crimes of Aggression against Ukraine, (Mar. 4, 2023), https://ec.europa.eu/commission/presscorner/detail/en/statement_23_1363 (publishing President von der Leyen's commitment to the European Union's support for the

provision of the United Nations Charter: the provision prohibiting the use of force against another nation.[5] In addition, Russia has committed a variety of atrocious international crimes, from bombing the Mariupol Theatre,[6] to massacring civilians in Bucha,[7] to destroying the dam in southern Ukraine,[8] to name only a few.

Given these crimes, it should come as no surprise that, from the very start of the war, the international community has called for criminal prosecutions against Russian President Vladimir Putin and other high-level Russian leaders.[9] And the International Criminal Court (ICC)—the

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International Criminal Court and prosecution of Russia's crime of aggression towards Ukraine).

[5] U.N. Charter art. 2, ¶ 4.

[6] *See UKRAINE*: *DEADLY MARIUPOL THEATRE STRIKE 'A CLEAR WAR CRIME' BY RUSSIAN FORCES*, AMNESTY INT'L (June 30, 2022), https://www.amnesty.org/en/latest/news/2022/06/ukraine-deadly-mariupol-theatre-strike-a-clear-war-crime-by-russian-forces-new-investigation/ (explaining that Russian military forces striking the Mariupol drama theatre is considered a war crime).

[7] *See Ukraine: Russian Forces' Trail of Death in Bucha,* HUM. RTS. WATCH (Apr. 21, 2022, 12:00 AM), https://www.hrw.org/news/2022/04/21/ukraine-russian-forces-trail-death-bucha (reporting on Human Rights Watch researchers who found extensive evidence of summary executions in Bucha after Russian forces withdrew from the area).

[8] *See* James Glanz et al., *Why the Evidence Suggests Russia Blew Up the Kakhovka Dam*, N.Y. TIMES (June 16, 2023), https://www.nytimes.com/interactive/2023/06/16/world/europe/ukraine-kakhovka-dam-collapse.html (alleging Russia detonated explosives from within the Nova Kakhovka Dam causing its destruction); *see* Ivana Kottasová & Gianluca Mezzofiore, *Here are the key theories on what caused Ukraine's catastrophic dam collapse*, CNN (June 9, 2023, 10:44 AM), https://www.cnn.com/2023/06/08/europe/nova-kakhovka-destruction-theories-intl/index.html (reporting that Russia has been blamed for the Nova Kakhovka Dam collapse by several Western officials).

[9] *See World leaders call for Putin to face war crimes trial* (CBS News broadcast Apr. 6, 2022), https://www.cbsnews.com/video/world-leaders-call-for-putin-to-face-war-crimes-trial/#x (reporting that President Biden and other World Leaders are calling for Vladmir Putin to face trial for his war crimes); *see also* Dan Mangan, *Biden calls to put Putin on trial for war crimes over Russia killings in Ukraine*, CNBC (Apr. 5, 2022, 3:16 PM), https://www.cnbc.com/2022/04/04/biden-calls-to-put-putin-on-trial-for-war-crimes-over-russias-actions-in-ukraine.html (reporting that US President Biden called for evidence to be gathered to put Vladimir Putin on trial for war crimes due to Russia's invasion of Ukraine); *see also Former UN prosecutor calls for global arrest warrant for Putin*, PBS NEWS HOUR (Apr. 2, 2022, 11:10 AM), https://www.pbs.org/newshour/world/former-un-prosecutor-calls-for-global-arrest-warrant-for-putin (reporting that a former UN chief prosecutor called for an international arrest warrant to be issued for Vladmir Putin); *see also Berlin is pushing for a war crimes trial of Russia's Putin*, DEUTSCHE WELLE (Apr. 8, 2022), https://www.dw.com/en/german-president-frank-walter-steinmeier-calls-for-putin-war-crimes-probe-after-bucha-killings/a-61410228# (reporting that German President Frank-Walter Steinmeier filed a criminal complaint against Russian leaders due to Russia's invasion of Ukraine).

permanent international court tasked with prosecuting international crimes—has sought to oblige.[10] The ICC immediately launched a large-scale investigation of the crimes taking place during the war in Ukraine,[11] and in March 2023, ICC prosecutors brought charges against Vladimir Putin and Maria Alekseyevna Lvova-Belova, who is Commissioner for Children's Rights in the Office of the President of the Russian Federation.[12] The ICC charged Putin and Lvova-Bulova with crimes against humanity for forcibly deporting Ukrainian children to Russia.[13]

On the one hand, it was unsurprising that the ICC brought its first—and thus far only—indictments against Russians, even though there have also been credible accusations of war crimes committed by Ukrainians.[14]

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[10] *See* Press Release, International Criminal Court, Situation in Ukraine (Mar. 2022) (declaring jurisdiction over war crimes committed on Ukraine territory, opening an investigation on the situation in Ukraine and naming suspects including Russia's Vladimir Vladimirovich Putin).

[11] *See Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation*, INT'L CRIM. CT. (Mar. 2, 2022), https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-receipt-referrals-39-states [hereinafter Statement of ICC Prosecutor] (announcing that the ICC will be opening an investigation into the Situation in Ukraine); *see also ICC Prosecutor Karim A.A. Khan QC announces deployment of forensics and investigative team to Ukraine, welcomes strong cooperation with the Government of the Netherlands*, INT'L CRIM. CT. (May 17, 2022), https://www.icc-cpi.int/news/icc-prosecutor-karim-aa-khan-qc-announces-deployment-forensics-and-investigative-team-ukraine (confirming that the ICC has hired an investigative team to advance their criminal investigation for the war crimes in Ukraine).

[12] *See* Press Release, ICC, Situation in Ukraine: ICC Judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova (Mar. 17, 2023) https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and (reporting on the arrest warrants issued by the ICC against Vladimir Putin and Maria Alekseyevna Lvova-Belova for the unlawful transfer of children from Ukraine).

[13] *Id*.

[14] *See Ukraine: Apparent POW Abuse Would be War Crime*, HUM. RTS. WATCH (Mar. 31, 2022, 3:00 PM), https://www.hrw.org/news/2022/03/31/ukraine-apparent-pow-abuse-would-be-war-crime (reporting on a video showing Ukrainian fighters beating and shooting Russian prisoners of war which, if confirmed, would constitute war crimes); *see also* Malachy Browne, et al., *Videos Suggest Captive Russian Soldiers Were Killed at Close Range*, N.Y. TIMES, (Nov. 22, 2022), https://www.nytimes.com/2022/11/20/world/europe/russian-soldiers-shot-ukraine.html (describing a series of videos posted on social media which document Ukrainian fighters shooting at least 11 Russian soldiers dead at close-range, some of whom had surrendered and were unarmed); *see also* Daniel Boffey, *UN official concerned over videos showing apparent abuse of PoWs in Ukraine*, THE GUARDIAN (Mar. 29, 2022, 1:31 PM), https://www.theguardian.com/world/2022/mar/29/un-official-concerned-over-videos-showing-apparent-abuse-of-pows-in-ukraine (referencing video footage of a Ukrainian soldier shooting three Russian prisoners of war at close-range); *see also Ukraine:*

After all, Russia started the war, so we might expect prosecutors to be more concerned with its infractions than with the infractions of a State that suffered an unprovoked attack and that, since then, has been fighting for its very existence.

As commonplace as that expectation might be, it has been clearly and categorically rejected by international humanitarian law (IHL), the law that governs warfare.[15] IHL is composed of two bodies of law: the *jus ad bellum*, which is the law that governs the initial use of force, and the *jus in bello*, which is the law that governs the conduct of warfare.[16] Although both bodies of law are typically implicated in any given war, IHL mandates a strict separation between the two.[17] As a result of this separation, the *jus ad bellum* might deem one party to be the aggressor because it violated the use-of-force rules, but that party's status as aggressor is not relevant to the application of the laws governing the conduct of warfare.[18] Indeed, this strict separation gives rise to the so-called equal application doctrine,[19] a fundamental IHL doctrine which

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Ukrainian fighting tactics endanger civilians, AMNESTY INT'L, (Aug. 4, 2022), https://www.amnesty.org/en/latest/news/2022/08/ukraine-ukrainian-fighting-tactics-endanger-civilians/ (claiming that Ukrainian forces have endangered Ukrainian civilians by operating weapons systems and establishing bases in popular residential areas, violating international humanitarian law).

[15] *See* International Committee of the Red Cross, International Humanitarian Law Answers To Your Questions (2014) (defining IHL as a branch of public international law consisting of rules of armed conflict applied to belligerent parties irrespective of the reasons for armed conflict).

[16] *See* Adam Roberts, *The equal application of the laws of war: a principle under pressure*, 90 INT'L REV. RED CROSS 931, 932 (2008) [hereinafter *Roberts*] (defining *jus in bello* as the "laws of war" and *jus ad bellum* as the "law relating to the lawfulness of the use of force"); *see also* 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, 967 (2008) [hereinafter *Moussa*] (explaining jus in bello as the law of armed conflict that applies to all, and the humanitarian argument in favor of its separation from jus ad bellum).

[17] *See* 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 EUR. J. INT'L L. 25, 26 (2013) (emphasizing the moral and historical reasoning behind the distinction between jus ad bellum and jus in bello, and why this separation is indispensable to international law).

[18] *See* François Bugnion, *Jus ad Bellum, Jus in Bello and Non-International Armed Conflicts*, INT'L REV. RED CROSS 167-198 (2004) (claiming the separation between jus in bello and jus ad bellum was confirmed after WWII when the Nuremberg Tribunal distinguished between war crimes committed in violation of laws of war, and war crimes against peace).

[19] *Id.* (describing the equal application doctrine as "the principle of the autonomy of jus in bello with regard to jus ad bellum"); *see also* Robert D. Sloane, *The Cost of Conflation: Preserving the Dualism of* Jus ad Bellum *and* Jus in Bello *in the Contemporary*

provides that a State that launches a war of aggression benefits from all the rights provided by the *jus in bello*, while a State forced to defend against a war of aggression must adhere to all the same rules to which the aggressor state is subject.[20]

As is evident from even this summary description, the equal application doctrine is unsatisfying on a number of levels. Not surprisingly, then, the doctrine has been subjected to widespread and persuasive criticism, particularly by moral philosophers.[21] But despite the convincing nature of this criticism, the doctrine has persisted unchanged as a matter of law.[22] Indeed, IHL lawyers, who are much more concerned with practicalities than principle, consider the doctrine crucial to the maintenance and workability of the IHL system as a whole.[23]

This symposium piece summarizes my scholarly efforts to chart a middle course between philosophical principle and practical necessity. The core insight of this scholarship is the need to separate the application of IHL rules from their enforcement. Specifically, I recognize the practical need to apply IHL rules equally across all warring parties, no matter their aggressor or defender status.[24] However, although the substantive IHL rules should apply equally to all parties to a conflict, I argue that the aggressor status of a party should be relevant to the way in which those IHL rules are enforced.[25] I term my proposal "the unequal enforcement doctrine," and Part I summarily describes and defends the proposal. My scholarship also grapples with questions of practical implementation, so

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Law of War, 34 YALE J. INT'L L. 47, 56–61 (2009) (labeling *jus ad bellum* and *jus in bello* the "dualistic axiom"); *see also* Christopher Greenwood, *The relationship between* jus ad bellum *and* jus in bello, 9 REV. INT'L STUD. 221, 225 (1983) (referring to j*us ad bellum* and *jus in bello* as the "equal application doctrine"); *see also* Roberts, *supra* note 16, at 932.

[20] Roberts, *supra* note 16, at 932; *see also* Moussa, *supra* note 16, at 967 (claiming the law of armed conflict is unique in that *jus in bello* applies equally between all belligerents).

[21] *See* Combs, *Unequal Enforcement of the Law*, *supra* note 1 (describing how philosophers, such as Jeff McMahan and Michael Walzer, have pinpointed moral issues with the enforcement of the equal application doctrine and have emphasized that violence committed by combatants needs to have a just cause).

[22] *See id.* at 165 (describing how legal scholars have used various arguments for supporting the equal application doctrine for nearly decades).

[23] *See id.* at 170 (describing arguments by legal scholars for strict adherence to the equal application doctrine).

[24] *See id.* at 168-69 (explaining how complex it would be for international organizations to regulate the amount of force used by each party and determine which parties violate jus ad bellum rules).

[25] *See id*. at 177 (introducing the basic tenets of the unequal post-conflict enforcement of IHL rules as well as the relevancy of aggressor status).

Part II of this paper describes an optimal standard for assessing which party to a conflict is the aggressor for purposes of enforcement decisions.[26] Finally, my scholarship has shown that although the enforcement rules I advance are not expressly the lex lata,[27] they nonetheless appear to exert a covert, yet powerful, influence on international criminal law case selection. To that end, Part III briefly describes my analysis of all ICC situations that have progressed to at least one trial.[28] This analysis suggests that although ICC prosecutors did not overtly consider aggressor status in case selection, that status likely has been influencing prosecutorial decisions all along.[29]

I. DIFFERENTIALLY ENFORCING INTERNATIONAL CRIMES: A PATHWAY BETWEEN PRINCIPLE AND PRACTICAL

A. The Equal Application Doctrine

As noted in the introduction, the equal application doctrine describes the core IHL tenet that the laws governing warfare must apply equally to combatants from all parties to the conflict.[30] Said differently, military acts are judged by the same legal standards regardless of whether they are committed in the service of a government seeking a naked and illegal power grab or a government that is fighting for its country's life against armed attackers.[31] As is evident from this description, the doctrine is both counterintuitive and seemingly unjust. For that reason, a number of moral philosophers have launched detailed and comprehensive critiques of the equal application doctrine.[32] The space constraints of this summary piece preclude the careful explication of these critiques, but their basic thrust is that the *jus in bello* and the *jus ad bellum* should not operate independently

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[26] *See* Combs, *Holding Aggressors Responsible for International Crimes*, *supra* note 1 (describing the high threshold prosecutors should use when determining aggressor status).

[27] *See id.* at 190 (claiming a novel yet familiar proposal for considering aggressor status when prosecuting war crimes).

[28] *See* Combs, *Holding Aggressors Responsible for International Crimes*, *supra* note 1 (discussing the ICC situations that have gone to trial).

[29] *See id.* (explaining how aggressor status has been a part of ICC prosecutorial decisions, even though prosecutors of ICC have not consciously used aggressor status).

[30] Roberts, *supra* note 16, at 932.

[31] *Id*.

[32] *See* DAVID RODIN & HENRY SHUE, JUST AND UNJUST WARRIORS THE MORAL AND LEGAL STATUS OF SOLDIERS 5 (2008) (arguing that asymmetry may be permissible when for example a supreme emergency is created and a nation is under destruction at the hands of an aggressor, then violations of *jus ad bello* may be permissible).

because "it is simply not morally permissible to fight in a war with an unjust cause."[33]

It is hard to dispute the theoretical soundness of the philosophers' critiques, so legal scholars rarely try. At the same time, legal scholars remain firmly committed to the equal application doctrine, and they invoke two primary arguments in its defense.[34] The less compelling argument centers on epistemology and fact-finding, and it goes something like this: Even if we wanted to apply the *jus in bello* rules differentially depending on which party was the aggressor, it would be almost impossible to do so because in most conflicts it is almost impossible to determine who in fact *is* the aggressor.[35] No warring party ever concedes that it breached *jus ad bellum*, and there is no authoritative body capable of conclusively determining the issue.[36] The United Nations Security Council theoretically could make such a determination, but it rarely has done so.[37]

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[33] Jeff McMahan, *Morality, Law, and the Relation Between* Jus ad Bellum *and* Jus in Bello, 100 AMER. SOC'Y INT'L L. 113 (2006); *see also* Thomas Hurka, *Proportionality in the Morality of War*, 33 PHIL. & PUB. AFF. 35 (2005) (stating that *jus ad bellum* conditions any resort to war on the existence of a just cause).

[34] *See* H. Lauterpacht, *The Limits of the Operation of the Law of War*, 30 BRIT. Y.B. INT'L L. 206, 211 (1953) [hereinafter *Lauterpatch*] (claiming the equal application doctrine is necessary because there during war between belligerents there is no authoritative judgment among international organizations on the question of which belligerent side is the aggressor).

[35] *Id.* at 211.

[36] YORAM DINSTEIN, WAR, AGGRESSION, AND SELF-DEFENCE 157 (3rd ed. Cambridge Univ. Press 2001) [hereinafter *Dinstein*] (reporting that both parties to a conflict either believe (or say they believe) their cause to be both just and legal); *see also* Marco Sassòli, 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* INT'L LAW AND ARMED CONFLICT: EXPLORING THE FAULTLINES ESSAYS IN HONOR OF YORAM DINSTEIN 241, 246 (Michael Schmitt & Jelena Pejic eds., 2007) (reporting that IHL needs to apply independently of which party is the aggressor otherwise each party would take advantage of the ambiguity); *see also* ROBERT KOLB, ADVANCED INTRODUCTION TO INTERNATIONAL HUMANITARIAN LAW 30 (2014) [hereinafter *Kolb*] (indicating that belligerent states interpret for themselves which party is using force illegally, thus considering themselves the party using lawful force)*; see also Christopher Greenwood, Self-Defence and the Conduct of Int'l Armed Conflict*, *in* INT'L LAW AT A TIME OF PERPLEXITY: ESSAYS IN HONOR OF SHABTAI ROSENNE 273, 287 (Yoram Dinstein & Mala Tabory eds., 1989) [hereinafter *Greenwood*] (reporting that both parties to a conflict typically claim to be acting in self-defense); *see also* 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 *The Morality of War*] (asserting that the majority of individuals engaged in combat perceive the wars in which they are involved as just, this notion holds true for unjust combatants nearly as much as it does for their just counterparts).

[37] *See* Dinstein, s*upra* note 36, at 157-58 (reporting that although the UN Security Council is vested with the authority to determine which party is the aggressor, it rarely does); *see also* François Bugnion, *Just wars, wars of aggression and international*

Epistemological difficulties may be able to be overcome, but when defending the equal application doctrine, legal scholars additionally and compellingly point to the need for reciprocity in IHL.[38] IHL contains a large number of rules, but few enforcement mechanisms,[39] and for that reason, reciprocity is understood to be key to IHL compliance.[40] That is, armies typically comply with IHL rules not because they fear the consequences of their failure to comply but because they wish to encourage their opponents also to comply.[41] But if "application of the [*jus in bello*] rules [turned] on the legality of the state's use of force," then we would reasonably fear that neither party would adhere to the *jus in bello* rules.[42] "The soldiers of the defending state would not . . . comply with [the] . . . rules" because the rules would not require their compliance.[43] The rules *would* require the soldiers of the aggressor state to comply, but those soldiers "would be unlikely to do so because their [side] would gain no benefit from their compliance."[44] Thus, international lawyers firmly believe that abandoning the equal application doctrine would lead to the widespread flouting of *jus in bello* rules and thereby would significantly increase wartime death and destruction.[45] Said differently, legal scholars are convinced that the equal application doctrine sharply reduces the harm caused by warfare.[46]

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humanitarian law, 84 INT'L REV. RED CROSS 15 (2002) (noting that a determination that aggression has occurred requires all five permanent members of the Security Council to vote in favor, a highly unlikely outcome); *see also* Greenwood, *supra* note 36, at 287 (noting when both sides act in self-defense claiming the other is the aggressor, the international community is unable or unwilling to validate either claim).

[38] *See* Kolb, *supra* note 36, at 30 (reporting that no party would accept the other party taking liberties with the law of armed conflicts while the first is expected not to reciprocate).

[39] Tristan Ferraro, *Enforcement of Occupation Law in Domestic Courts: Issues and Opportunities*, 41 ISR. L. REV. 332 (2008).

[40] *See* Combs, *Unequal Enforcement of the Law, supra* note 1 (noting that compliance with the laws of war is contingent on reciprocity).

[41] *Id*.

[42] *See id.* at 159 (explaining the result of turning to the legality of the *jus in bello* rules instead of reciprocity).

[43] *Id*.

[44] *Id*.

[45] *See* Dinstein, *supra* note 36, at 157; *see also* Lauterpacht, *supra* note 34, at 212 (explaining some repercussions of abandoning the Equal Application Doctrine).

[46] *See* Combs, *Unequal Enforcement of Law, supra* note 1; *see also* Kolb, *supra* note 36, at 30 (claiming IHL could not work if it was not based on reciprocity).

B. Bridging the Divide Between Practical Reality and Moral Principle

My scholarship has sought to bridge the divide between the unassailable moral principles that excoriate the equal application doctrine and the practical necessities that support it. I have done so by shifting focus from the application of IHL rules to the post-conflict enforcement of those rules in international criminal tribunals such as the ICC. In particular, I argue that international criminal prosecutors should consider aggressor status when deciding whom to prosecute such that those launching illegal wars face enhanced likelihood of prosecution for any other international crimes they may commit.[47] This serves the moral principles that underpin the IHL system without impairing the reciprocity upon which the system relies.

My proposal rests on the unfortunate reality that resource constraints dramatically limit the number of IHL violators whom international criminal tribunals can prosecute.[48] Thus, whereas we might expect prosecutors of domestic crimes to be able to prosecute all violent offenders against whom they have credible evidence, prosecutors of international crimes have the resources to prosecute only a miniscule proportion.[49] For that reason, prosecutors must select a mere few defendants from a dramatically larger body of offenders.[50] Not surprisingly, then, case selection has proven to be among the most challenging tasks that prosecutors must undertake.[51]

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[47] Combs, *Holding Aggressors Responsible for International Crimes*, *supra* note 1.

[48] *Id*.; *see also* International Criminal Court [ICC], *Independent Expert Review of the International Criminal Court and the Rome Statute System, Final Report*, at 209 (Sept. 30, 2020), https://asp.icc-cpi.int/Review-Court [hereinafter *Independent Expert Review of the ICC*] (reporting limited judicial resources for the office of the prosecutor); *see also* Alison Smith, Opening of Ukraine investigation should be a wake-up call to look again at ICC's budget, COAL. INT'L CRIM. CT. (Mar. 7, 2022), https://www.coalitionfortheicc.org/news/20220307/opening-ukraine-investigation-icc-budget (reporting on Prosecutor Khan's statement regarding the un-foreseeability for the need of added resources in the ICC's 2022 budget); *see also* Hum. Rts. Watch, *Human Rights Watch Briefing Note for the Twenty-First Session of the International Criminal Court Assembly of States Parties*, at 6-9 (Nov. 2022) (recommending ways for the ICC to address a lack of sufficient resources through budget negotiations).

[49] William A. Schabas, *Victor's Justice: Selecting "Situations" at the International Criminal Court*, 43 J. MARSHALL L. REV. 535, 542 (2010) (explaining that international criminal tribunals do not aspire to prosecute all international crimes within their jurisdiction due to lack of resources).

[50] *Id.* at 543 (noting how at Nuremberg the international prosecutors selected twenty-four cases for trial, but many more defendants could have been considered).

[51] *See* Birju Kotecha, *The International Criminal Court's Selectivity and Procedural Justice*, 18 J. INT'L CRIM. JUST. 107, 135 (2020) (claiming prosecution selectivity is the

International prosecutors have tremendous discretion in their case-selection decisions,[52] though ICC prosecutors in particular have sought to be reasonably transparent about the factors they consider when selecting defendants.[53] Specifically, ICC prosecutors have identified the gravity of the relevant crimes as their primary case selection criterion.[54] Prosecutors have interpreted "gravity" to include both quantitative and qualitative elements assessed by considering such factors as the "scale, nature, manner of commission, and impact of the crimes."[55] I have argued that the ICC's notion of gravity is sufficiently flexible and capacious to allow the ICC also to consider an individual's aggressor status in case-selection decisions.[56] Thus, as a practical matter, international prosecutors *could* consider aggressor status, and I provide several normative arguments suggesting that they *should.* For one thing, prosecuting a larger proportion of defendants committing crimes on behalf of aggressors than defendants committing crimes on behalf of defenders is consistent with our moral intuitions.[57] Second, prosecuting a larger proportion of aggressors

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"greatest problem of international criminal justice"); *see also* Asad G. Kiyani, *Re-narrating selectivity*, *in* THE ELGAR COMPANION TO THE INTERNATIONAL CRIMINAL COURT 307, 307 (Margaret deGuzman and Valerie Oosterveld eds., 2020).

[52] *See* Lovisa Bådagård & Mark Klamberg, *The Gatekeeper of the ICC*: *Prosecutorial Strategies for Selecting Situations and Cases at the International Criminal Court*, 48 GEO. J. INT'L L. 639, 647-48 (2016) (discussing how international prosecutors exercise selectivity by concerning themselves mostly with the gravest of crimes such as war crimes, crimes against humanity, and genocide).

[53] *See* Kai Ambos & Ignaz Stegmiller, Prosecuting international crimes at the International Criminal Court: is there a coherent and comprehensive prosecution strategy?, 59 CRIME L. SOC. CHANGE 415, 416 (2013) (noting that, unlike the ICTY and ICTR, the ICC initiated a process of public consultations to develop consistent and transparent case selection criteria).

[54] *See* Office of the Prosecutor, Policy paper on case selection and prioritization, ¶ 6 (Sept. 15, 2016), https://www.icc-cpi.int/sites/default/files/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf [hereinafter *Policy Paper on Case Selection*] (claiming gravity is the main selection criteria adopted by the Office of the Prosecutor); *see also* Office of the Prosecutor, Report on Prosecutorial Strategy, (Sept. 14, 2006), https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/D673DD8C-D427-4547-BC69-2D363E07f (asserting prosecutorial strategy is principally focused on investigations and prosecutions of the most serious crimes and those who bearing the greatest responsibility for such crimes); *see also* Regulations of the Office of the Prosecutor, Regul. 29(2), ICC-BD/05-01-09, (Apr. 23, 2009), https://www.icc-cpi.int/sites/default/files/RegulationsOTPEng.pdf (mandating the Office to consider factors like "scale, nature, manner of commission, and impact" when assessing the gravity of an alleged crime).

[55] Policy Paper on Case Selection, *supra* note 54, at ¶¶ 35, 37.

[56] Combs, *Unequal Enforcement of the Law*, *supra* note 1, at 193.

[57] *Id.* at 194.

enhances international criminal law's ability to advance important penological goals, such as retribution.[58] Third, considering aggressor status in case-selection decisions is apt to enhance the legitimacy of international criminal tribunals with their core constituencies.[59]

Finally, the ICC was recently (and controversially) provided jurisdiction over the crime of aggression.[60] Proponents and opponents of this jurisdiction intensely debated the wisdom of this jurisdiction,[61] but I believe that both sides should welcome my proposal.[62] Proponents supported the ICC's jurisdiction over aggression, but the Assembly of States Parties defined the crime and the ICC's jurisdiction so narrowly that it is unlikely that the ICC will ever prosecute anyone for aggression.[63] Thus, because this jurisdiction is not apt to be exercised, my proposal provides the next best option to prosecuting aggression.[64] That is, since defendants almost certainly will not be prosecuted for crimes of aggression, "then increasing their chances of being prosecuted for their

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[58] *Id.* at 200.

[59] See *id*. at 202 (claiming considering aggressor status helios credibility and legitimacy among constituents like victims).

[60] *See* International Criminal Court, Assembly of States Parties, *The Crime of Aggression*, ICC Res. RC/Res.6, Art. 8*bis*(2) (June 11, 2010) (defining crimes of aggression); International Criminal Court, Assembly of States Parties, *Activation of the jurisdiction of the Court over the crime of aggression*, Doc. No. ICC-ASP/16/Res. 5, ¶ 1 (December 14, 2017).

[61] *See* Andreas Zimmerman, *Crimes within the jurisdiction of the Court*, *in* COMMENT. ON THE ROME STATUTE OF THE INT'L. CRIM. COURT: OBSERVERS NOTES, ARTICLE BY ARTICLE 129, 135-37 (Otto Triffterer ed., 2008 (discussing the deep divisions among delegations and State representatives regarding the definition of crime of aggression, among other things); *see also* Claus Kreß & Leonie von Holtzendorff, *The Kampala Compromise on the Crime of Aggression*, 8 J. INT'L CRIM. JUST. 1179, 1184 (2010) (discussing the disagreements and negotiations surrounding the crime of aggression).

[62] Combs, *Holding Aggressors Responsible for International Crimes*, *supra* note 1.

[63] *See* Kevin Jon Heller, *Who is Afraid of the Crime of Aggression?*, 19 J. INT'L CRIM. JUST. 999, 1000-13 (Aug. 2019) (identifying various narrow limitations on the ICC's jurisdiction over chrome of aggression); *see also* Frederick Cowell & Ana Leticia Magini, *Collapsing Legitimacy: How the Crime of Aggression could affect the ICC's legitimacy*, 17 INT'L CRIM. L. REV. 517, 517 (2017) (reporting that due to the "high definitional threshold," very few acts of aggression will be considered crimes); *see also* Iryna Marchuk & Aloka Wanigasuriya, *The ICC and the Russia-Ukraine War*, 26 ASIL INSIGHTS, July 2022, at 1-2 (discussing how the ICC has no jurisdiction over Russia's alleged aggression against Ukraine); *see* Resolution on Legal and Human Rights Aspects of the Russian Federation's Aggression against Ukraine, EUR. PARL. Doc. 2482 (2023) (reiterating its unanimous call on member states to create a special international tribunal for the crimes of aggression against Ukraine).

[64] Combs, *Holding Aggressors Responsible for International Crimes*, *supra* note 1.

war crimes and crimes against humanity provides some measure of retribution and deterrence."[65]

As for opponents of the ICC's assumption of aggression jurisdiction, many were non-governmental organizations (NGOs) which ardently support international criminal justice and the ICC in general but which had concerns about the desirability and viability of the court prosecuting the crime of aggression.[66] The details of their objections varied, but they shared a common concern that the ICC's prosecution of aggression would have deleterious consequences both for international relations in general and for the ICC in particular.[67] My proposal helps to ameliorate these concerns. Concededly, considering aggressor status in allocating prosecutions of other international crimes is no substitute for a successful prosecution for the crime of aggression. Instead of convicting a defendant for launching an illegal aggressive war, my proposal merely increases the likelihood that defendants from aggressor parties will be prosecuted for the other crimes they committed. However, this more limited measure may strike just the right balance between the bold statement—and potentially deleterious consequences—of an aggression prosecution and complete impunity for aggressors. That is, prosecuting defendants for the crime of aggression directly advances certain deterrence and retributive goals but also has the potential to generate negative consequences in the process.[68] My proposal, by contrast, advances these same goals albeit indirectly and to a lesser extent. But for this reason, it should not give rise to the negative consequences that aggression-jurisdiction opponents fear.[69]

In sum, it makes sense for prosecutors to take aggressor status into account when selecting cases. Part II proposes a standard for how to do so in the most effective manner.

II. AN AGGRESSOR STANDARD FOR CASE-SELECTION DECISIONS

As a matter of law and practice, the ICC's Office of the Prosecutor (OTP) would have no difficulty considering aggressor status in case selection. The OTP has already delineated a series of factors that guide its

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[65] *Id*.

[66] *Id*. at 24.

[67] *See id.* at 25-26 (asserting some NGOs feared the ICC's aggression jurisdiction would deter well-meaning States while others worried the ICC would set the bar for aggression prosecution too high).

[68] *Id*. (describing fear some aggression jurisdiction opponents have regarding the potential negative consequences of the scope of aggression prosecution).

[69] *Id*.

case selection,[70] so aggressor status could be easily added to that list. But if considering aggressor status in case selection, prosecutors would do well to consider three broad issues: (1) whether there should be restrictions on the nature of the parties who can be considered aggressors; (2) whether there should be restrictions on the kinds of attacks that can be considered aggressive for purposes of case selection; and finally, (3) whether there should be a threshold that must be exceeded before prosecutors can conclude that a party initiated the conflict?

The only individuals who can commit the crime of aggression are the leaders of one state who initiate an illegal war against another state.[71] Prosecutors considering aggressor status as a case-selection factor also could limit their consideration to such individuals, but they should not do so. For one thing, the vast majority of armed conflicts that have occurred during the last half century have been non-international,[72] so limiting consideration of aggressor status only to the leaders who initiate state-on-state armed conflicts would dramatically reduce the applicability of the proposal. Additionally, the goals advanced by considering aggressor status in case-selection do not depend on whether the aggressors launched an international or a non-international armed conflict.[73] The same analysis prevails when considering restrictions on the kinds of attacks that qualify as the launching of aggressive warfare. Although the definition of the crime of aggression is narrowly restricted to certain specified kinds of attacks,[74] prosecutors considering aggressor status should not import such limitations. As noted, my proposal seeks to effectuate a limited form of retribution and deterrence on aggressors by enhancing the likelihood of prosecution for those who wrongfully initiate armed conflicts. But it makes no difference what kind of wrongful act initiated the conflict.

That said, I do recommend that prosecutors import some version of the high substantive threshold that is contained in the crime of

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[70] Policy paper on case selection, *supra* note 54, at ¶¶ 35, 37-41 (identifying factors such as the gravity of crime, the number of direct and indirect victims, the extent of damage, etc.).

[71] Rome Statute of the International Criminal Court Art. 8*bis*(3), July 17, 1998, 2187 U.N.T.S. 38544 [hereinafter *Rome Statute*] (establishing that in crimes of aggression, an alleged defendant must have been in a position to control military action of a state).

[72] *See* Eliav Lieblich, *Internal Jus Ad Bellum*, 67 HASTINGS L. J. 687, 689 (2016) (establishing that of the 254 armed conflicts between 1946 and 2013, 153 have been intrastate conflicts); *see also* Adam Roberts, *The Laws of War: Problems of Implementation in Contemporary Conflicts*, 6 DUKE J. COMP. & INT'L L. 11, 13 (1995) (claiming most conflicts since WWII have been Civil conflicts).

[73] Combs, *Holding Aggressors Responsible for International Crimes*, *supra* note 1.

[74] *See id.* at 33-35 (describing how recognition of crimes of aggression are limited to state-to-state conflicts).

aggression.[75] The crime of aggression requires "an act of aggression which, by its character, gravity and scale, constitutes a *manifest* violation of the Charter of the United Nation."[76] That standard is necessarily different from the aggression standard that would be relevant to case selection; nonetheless, I suggest that before prosecutors consider aggressor status when selecting cases, they have a high level of factual certainty that the initiation of the conflict was manifestly wrongful.[77] The rigorous substantive standard found in the definition of the crime of aggression provides a precedent of sorts;[78] moreover, determining aggressor status is so wrought with factual and legal controversies that it would not be worth the resources necessary to determine the issue for case-selection purposes if it is a close question.[79] Said differently, aggressor status should be a factor in the prosecution's case selection decisions only when we have substantial confidence that the putative aggressor acted manifestly wrongfully.[80] In sum, I suggest that prosecutors employ an expansive definition of the parties who might be considered aggressors and the way in which a conflict may be initiated. However, I also recommend that prosecutors apply a rigorous threshold and consider aggressor status only when there is clear and convincing evidence that one party acted in a manifestly wrongful way when initiating the conflict.[81]

III. AGGRESSOR STATUS AS A *SUB SILENTIO* FACTOR IN ICC CASE SELECTION

Although my proposal to add aggressor status to the panoply of factors ICC prosecutors consider when selecting cases is novel, it is also so consistent with our moral intuitions that I suspected that aggressor status may already have been playing a role in case selection. To that end, I examined all of the ICC situations that have progressed to at least one trial, and my analysis of these cases confirms that aggressor status appears

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[75] ICC. Res. 6, The Crime of Aggression (June 11, 2010), RC/11, part II, 17, Annex 1.

[76] Rome Statute, *supra* note 71, at art. 8*bis*(3) ¶ 1.

[77] Combs, *Holding Aggressors Responsible for International Crimes*, *supra* note 1.

[78] *Id*.

[79] *See* Combs, *Unequal Enforcement of the Law*, *supra* note 1, at 36 (using the United States' 2003 invasion of Iraq as an example of the difficulty of ascertaining accurate facts when aggressors claim they are acting in self-defense); *see also* Roberts, *supra* note 16, at 956 ("[t]]here is a notable lack of reliable objective standards as to what constitutes the crime of aggression.").

[80] *Id*.

[81] Combs, *Holding Aggressors Responsible for International Crimes*, *supra* note 1.

to have been exerting a powerful, if sub silentio, influence on case selection all along.[82] My analysis of these cases is necessarily fact-intensive, so it cannot be described with any level of detail in this summary. Rather, here I will simply provide some cursory conclusions, of which the most noteworthy is this: ICC prosecutors have brought charges against more than one party to the relevant conflict when the initiation of that conflict was muddy or its origin was otherwise difficult to determine.[83] However, in situations in which it seems manifest that one party wrongfully initiated the conflict, ICC prosecutors have charged only members of that party.[84]

A. Bringing Charges Against Multiple Parties: Prosecutorial Selection Decisions in Muddy Conflicts

ICC situations can be divided into those in which prosecutors charged members of more than one party to the conflict and those where they charged members of only one party.[85] The former situations include the Democratic Republic of the Congo (DRC), the Central African Republic (CAR), Darfur, and Kenya.[86] In all of these situations, the initiation of the conflict was factually "muddy."[87] For this reason, it came as no surprise that, in these situations, ICC prosecutors charged members of multiple warring parties and appeared to ignore aggressor status when selecting defendants.[88]

The conflicts in the DRC and the CAR were particularly "messy" from a factual point of view.[89] They began long before the ICC itself began[90] and in some fashion continue to this day.[91] The conflicts did not

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[82] *See id.* (suggesting ICC prosecutors select defendants because of either clear and compelling evidence of their crimes).

[83] *Id*.

[84] *Id*.

[85] *Id*.

[86] *Id*.

[87] Combs, *Holding Aggressors Responsible for International Crim*es, *supra* note 1.

[88] *Id*.

[89] *Id*.

[90] *Id*.

[91] *See* Center for Preventative Action, *Conflict in the Democratic Republic of Congo*, COUNCIL ON FOREIGN RELATIONS, https://www.cfr.org/global-conflict-tracker/conflict/violence-democratic-republic-congo#RecentDevelopments-2 (last updated Jul. 20, 2023) (explaining some reasons for continued violent conflicts in Eastern DRC since the 1990's); *see* UN NEWS, *MINUSCA chief to security council: Decade-long cycle of conflict can be broken*, https://news.un.org/en/story/2023/06/1137947 (June 20, 2023) (reporting on the peacekeeping progress between government and armed groups).

feature an obvious starting point or aggressive act,[92] and they have involved large numbers of frequently shifting parties.[93] The conflicts in Darfur and Kenya were more straightforward, and featured more defined parties, but there was still not a clearly identifiable, manifestly wrongful aggressor.[94] Thus, the Prosecutor's decision to charge members of multiple parties to each of these conflicts is in keeping with my unequal enforcement doctrine.

B. Prosecuting Only One Side of the Conflict: Taking Aggressor Status into Account

ICC Prosecutors charged only one party to the conflict in three ICC situations that have gone to trial: Mali, Côte d'Ivoire, and Uganda.[95] The prosecuted parties in Mali and Côte d'Ivoire were the parties that unambiguously and wrongfully initiated the conflict.[96] The genesis of the Uganda conflict was more complex, but as I have described elsewhere, in all three situations, prosecuting only one party to the conflict accords with my proposal.[97]

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[92] See Combs, *Holding Aggressors Responsible for International Crimes*, *supra* note 1, for a more detailed explanation of the origins of the conflicts in the DRC and CAR.

[93] *See* U.N. Off. of the High Comm'r for Hum. Rts., *Democratic Republic of the Congo, 1993-2003: report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003*, at ¶ 60 (noting that "armed groups proliferated and alliances between them were constantly made and unmade, amplifying the chaos"); *see also* HUMAN RIGHTS WATCH, DEMOCRATIC REPUBLIC OF CONGO (2003) (referring to the "ever splintering rebel groups" in the DRC); *see also* Marielle Debos, *Fluid Loyalties in a Regional Crisis: Chadian 'Ex-Liberators' in the Central African Republic*, 107 AFR. AFFS. 225, 226 (2008) (noting that combatants' loyalties are "extremely fluid" and they "may easily shift allegiance"); *see also* Marlies Glasius, *'We Ourselves, We are Part of the Functioning': The ICC, Victims, and Civil Society in the Central African Republic*, 108 AFR. AFF. 49, 58 (2009) (observing that "hostilities and alliances are fluid in Central African politics").

[94] Combs, *Holding Aggressors Responsible for International Crimes*, *supra* note 1.

[95] *Id.*; *see* cases cited *infra* note 97.

[96] *Id*.

[97] *Id*.

In Mali, the ICC charged two members of Ansar Dine,[98] when there was little question that Ansar Dine had launched the conflict.[99] The situation in Côte d'Ivoire in one sense mirrored the situation in Kenya, in that both involved election misconduct and post-election bursts of violence.[100] However, in Côte d'Ivoire, unlike in Kenya, the same party both engaged in election misconduct and initiated the violence.[101] Unsurprisingly, then, it was that party that the ICC targeted for prosecution.[102] The Uganda situation was less straightforward, but ICC prosecutors' decision to charge only members of the rebel movement, the Lord's Resistance Army (LRA), was nonetheless consistent with my proposal.[103] Just before the LRA joined the conflict, peace seemed to be

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[98] Prosecutor v. Al Mahdi, Case No. ICC-01/12-01/15, Judgment and Sentence, ¶¶ 2, 10 (Sept. 27, 2016), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2016_07244.PDF; Prosecutor v. Al Hassan, Case No. ICC-01/12-01/18, Case Information Sheet (Aug. 2023), https://www.icc-cpi.int/sites/default/files/2023-08/al-hassanEng.pdf; *see* Susan Kendi, *First witness in Al Hassan trial testifies at the ICC*, JOURNALISTS FOR JUST. (Sept. 11, 2020), https://jfjustice.net/first-witness-in-al-hassan-trial-testifies-at-the-icc/ (reporting on the commencement of Mr. Al Hassan's trial); *see Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmound*, COAL. FOR THE INT'L CRIM. CT., https://www.coalitionfortheicc.org/al-hassan-ag-abdoul-aziz-ag-mohamed-ag-mahmoud-0 (last visited Oct. 4, 2023) (reporting on Mr. Al Hassan's charges of war crimes and crimes against humanity); *see also Ansar Dine*, Mapping Militant Organizations, STANFORD CTR. FOR INT'L SEC. AND COOP., https://cisac.fsi.stanford.edu/mappingmilitants/profiles/ansar-dine (last visited Oct. 4, 2023)(noting that members of Ansar Dine had been criminally charged and explaining the history leading up to such events).

[99] DONA J. STEWART, What is Next for Mali? The Roots of Conflict and Challenges to Stability 42 (James G. Pierce ed., 2013).

[100] Combs, *Holding Aggressors Responsible for International Crimes*, *supra* note 1.

[101] *Id.*; *see* Sean Butler, Separating Protection from Politics: The UN Security Council, the 2011 Ivorian Political Crisis and the Legality of Regime Change, 20 J. CONFLICT & SEC. L. 252, 254-55 (2015) (stating that the Independent Election Commission [IEC] engaged in election misconduct); *see also* SPECIALIST IN AFRICAN AFFAIRS, CONG. RSCH. SERV., RS21989, CÔTE D'IVOIRE POST-GBAGBO: CRISIS RECOVERY 17 (2011) (describing how Gbagbo rejected the IEC's poll results due to electoral violence); *see also* Yejoon Rim, Two Governments and One Legitimacy: International Responses to the Post-Election Crisis in Côte d'Ivoire, 25 LEIDEN J. INT'L L. 683, 685 (2012) (noting how from Dec. 2010 to April 2011, Gbagbo was a state with two governments); *see also* Econ. Cmty. of W. Afr. States [ECOWAS], of The Authority of the Heads of State and Government of ECOWAS on the Situation in Côte d'Ivoire, Resolution A/RES.1/03/11 (Mar. 25, 2011) (condemning violence against civilians due to political upheavals); U.N. SCOR, 66th Sess., 6508th mtg. at 2-3, S/PV/6508 (Mar. 30, 2011) (reinforcing sanctions in Côte d'Ivoire).

[102] *Id*.

[103] Combs, *Holding Aggressors Responsible for International Crimes*, *supra* note 1.

at hand.[104] The LRA not only extended the conflict; it broadened it and took it in a new and particularly brutal direction.[105] Under these circumstances, prosecutors could reasonably view the LRA as the aggressor and in part for that reason direct against it a disproportionate quantity of prosecutions.[106]

CONCLUSION

It matters who starts an armed conflict. Unfortunately, due to the intractable need for reciprocity during warfare, IHL rules must be applied in ways that take no account of who started the armed conflict, despite the compelling theoretical and practical relevance of that fact. But the enforcement of IHL rules can and should take account of aggressor status. My scholarship has made the case for the differential enforcement of IHL rules, based in part on aggressor status, and it has fleshed out that proposal by developing a standard for prosecutors to apply. Finally, my scholarship has also suggested that despite having no express basis for doing so, ICC prosecutors may themselves have been considering aggressor status all along.

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[104] *See* Ruddy Doom & Koen Vlassenroot, *Kony's Message: A New Koine? The Lord's Resistance Army in Northern Uganda*, 98 AFR. AFSF. 5, 20 (1999) (noting the a short lived absence of widespread violence after the defeat of both Alice Lakwena and Serverino Okoya in late 1987); *see also* Kevin C. Dunn, *Uganda*: *The Lord's Resistance Army*, 31 REV. AFR. POL. ECON. 139, 140 (2004) (describing the Lord's Resistance Army's attacks outside the zone of conflict).

[105] Combs, *Holding Aggressors Responsible for International Crimes*, *supra* note 1.

[106] *Id*.