Holding Aggressors Responsible for International Crimes: Implementing the Unequal Enforcement Doctrine

Nancy Amoury Combs[*]

It is a fundamental tenet of the laws of war that they apply equally to all parties to a conflict. For this reason, a party such as Russia — that illegally launches a war — benefits from all the same rights as a party such as Ukraine — that is forced to defend against the illegal aggression. Countless philosophers have shown that this so-called equal application doctrine is morally indefensible because defenders should have more rights and fewer responsibilities than aggressors. Legal scholars continue to support the equal application doctrine, however, because they reasonably fear that applying different rules to different warring parties will dramatically undermine compliance with the international humanitarian law system as a whole. In previous work I have sought to bridge this divide by shifting the focus from the application of international humanitarian law rules to their enforcement. Specifically, I have advocated retaining the equal application doctrine but reducing its inherent unfairness by disproportionately prosecuting aggressors. To that end, I developed a doctrine that I call "the unequal enforcement doctrine." This Article advances the doctrine in several key ways, but it makes two particularly significant contributions. First, the Article answers a series of core questions regarding the implementation of the unequal enforcement doctrine. Second, the Article applies the unequal enforcement doctrine

 Ernest W. Goodrich Professor of Law, Robert E. and Elizabeth S. Scott Research Professor of Law, Director Human Security Law Center, William & Mary Law School. Thanks to Sasha Greenawalt, Eric Kades, Tom McDonnell, Smita Narula and Susan Somers for helpful comments. This Article benefited from excellent research assistance provided by Kristen Gartner, Morgan Lawrence, Nathan Lowell, Munseong Park, and Rachel Sleiman. Any errors are my own.

retrospectively to prosecutorial decisions made in all of the International Criminal Court ("ICC") situations that have progressed as far as trial. Doing so reveals that, although the ICC 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. *Indeed, this Article's analysis provides powerful support for my claim that "who started it" matters intuitively and profoundly and that the answer to that question has significantly impacted international criminal prosecutions.*

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INTRODUCTION

Russia's invasion of Ukraine has transfixed and horrified the world. Not only did Russia launch an unprovoked armed conflict against its neighbor, but in targeting large-scale attacks against civilians, Russian soldiers have committed war crimes and crimes against humanity that have killed thousands and displaced hundreds of thousands.[1] For these acts, Russia has been condemned in virtually every quarter by world

[1] *See* 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 [https://perma.cc/FC5S-H49D]; *What Is a War Crime and Could Putin Be Prosecuted over Ukraine?*, BBC NEWS (Jul. 20, 2023, 1:01 PM PDT), https://www.bbc.com/news/world-60690688 [https://perma.cc/LU5G-RF59].

leaders,[2] diplomats,[3] celebrities,[4] as well as the person on the street.[5] These condemnations are not merely verbal; States have backed up their words by imposing on Russia the most comprehensive and punishing set of economic sanctions the world has seen.[6]

[2] *See At UN General Assembly, Leaders Condemn Russian War in Ukraine*, AL JAZEERA (Sept. 21, 2022), https://www.aljazeera.com/news/2022/9/21/at-un-general-assembly-leaders-condemns-russias-war-in-ukraine [https://perma.cc/Q4RH-MGD7]; *World Leaders Condemn Russian Invasion of Ukraine: "A Turning Point in the History of Europe"*, CBS NEWS (Feb. 24, 2022, 10:51 AM EST), https://www.cbsnews.com/news/world-leaders-condemn-russian-invasion-ukraine-turning-point-history-of-europe/ [https://perma.cc/N8QJ-UQ6S].

[3] G.A. Res. ES-11/1 (Mar. 2, 2022); Humeyra Pamuk & Jonathan Landay, *U.N. General Assembly in Historic Vote Denounces Russia over Ukraine Invasion*, REUTERS (Mar. 2, 2022, 4:25 PM PST), https://www.reuters.com/world/un-general-assembly-set-censure-russia-over-ukraine-invasion-2022-03-02/ [https://perma.cc/VJ3L-HFUJ] (United Nations General Assembly overwhelmingly voted to adopt resolution condemning Russian invasion). Even some Russian diplomats and military officials condemned the attack. *See* Anders Åslund, *Retired Russian Generals Criticize Putin over Ukraine, Renew Call for His Resignation*, JUST SEC. (Feb. 9, 2022), https://www.justsecurity.org/80149/retired-russian-generals-criticize-putin-over-ukraine-renew-call-for-his-resignation/ [https://perma.cc/KD4X-Z8YQ]; Dan De Luce, *"Ashamed" Russian Diplomat Quits over Invasion of Ukraine*, NBC NEWS (May 23, 2022, 12:40 PM PDT), https://www.nbcnews.com/politics/national-security/ashamed-russian-diplomat-quits-invasion-russia-rcna30125 [https://perma.cc/3UA4-SCMM].

[4] Pjotr Sauer, *Support for Putin Among Western Celebrities Drains Away over Ukraine*, GUARDIAN (Apr. 11, 2022, 11:40 AM EDT), https://www.theguardian.com/world/2022/apr/11/vladimir-putin-celebrities-ukraine-invasion-steven-seagal-gerard-depardieu [https://perma.cc/RDX4-8U9D].

[5] Sam Jones, Armed Conflict Location & Event Data Project, Fact Sheet: Global Demonstrations Against the Russian Invasion of Ukraine (2022), https://acleddata.com/2022/03/09/fact-sheet-global-demonstrations-against-the-russian-invasion-of-ukraine/ [https://perma.cc/DE2H-QWEZ] (reporting that at least 1,800 demonstrations against Russian invasion of Ukraine were recorded within the first nine days of the invasion).

[6] *See* Chad P. Bown, *Russia's War on Ukraine: A Sanctions Timeline*, PETERSON INST. FOR INT'L ECON. (Dec. 31, 2023, 11:00 AM), https://www.piie.com/blogs/realtime-economic-issues-watch/russias-war-ukraine-sanctions-timeline [https://perma.cc/X2RL-N4XV] (detailing sanctions against Russia). Immediately following Russia's invasion of Ukraine, the EU and the United States imposed economic sanctions against Russia, by among other things, freezing Russian bank assets and limiting trade with Russia. *See* Ingrid Melander & Gabriela Baczynska, *EU Targets Russian Economy After "Deluded Autocrat" Putin Invades Ukraine*, REUTERS (Feb. 24, 2022, 1:49 PM PST), https://www.reuters.com/world/europe/eu-launch-new-sanctions-against-russia-over-barbaric-attack-ukraine-2022-02-24/ [https://perma.cc/F9KE-4DB5]; Ellen Nakashima &

Russia's acts constitute international crimes, and the international community also has proposed criminal prosecutions against Russian President Vladimir Putin and other high-level Russian leaders.[7] In particular, numerous States have called for the International Criminal Court ("ICC") to investigate crimes committed in Ukraine,[8] and some

Felicia Sonmez, *U.S. Targets Major Russian Banks and Tech Sector with Sweeping Sanctions and Export Controls Following Ukraine Invasion*, WASH. POST (Feb. 24, 2022, 1:56 PM EDT), https://www.washingtonpost.com/politics/2022/02/24/russia-sanctions-ukraine-biden/ [https://perma.cc/ENE5-8SRN]. Countries that had not previously participated in sanctions against Russia also took action after the invasion. *See, e.g.*, *Russia-Ukraine Crisis: South Korea to Support Sanctions on Russia*, BUS. STANDARD, https://www.business-standard.com/article/international/russia-ukraine-crisis-south-korea-to-support-sanctions-on-russia-122022400327_1.html (last updated Feb. 24, 2022, 10:14 AM IST) [https://perma.cc/TE2X-2HCX]; *Singapore Sanctions Russia Over "Unprovoked Attack" on Ukraine*, REUTERS (Mar. 5, 2022, 4:33 AM PST), https://www.reuters.com/world/asia-pacific/singapore-sanctions-russia-over-unprovoked-attack-ukraine-2022-03-05/ [https://perma.cc/5PPS-NMA5]. Individual sanctions and export-import bans have also been imposed. *See EU Sanctions Against Russia Explained*, COUNCIL OF THE EU, https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-russia-over-ukraine/sanctions-against-russia-explained/ (last viewed Dec. 20, 2023) [https://perma.cc/8SAH-7WS9]; *What Are the Sanctions on Russia and Are They Hurting Its Economy?*, BBC NEWS (May 24, 2023, 11:40 AM PDT), https://www.bbc.com/news/world-europe-60125659 [https://perma.cc/KF8A-NL3V].

[7] *See* Dan Mangan, *Biden Calls to Put Putin on Trial for War Crimes over Russia Killings in Ukraine*, CNBC (Apr. 5, 2022, 3:16 PM EDT), https://www.cnbc.com/2022/04/04/biden-calls-to-put-putin-on-trial-for-war-crimes-over-russias-actions-in-ukraine.html [https://perma.cc/J8A9-UR3L]; *Former UN Prosecutor Calls for Global Arrest Warrant for Putin*, PBS NEWS HOUR (Apr. 2, 2022, 11:10 AM EST), https://www.pbs.org/newshour/world/former-un-prosecutor-calls-for-global-arrest-warrant-for-putin [https://perma.cc/9J9U-Z543]; *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 [https://perma.cc/N6HP-9XNL]; *World Leaders Call for Putin to Face War Crimes Trial* (CBS News television broadcast Apr. 6, 2022), https://www.cbsnews.com/video/world-leaders-call-for-putin-to-face-war-crimes-trial/#x [https://perma.cc/E2MT-DLP7].

[8] 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 (Mar. 2, 2022), https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-receipt-referrals-39-states [https://perma.cc/N4ZL-EMHA] [hereinafter Prosecutor's March 2022 Statement]; *Ukraine: Countries Request ICC War Crimes Inquiry*, HUM. RTS. WATCH (Mar. 2, 2022, 4:42 PM EST), https://www.hrw.org/news/2022/03/02/ukraine-countries-request-icc-war-crimes-inquiry [https://perma.cc/2LKB-ARS5].

States have donated substantial sums to advance that end.[9] Even States that historically have had a contentious relationship with the ICC have buried the hatchet, as it were, and have supported the ICC's jurisdiction over Russian crimes in Ukraine.[10] The ICC was happy to oblige. Immediately after the war began, the Office of the Prosecutor ("OTP") opened a preliminary investigation[11] and sent dozens of investigators, forensic experts, and support personnel to Ukraine as part of what the Prosecutor described as "the largest ever single field deployment by my Office since its establishment."[12]

So, what crimes should the ICC investigate and prosecute? Certainly, there are plenty to choose from. Perhaps the ICC should focus on Russia's May 2022 bombing of the occupied theater in Mariupol.[13] Alternatively, it could focus on Russian soldiers' alleged massacres of civilians in Bucha[14] or the torture and enforced disappearances they

[9] *Russian War Crimes in Ukraine: EU Supports the International Criminal Court Investigation with €7.25 Million*, RELIEFWEB (June 9, 2022), https://reliefweb.int/report/ukraine/russian-war-crimes-ukraine-eu-supports-international-criminal-court-investigation-eu725-million [https://perma.cc/S5HT-8YM9].

[10] The United States has had a contentious, often oppositional, relationship to the ICC since the court's inception. *See The U.S. Does Not Recognize the Jurisdiction of the International Criminal Court*, NPR: ALL THINGS CONSIDERED (Apr. 16, 2022, 4:54 PM EDT), https://www.npr.org/2022/04/16/1093212495/the-u-s-does-not-recognize-the-jurisdiction-of-the-international-criminal-court [https://perma.cc/U4VQ-D3GP]. However, the United States has firmly supported ICC involvement in Ukraine. *See* Charlie Savage, *U.S. Weighs Shift to Support Hague Court as It Investigates Russian Atrocities*, N.Y. TIMES (Apr. 11, 2022), https://www.nytimes.com/2022/04/11/us/politics/us-russia-ukraine-war-crimes.html [https://perma.cc/YN3A-VJAL].

[11] Prosecutor's March 2022 Statement, *supra* note 8.

[12] Statement of 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 (May 17, 2022), https://www.icc-cpi.int/news/icc-prosecutor-karim-aa-khan-qc-announces-deployment-forensics-and-investigative-team-ukraine [https://perma.cc/73PY-MNSW].

[13] *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/ [https://perma.cc/52K5-VXUL].

[14] *See Ukraine: Russian Forces' Trail of Death in Bucha*, HUM. RTS. WATCH (Apr. 21, 2022, 12:00 AM EDT), https://www.hrw.org/news/2022/04/21/ukraine-russian-forces-trail-death-bucha [https://perma.cc/6E25-CJ23].

allegedly committed in Kherson.[15] But what about Ukrainian soldiers' alleged killing of Russian prisoners of war ("POWs")?[16] Or the armed attacks that the Ukrainian military allegedly launched from populated residential areas between April and July 2022?[17] Perhaps you have not heard of those allegations against Ukrainian forces. Even if you have, you might consider any Ukrainian infractions less concerning to prosecutors than Russia's Mariupol bombing or its civilian massacres. After all, even if Ukrainian soldiers did kill Russian POWs or launch attacks from populated locations, they did so in a desperate and understandable attempt to defend their country against an invading force hellbent on eradicating it.

As persuasive as that reasoning might seem, it has been clearly and categorically rejected by international humanitarian law ("IHL") — the law that governs the conduct of warfare. IHL is composed of two bodies of law: 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.[18] Although both bodies of law govern warfare, a strict

[15] *See* YALE SCH. OF PUB. HEALTH HUMANITARIAN RSCH. LAB, EXTRAJUDICIAL DETENTIONS AND ENFORCED DISAPPEARANCES IN KHERSON OBLAST 5 (2022), https://hub.conflictobservatory.org/portal/sharing/rest/content/items/90f22f80754042c597f85529c42e8f6b/data [https://perma.cc/Y6HA-7WA7].

[16] *See* Daniel Boffey, *UN Official Concerned over Videos Showing Apparent Abuse of POWs in Ukraine*, GUARDIAN (Mar. 29, 2022, 1:31 PM EDT), https://www.theguardian.com/world/2022/mar/29/un-official-concerned-over-videos-showing-apparent-abuse-of-pows-in-ukraine [https://perma.cc/XB24-EMZA]; Malachy Browne, Stephen Hiltner, Chevaz Clarke-Williams & Taylor Turner, *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 [https://perma.cc/H2CF-CZRN]; *Ukraine: Apparent POW Abuse Would Be War Crime*, HUM. RTS. WATCH (Mar. 31, 2022, 3:00 PM EDT), https://www.hrw.org/news/2022/03/31/ukraine-apparent-pow-abuse-would-be-war-crime [https://perma.cc/AWX7-BL2N].

[17] *Ukraine: 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/ [https://perma.cc/FC6U-U5UH].

[18] 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, 967-68 (2008); Adam Roberts, *The Equal Application of the Laws of War: A Principle Under Pressure*, 90 INT'L REV. RED CROSS 931, 932 (2008) [hereinafter *The Equal Application of the Laws of War*].

separation is maintained between the two.[19] For that reason, the *jus ad bellum* might designate one party the aggressor because it violated the laws governing the initiation of the use of force, but that party's status as aggressor has no bearing on the application of the laws governing the conduct of warfare. This strict separation gives rise to the so-called equal application doctrine,[20] a core IHL tenet, which provides that a State that launches a war of aggression benefits from all the rights provided by the *jus in bello*, while a State defending against a war of aggression must comply with all the same rules to which the aggressor State is subject.[21] As a legal matter, therefore, a war crime is a war crime is a war crime: military actions are judged by the same legal standards regardless of whether they are committed in the service of a government seeking a naked power grab or a government that is fighting for its country's life against armed invaders. As Amnesty International put it when condemning Ukraine for allegedly launching attacks from civilian locations: "Being in a defensive position does not exempt the Ukrainian military from respecting international humanitarian law."[22]

The equal application doctrine has been subject to harsh and compelling criticism on both philosophical and moral grounds. Every school child who shouts "but he started it!" appeals to a basic moral

[19] 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) (noting "the mainstream among moral thinkers and legal theorists has held fast to a complete separation between *jus in bello* and *jus ad bellum*").

[20] The doctrine goes by a variety of names. François Bugnion described 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 HUMANITARIAN L. 167, 168 (2003). Others have labeled 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). This Article adopts Christopher Greenwood's and Adam Roberts's terminology and call it the "equal application doctrine" or the "equality doctrine." *See* Christopher Greenwood, *The Relationship Between* Ius ad Bellum *and* Ius in Bello, 9 REV. INT'L STUD. 221, 225 (1983); Roberts, *The Equal Application of the Laws of War*, *supra* note 18, at 932.

[21] *See* Moussa, *supra* note 18, at 967; Roberts, *The Equal Application of the Laws of War*, *supra* note 18, at 932.

[22] *Ukraine: Ukrainian Fighting Tactics Endanger Civilians*, *supra* note 17.

intuition,[23] and philosophers have elaborated that basic intuition as applied to IHL in a multitude of sophisticated ways.[24] Although the moral philosophers' critiques are extraordinarily persuasive in the theoretical realms in which they operate, international lawyers have never seriously considered abandoning the equal application doctrine because the doctrine is supported by an even more compelling practical consideration: the need for reciprocity in international law. The modern body of *jus in bello* rules, which dates to the nineteenth century, was adopted to advance one primary purpose: to minimize the suffering caused by war.[25] International lawyers contend that if that body of law did not apply equally to aggressors and defenders, then both parties would flout it.[26] Said differently, international lawyers are convinced that compliance with the laws of war requires reciprocity.[27] Army A may adhere to IHL rules requiring humane treatment of Army B's civilians and captured soldiers but only if the same rules require Army B to treat humanely Army A's civilians and captured soldiers. If, instead, aggressors were obliged to comply with more stringent rules than defenders, then the reciprocity that currently motivates compliance with IHL rules would no longer exist and compliance rates would

[23] That basic moral intuition was also on display in the widespread condemnation that followed Amnesty International's report criticizing Ukrainian military tactics. *See* Clara Ferreira Marques, *Amnesty's Impartiality Plays to Russia's Advantage*, BLOOMBERG NEWS (Aug. 7, 2022, 9:00 PM PDT), https://www.bloomberg.com/opinion/articles/2022-08-08/amnesty-international-comes-to-putin-s-aid-again-with-its-ukraine-report#xj4y7vzkg [https://perma.cc/VE83-R4J5]; Lillian Posner, *Flawed Amnesty Report Risks Enabling More Russian War Crimes in Ukraine*, ATLANTIC COUNCIL (Aug. 9, 2022), https://www.atlanticcouncil.org/blogs/ukrainealert/flawed-amnesty-report-risks-enabling-more-russian-war-crimes-in-ukraine/ [https://perma.cc/XTV9-X8G9] (noting that the report had "been widely condemned by Ukrainian officials and many others in the international community" and prompted the resignation of the Director of Amnesty International Ukraine).

[24] *See* Nancy Amoury Combs, *Unequal Enforcement of the Law: Targeting Aggressors for Mass Atrocity Prosecutions*, 61 ARIZ. L. REV. 155, 170-72 (2019) (describing the literature).

[25] *See* Tetsuya Toyoda, *Influence of Public Opinion on International Law in the Nineteenth Century*, 46 ALTA. L. REV. 1099, 1108-09 (2009).

[26] *See infra* text accompanying notes 55–58.

[27] Sean Watts, *Reciprocity and the Law of War*, 50 HARV. INT'L L.J. 365, 365 (2009) ("The principle of reciprocity has long been foundational to international law and the law of war specifically."); *see also id.* at 368.

plummet. The soldiers of the defending State would not comply with *jus in bello* rules because the rules would not require their compliance. The rules *would* require the soldiers of the aggressor State to comply, but those soldiers would be unlikely to do so because neither they nor their compatriot civilians would gain any 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) 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."[28] Thus, it is widely believed that eliminating the equal application doctrine would lead to the widespread flouting of *jus in bello* rules and thereby would significantly increase wartime death and destruction.[29]

These urgent practical concerns, then, have motivated both the emergence and retention of the equal application doctrine, a doctrine that most consider theoretically and morally indefensible. In a 2019 article, however, I charted a middle course between philosophical principle and practical reality.[30] My article recognized that "who started" the armed conflict is profoundly relevant as a moral matter to the way in which the armed conflict should be regulated. But it likewise acknowledged that it is counterproductive to advance (even unassailable) moral principles if doing so will almost certainly increase practical suffering. The traditional understanding of the equal application doctrine pitted theory and practice in a seemingly zero-sum game; however, my article advocated shifting the focus from the application of international humanitarian law rules to their post-conflict enforcement. In particular, I advocated retaining the equal application doctrine — so that the laws of war continue to apply identically to aggressors and defenders — but I proposed allocating international criminal prosecutions for the violation of those laws differentially. In particular, I argued that aggressors should be subject to a greater proportion of prosecutions than defenders.

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[28] YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 157 (4th ed. 2005).

[29] *Id.* at 156-57.

[30] Combs, *supra* note 24.

Fundamental to my proposal is the sad fact that — due to resource constraints — international criminal prosecutors necessarily must be highly selective when determining whom to prosecute. Said differently, although we expect the prosecution of all violent domestic offenders who can be identified, prosecutors of international crimes have the resources to charge only a tiny percentage of international criminals, despite the frequent availability of compelling evidence. Prosecutors of international crimes consider a variety of factors when deciding whom to target with their limited indictments. At the ICC,[31] for instance, prosecutors assess "the gravity of the crimes, the degree of responsibility of the alleged perpetrators and the potential charges."[32] My previous article argued that the aggressor status of a putative defendant should also be included amongst the factors that prosecutors consider. Under my proposal, then, those who commit international crimes on behalf of aggressor parties would be more likely to be prosecuted for their crimes than those who commit identical international crimes on behalf of defender parties. Enforcing IHL violations unequally across aggressors and defenders, I argued, will reduce the moral unjustifiability of the equal application doctrine without generating the catastrophic practical consequences apt to ensue from its elimination. I maintained, indeed, 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."[33]

Although my 2019 article set forth the normative case supporting what I here call the "unequal enforcement doctrine," space constraints prevented me from addressing certain core issues. In this Article,

[31] Prosecutions of international crimes can take place in national courts or international courts and tribunals, and my 2019 proposal as well as the proposals contained herein are applicable to any and all prosecutions of international crimes. That said, for the sake of simplicity, I focus primarily on prosecutions occurring at the ICC, the preeminent body prosecuting war crimes, crimes against humanity, and genocide.

[32] OFF. OF THE PROSECUTOR, INT'L CRIM. CT., POLICY PAPER ON CASE SELECTION AND PRIORITISATION 12 (2016), https://www.icc-cpi.int/sites/default/files/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf [https://perma.cc/L7LM-8X5G] [hereinafter POLICY PAPER ON CASE SELECTION].

[33] Combs, *supra* note 24, at 160.

therefore, I advance the doctrine in several significant ways. First, after Part I.A recaps the equal application doctrine and my proposal to alter that doctrine in the realm of enforcement, Part I.B marshals additional support for my proposal from the recent negotiations surrounding the ICC's jurisdiction over the crime of aggression. Next, Part II examines a series of key questions regarding implementation of the doctrine. For instance, we might agree in principle that defendants who commit international crimes on behalf of an aggressor State (say, Russia) should run a greater risk of prosecution than defendants who commit identical international crimes on behalf of a defender State (say, Ukraine). But how do we determine who is the aggressor in a given conflict for purposes of case selection? The answer might seem straightforward in the Russia-Ukraine war, but the geneses of most conflicts are less clear-cut, and many also give rise to challenging practical questions. For instance, should parties that launch attacks for humanitarian purposes be considered aggressors for purposes of prosecution allocation? And is there some sort of severity threshold that must be exceeded or does even a very minor incursion trigger aggressor status for purposes of unequal enforcement decisions? An examination of these and other questions reveals that aggressor status is highly contested; thus, prosecutors will need a standard by which to assess which party, if any, should be deemed an aggressor for purposes of case selection. Part II provides that standard. Fortunately, during the last decade, the international community has intensely debated the definition of the crime of aggression. To be sure, the definition of an international crime differs substantially from a definition of a factor to be weighed for purposes of case selection; at the same time, the lengthy, detailed, and all-encompassing discussions surrounding the crime of aggression usefully inform our inquiry and provide a valuable starting point for the exploration.

Finally, Part III applies the standard developed in Part II to all of the ICC situations that have progressed to at least one trial. As noted, ICC prosecutors have not previously included aggressor status in the factors they say they consider when deciding whom to prosecute. However, Part III strongly suggests that although the ICC did not heretofore *expressly* consider aggression status when selecting cases, that status has likely been influencing prosecutorial decisions all along. Indeed, scholars have

advanced a variety of theories to explain the ICC's case-selection decisions.[34] Most of these explanations highlight the (seemingly inappropriate) role of global politics in ICC case selection.[35] Although political considerations may well be playing an outsized role in ICC case selection, Part III suggests that aggressor status likewise constitutes a covert, but influential, factor motivating prosecutors to select some defendants over others. Indeed, Part III's analysis provides powerful support for my claim that aggressor status matters at an intuitive level, as it shows that prosecutors have almost certainly been considering aggressor status without a legal mandate to do so. The ICC Prosecutor's *sub silentio* reliance on aggressor status provides additional compelling support for my proposal that the OTP expressly adopt aggressor status as a case-selection criterion.

[34] *See, e.g.*, Kai Ambos & Ignaz Stegmiller, *Prosecuting International Crimes at the International Criminal Court: Is There a Coherent and Comprehensive Prosecution Strategy?*, 58 CRIME, L. & SOC. CHANGE 391, 391 (2012) (acknowledging the need for a "more precise and comprehensive strategy" and noting that the Prosecutor "has developed a strategic framework guided by four fundamental principles: focused investigations, positive complementarity, the interests of the victims and the impact of the OTP's work"); Phil Clark, *Law, Politics and Pragmatism: The ICC and Case Selection in Uganda and the Democratic Republic of Congo*, *in* COURTING CONFLICT? JUSTICE, PEACE AND THE ICC IN AFRICA 37, 44 (Nicholas Waddell & Phil Clark eds., 2008) (opining that in the DRC and Uganda, "the ICC has been fundamentally motivated by self-interested pragmatic concerns, avoiding the fraught task of investigating and prosecuting sitting members of government who are responsible for grave crimes, while also overlooking the capacity of domestic jurisdictions to address the atrocities concerned"); Frederiek de Vlaming, *Selection of Defendants*, in INTERNATIONAL PROSECUTORS 542, 571 (Luc Reydams, Jan Wouters & Cedric Ryngaert eds., 2012) (noting that "[i]n most cases, grounds for selection focused on the level of the suspects' responsibility and the gravity of the crimes," but, in practice, is at times superseded by other policies, potentially undermining the legitimacy of the courts); Fabricio Guariglia & Emeric Rogier, *The Selection of Situations and Cases by the OTP of the ICC*, *in* THE LAW AND PRACTICE OF THE INTERNATIONAL CRIMINAL COURT 350, 358-59 (Carsten Stahn ed., 2015) ("The OTP has developed the following guiding principles for the purposes of selecting cases for prosecution: Independence . . . Impartiality . . . Objectivity . . . Non-discrimination.").

[35] Jonathan Hafetz, *Fairness, Legitimacy, and Selection Decisions in International Criminal Law*, 50 VAND. J. TRANSNAT'L L. 1133, 1135 (2017); Thomas O. Hansen, *Reflections on the ICC Prosecutor's Recent "Selection Decisions,"* 17 MAX PLANCK Y.B. U.N. L. ONLINE 125, 139 (2013); Rocío Lorca, *Impunity Thick and Thin: The International Criminal Court in the Search for Equality*, 35 LEIDEN J. INT'L L. 421, 428 (2022).

I. EXPLICATING AND DEFENDING THE UNEQUAL ENFORCEMENT DOCTRINE

This Part sets the stage for the contributions of Parts II and III. Section A briefly recaps the equal application doctrine and my proposal for differentially allocating prosecutorial enforcement measures. Section B highlights recent and dramatic legal developments involving the crime of aggression and shows how those developments strengthen the normative weight of my proposal and make it particularly timely.

A. The Equal Application Doctrine and the Unequal Enforcement Doctrine: A Recap

Although wars have been waged throughout human history, it was only in the nineteenth century that the international community began to regulate the conduct of warfare.[36] Beginning in the 1860s, States began concluding international treaties, some which restricted the weapons that could be employed during war[37] while others proscribed certain targeting decisions[38] and still others mandated humane treatment for specified categories of individuals — from injured

[36] Watts, *supra* note 27, at 389-97. The United States had subjected its own armed forces to domestic prohibitions during warfare. War Dep't, Adjutant-Gen.'s Office, *Instructions for the Government of Armies of the United States in the Field*, *in* 3 THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES 148-64 (1902). Additionally, some of the rules that found their way into nineteenth century international law treaties appeared centuries before in the codes of ancient peoples. *See, e.g.*, THE LAWS OF MANU, ch. VII, 158-226 (G. Buhler trans., 2001); THE CODE OF HAMMURABI (L.W. King trans., 1915), https://avalon.law.yale.edu/ancient/hamframe.asp [https://perma.cc/W6V8-52LY].

[37] *See, e.g.*, Declaration (IV,1), to Prohibit, for the Term of Five Years, the Launching of Projectiles and Explosives from Balloons, and Other Methods of Similar Nature, July 29, 1899, 32 Stat. 1803 (prohibiting the launch of balloon projectiles and explosives for a five-year term).

[38] *See, e.g.*, Convention No. IV Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277 (prohibiting, for example, the targeting of undefended towns, villages, dwelling or buildings).

soldiers[39] to prisoners of war[40] and later to civilians.[41] The express aim of these treaties was to reduce the suffering attendant upon warfare.[42] International law at this time permitted States to initiate armed attacks on other States,[43] but statesmen and diplomats believed it beneficial to regulate the conduct of warfare so as to reduce the resulting death and destruction. The *jus in bello* rules contained in these treaties now fall under the umbrella term "IHL."

Because international law did not prohibit initiating warfare and because IHL sought to achieve the broadest possible coverage (so as to minimize war-related suffering to the greatest possible extent), it has always been a core tenet of IHL that its rules apply equally to all parties to a conflict.[44] Prohibited weapons may not be used by anyone, neither those who start wars nor those who defend themselves against aggressors. Civilians are entitled to humane treatment whether they belong to parties that launched an aggressive war or parties that seek to defend against the aggression.[45] This tenet of equal treatment is often denominated the equal application doctrine, and it can be summarized as providing that each party to a conflict benefits from the same IHL

[39] *See, e.g.*, Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Aug. 22, 1864, 22 Stat. 940 (requiring parties to take care of any wounded or sick soldiers, including those belonging to enemy forces, and prohibiting attack on any individual or emergency vehicle providing medical care).

[40] *See, e.g.*, Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021 (requiring prisoners of war at all times to "be humanely treated and protected").

[41] Geneva Convention Relative to the Protection of Civilian Persons in Time of War arts. 3 & 4, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

[42] *See* Toyoda, *supra* note 25, at 1108-09.

[43] DINSTEIN, *supra* note 28, at 75 ("The predominant conviction in the nineteenth (and early twentieth) century was that every State had a right — namely, an interest protected by international law — to embark upon war whenever it pleased. The discretion of States in this matter was portrayed as unfettered."); *see also* Combs, *supra* note 24, at 162.

[44] William Schabas, *Aggression and International Human Rights Law*, *in* THE CRIME OF AGGRESSION: A COMMENTARY 351, 359 (Claus Kreß & Stefan Barriga eds., 2016) ("It is the very essence of the law of armed conflict that both sides be held to the same normative standards.").

[45] Laurie R. Blank, *Irreconcilable Differences: The Thresholds for Armed Attack and International Armed Conflict*, 96 NOTRE DAME L. REV. 249, 249 (2020).

rights and are constrained by the same IHL obligations as every other party.

Although the equal application doctrine remains a core IHL tenet, in recent years, non-legal commentators have compellingly highlighted the doctrine's irremediable theoretical flaws. In particular, these commentators have convincingly argued that because the equal application doctrine is morally unjustifiable, defenders should have more rights and fewer legal obligations than aggressors. Many of these arguments are complex and multi-faceted, but it is sufficient for our purposes merely to summarize their general thrust. That summary begins with the so-called combatant's privilege: the foundational IHL rule that allows soldiers to kill other soldiers.[46] Thanks to the equal application doctrine, the combatants' privilege applies equally to aggressors and defenders; thus, just as soldiers defending against aggression are legally permitted to kill soldiers of aggressor States, soldiers from aggressor States likewise are legally permitted to kill soldiers of defender States. Philosophers such as Jeff McMahan argue that, as a matter of morality, combatants from aggressor States should not be permitted to kill combatants from defender States because the latter are morally innocent and therefore have a right not to be attacked.[47] McMahan and his cohort make their arguments with the language of IHL rules and precepts,[48] but their general insights can be summarized more simply in this way: the equal application doctrine mandates the strict separation of the *jus ad bellum* — the law governing the resort to armed conflict — and the *jus in bello* — the law governing the conduct of warfare — such that aggressor combatants can violate *jus ad bellum* rules while complying with *jus in bello* rules and defender combatants can comply with *jus ad bellum* rules while violating *jus in bello* rules. However, morally speaking, those two bodies of law can never be

[46] MARCELA PRIETO RUDOLPHY, *Combatants and the Privilege to Kill*, *in* THE MORALITY OF THE LAWS OF WAR: WAR, LAW, AND MURDER 39 (2023).

[47] Jeff McMahan, *The Ethics of Killing in War*, 114 ETHICS 693, 706 (2004) [hereinafter *The Ethics of Killing in War*]; *see also* Jeff McMahan, *On the Moral Equality of Combatants*, 14 J. POL. PHIL. 377, 379 (2006).

[48] They claim, for instance, that when combatants from aggressor states kill combatants from defender states, then the former violate core IHL rules such as those requiring attacks to be necessary and proportional. *See* McMahan, *The Ethics of Killing in War*, *supra* note 47, at 702-22.

fully separate because it is never morally acceptable to fight in a war for an unjust cause.[49] Christopher Kutz made this point eloquently when he observed: "If death and destruction matter morally, 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."[50]

Although legal commentators have been wholly unable to refute these arguments, their commitment to the equal application doctrine remains as strong as ever. This is because legal commentators concern themselves almost exclusively with the purposes the equal application doctrine serves and the likely consequences of its elimination. The overarching purpose of IHL rules is to reduce harm to victims of warfare.[51] The general thrust both of the broad principles of IHL (including the principles of distinction,[52] necessity,[53] and proportionality[54]) and the specific rules that grow out of these principles is to prohibit acts that target the victims of warfare or otherwise cause them unnecessary suffering. The equal application doctrine is not itself a substantive rule, but it also exists to reduce harm to innocent victims by mandating equal coverage of all legal rules across all combatants.

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[49] Jeff McMahan, *Morality, Law and the Relations Between* Jus ad Bellum *and* Jus in Bello, 100 PROC. ANN. MEETING 112, 113 (2006).

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

[51] *See* Blank, *supra* note 45, at 249, 257.

[52] The principle of distinction is illustrated in Article 48 of the 1977 Additional Protocol I, which provides that "the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives . . . ." Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 48, June 8, 1977 [hereinafter Protocol I].

[53] The first formulation of the principle of necessity appeared in the Lieber Code. *See* LAURIE R. BLANK & GREGORY P. NOONE, INTERNATIONAL LAW AND ARMED CONFLICT: FUNDAMENTAL PRINCIPLES AND CONTEMPORARY CHALLENGES IN THE LAW OF WAR 40 (2d ed. 2019).

[54] Article 51(5)(b) of the 1977 Additional Protocol I demonstrates the principle of proportionality through its prohibition of any attack on military objectives that may cause harm to civilians or civilian property "which would be excessive in relation to the concrete and direct military advantage anticipated." Protocol I, *supra* note 52, art. 51(5)(b).

The need for this equal coverage stems primarily from the sad fact that IHL has woefully underdeveloped enforcement capabilities,[55] a reality that Russia's unprovoked war of aggression has highlighted in a particularly stark way. Although Russia's initiation of war as well as many of its specific attacks are well-understood to be manifestly unlawful,[56] States have no centralized enforcement apparatus capable of ending Russia's illegal behavior. Thus, because IHL contains a large number of substantive rules but possesses limited capacity to enforce those rules, the system relies on States' voluntary compliance. Russia's widespread and blatant war crimes make clear that States do not always voluntarily comply with the rules governing the conduct of warfare, but we can be assured that they will not unless they believe that other States will also comply. That is, although States engaged in warfare typically regard their adversaries with the utmost hostility, they have often been willing to comply with the IHL rules that constrain their actions and benefit their adversaries because doing so is the only way to motivate their adversaries also to comply with the rules and thereby gain their own benefits.[57] Thus, a State may ardently desire to kill captured enemy soldiers rather than house them in decently-appointed POW camps, but the only way to have any hope that their own captured soldiers will be treated humanely is to provide such decent treatment to their adversary's soldiers. The famed international law scholar Hersh Lauterpacht stated it simply thus: "[I]t is impossible to visualize the conduct of hostilities in which one side would be bound by rules of

[55] *See* Christine Byron, *A Blurring of the Boundaries: The Application of International Humanitarian Law by Human Rights Bodies*, 47 VA. J. INT'L L. 839, 842-48 (2007); Adam Roberts, *The Laws of War: Problems of Implementation in Contemporary Conflicts*, 6 DUKE J. COMP. & INT'L L. 11, 12 (1995) [hereinafter *The Laws of War*] ("The international system differs from domestic politics precisely in the fact that there is no strong central authority capable of enforcing the full range of rules that states and non-state bodies are obliged to follow.").

[56] *See* Claudio Grossman, *The Invasion of Ukraine: A Gross Violation of International Law*, 25 HUM. RTS. BRIEF 74, 75 (2022); *see also* citations appearing *supra* notes 13–15.

[57] *See* ROBERT KOLB, ADVANCED INTRODUCTION TO INTERNATIONAL HUMANITARIAN LAW 43 (2014) ("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.)").

warfare without benefiting from them and the other side would benefit from rules of warfare without being bound by them."[58]

My proposal acknowledges the immense practical value of applying the same rules to aggressors as defenders, but it likewise acknowledges the moral indefensibility of that practice as well as the condemnation it receives from the public at large. Thanks to the equal application doctrine, Amnesty International's critique of Ukrainian military practices was legally flawless, but the critique nonetheless generated widespread pushback,[59] as has prosecutions of those believed to be defending their countries against illegal warfare.[60] For that reason, I have argued that while the same IHL rules should apply to both aggressors and defenders, the international community should deploy its limited enforcement capabilities differentially so as to increase the likelihood that those launching illegal wars will be prosecuted for any war crimes or crimes against humanity they may commit. Doing so will serve the moral principles that underlie IHL without undermining the reciprocity upon which the system relies.

B. Support for the Unequal Enforcement Doctrine from the ICC's Crime of Aggression

The biggest news to emerge from the ICC in recent years was its adoption of jurisdiction over the crime of aggression. In layperson's terms, the crime of aggression is perpetrated when the leaders of a State

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[58] Hersch Lauterpacht, *The Limits of the Operation of the Law of War*, 30 BRIT. Y.B. INT'L L. 206, 212 (1953).

[59] *See* citations appearing *supra* note 23.

[60] In Croatia, the 1990s conflict is viewed exclusively as "a war of aggression by Serbia and Croatian Serbs rebelling against the Croatian state." Vjeran Pavlaković, *Croatia, the International Criminal Tribunal for the Former Yugoslavia, and General Gotovina as a Political Symbol*, 62 EUR.-ASIA STUD. 1707, 1717 (2010). For that reason, efforts to prosecute Croatian generals who defended against that aggression were deeply unpopular. *Id.* at 1710, 1712 n.13; *see also* Combs, *supra* note 24, at 197-98 (describing the intense unpopularity of the prosecution of the leaders of the Civil Defense Forces, who committed crimes in defense of their country); Lansana Gberie, *Sierra Leone*, Z NETWORK (July 6, 2004), https://znetwork.org/znetarticle/sierra-leone-by-lansana-gberie-1-2/ [https://perma.cc/DL39-U97Z]; Andrea Trigoso, *The Kosovo Specialist Chambers: In Need of Local Legitimacy*, OPINIO JURIS (Aug. 6, 2020), https://opiniojuris.org/2020/06/08/the-kosovo-specialist-chambers-in-need-of-local-legitimacy/ [https://perma.cc/NVE4-V68R].

launch unjustified warfare against another State.[61] Nazi leaders were prosecuted for the crime[62] at the Nuremberg Tribunal,[63] but subsequent efforts to codify the prohibition against aggression were stymied by Cold War politics.[64] Controversy surrounding the crime of aggression still predominated in 1998 when diplomats were negotiating the crimes to be included in the ICC's jurisdiction.[65] With some delegations strongly advocating ICC jurisdiction over the crime of aggression and other delegations just as ardently opposed,[66] the delegates eventually compromised by providing the ICC with jurisdiction over aggression but postponing implementation of that jurisdiction until a definition of the crime could be adopted.[67] In 2010, against all expectations,[68] the ICC's Assembly of States Parties did adopt a definition for the crime,[69]

[61] That summary description unquestionably fails to capture the complexities and nuances surrounding the crime, but it conveys the core concept and is sufficient for our purposes.

[62] In the Nuremberg Charter, the crime was denominated "[c]rimes against the peace." Charter of the International Military Tribunal — Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis art. 6, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

[63] *See* IMT Judgment, Sept. 30, 1946, *reprinted in* 22 THE TRIAL OF GERMAN MAJOR WAR CRIMINALS: PROCEEDINGS OF THE INTERNATIONAL MILITARY TRIBUNAL SITTING AT NUREMBERG, GERMANY 421-47 (1950); *see also* Matthew Lippman, *The History, Development, and Decline of Crimes Against Peace*, 36 GEO. WASH. INT'L L. REV. 957, 984-1009 (2004).

[64] *See* Lippman, *supra* note 63, at 1033-35.

[65] *See id.* at 1044-49. For a comprehensive account of the negotiations surrounding the Rome Statute's jurisdiction over aggression, see Roger S. Clark, *Negotiations on the Rome Statute*, *in* THE CRIME OF AGGRESSION: A COMMENTARY, *supra* note 44, at 244.

[66] *See* Andreas Zimmermann, *Crimes Within the Jurisdiction of the Court*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE 129, 135-37 (Otto Triffterer ed., 2d ed. 2008).

[67] Rome Statute of the International Criminal Court art. 5(1)(d), July 17, 1998, 2187 U.N.T.S. 90, 92 [hereinafter Rome Statute].

[68] HANS-PETER KAUL, IS IT POSSIBLE TO PREVENT OR PUNISH FUTURE AGGRESSIVE WAR-MAKING?: 2011 LI HAOPEI LECTURE 1 (Torkel Opsahl Acad. EPublisher, Occasional Paper Series, 2011), https://www.toaep.org/ops-pdf/1-kaul/ [https://perma.cc/N9DU-R9G4]. For a discussion of the disagreements and negotiations surrounding the crime of aggression, see, e.g., Claus Kreß & Leonie von Holtzendorff, *The Kampala Compromise on the Crime of Aggression*, 8 J. INT'L CRIM. J. 1179 (2010).

[69] Int'l Crim. Ct., RC/Res. 6, *The Crime of Aggression*, *in* REVIEW CONFERENCE OFFICIAL RECORDS, RC/11, pt. II, annex 1, at 17 (June 11, 2010).

but even then it postponed activation of the ICC's jurisdiction over aggression until additional requirements could be met.[70] These conditions were fulfilled in 2017, and the ICC's jurisdiction over the crime of aggression was activated in July 2018.[71]

At first blush, it might seem as though the ICC's implementation of jurisdiction over the crime of aggression would reduce the force and relevance of my proposal. After all, a primary reason for disproportionately allocating more prosecutions of other international crimes against aggressors is to punish and deter those who launch wars of aggression. But prosecuting such individuals for the crime of aggression itself provides more direct and efficacious punishment and deterrence than weighing aggression in case-selection decisions. Nevertheless, the events surrounding the court's adoption of jurisdiction over aggression provides support for my proposal, among both opponents of the ICC's activation of aggression jurisdiction and proponents.

I will begin with proponents. Many international criminal law advocates worked tirelessly to promote the ICC's jurisdiction over the crime of aggression,[72] and they enthusiastically welcomed the ICC's activation of that jurisdiction.[73] A symbolic achievement it was, to be

[70] The amendments needed to be ratified by 30 States and a decision could be taken after January 1, 2017, by the same majority as is required for the adoption of an amendment to the Statute. COALITION FOR THE ICC, THE CRIME OF AGGRESSION WITHIN THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, (2019) https://www.coalitionfortheicc.org/sites/default/files/cicc_documents/CICC-%20Factsheet%20Crime%20of%20Aggression%20Final-%20changes%2027Nov2019.pdf [https://perma.cc/77WE-TKGJ].

[71] Int'l Crim. Ct., ICC-ASP/16/Res. 5, *On the Activation of the Jurisdiction of the Court over the Crime of Aggression* ¶ 1 (Dec. 14, 2017) (adopted by consensus at the ICC Assembly of States Parties 13th plenary meeting).

[72] Most notable in this cadre is Ben Ferencz, who prosecuted Nazis at the Nuremberg Tribunal. *See* FEDERICA D'ALESSANDRA, "LAW, NOT WAR": FERENCZ' 70-YEAR FIGHT FOR A MORE JUST AND PEACEFUL WORLD 28 (Torkel Opsahl Acad. EPublisher, Occasional Paper Series, 2018), https://www.toaep.org/ops-pdf/7-dalessandra [https://perma.cc/JZ2N-JUZC].

[73] Tom Ruys called the activation of the ICC jurisdiction over the crime of aggression "a defining moment in the development of the international legal order." Tom Ruys, *Criminalizing Aggression: How the Future of the Law on the Use of Force Rests in the Hands of the ICC*, 29 EUR. J. INT'L L. 887, 915 (2018); *see also* Marieke de Hoon, *The*

sure; however, a closer look reveals that its practical import is likely to range from minimal to non-existent. As Kevin Jon Heller has painstakingly detailed, the stringent definition of the crime[74] combined with exceedingly narrow jurisdictional provisions[75] renders it extraordinarily unlikely that the ICC will ever prosecute anyone for aggression.[76]

That the aggression amendments are functionally dead-on-arrival is the deeply disturbing, yet realistic, conclusion of many commentators, as well as States, who fought for a broader definition and more impactful jurisdictional regime.[77] However, to the extent that the aggression amendments constitute much ado about nothing, my proposal emerges as the best second-best means of advancing the retributive and deterrence goals that are intended to be served by an aggression prosecution. That is, in a world in which aggressors face no real prospect of being prosecuted for the crime of aggression, then increasing their chances of being prosecuted for their war crimes and crimes against humanity provides some measure of retribution and deterrence.

Crime of Aggression's Show Trial Catch-22, 29 EUR. J. INT'L L. 919, 931 (2018) (reporting that the sentiment in Kampala was that the aggression amendments brought the world one step closer to "ending impunity, saving succeeding generations from the 'scourge of war' and [enhancing] the civilizing project of international relations").

[74] Kevin Jon Heller, *Who Is Afraid of the Crime of Aggression?*, 19 J. INT'L CRIM. JUST. 999, 1006-13 (2021); *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).

[75] Heller, *supra* note 74, at 1001-06.

[76] *Id.* at 1000. The ICC certainly has no jurisdiction over the Russia's alleged aggression against Ukraine. Iryna Marchuk & Aloka Wanigasuriya, *The ICC and the Russia-Ukraine War*, 26 ASIL INSIGHTS 1, 1-2 (2022), https://www.asil.org/insights/volume/26/issue/4 [https://perma.cc/8HPX-6XS8]. This lack of jurisdiction has prompted calls for the creation of a special aggression tribunal to prosecute Russian leaders for the crime, see, for example, Council of Eur. Parl. Assemb. Res. 2482, *Legal and Human Rights Aspects of the Russian Federation's Aggression Against Ukraine* (Jan. 26, 2023), https://pace.coe.int/en/files/31620/html [https://perma.cc/DAQ9-CPUK] [hereinafter Council of Eur. Parl. Assemb. Res. 2482].

[77] *See* Jeremy Sarkin & Juliana Almeida, *Understanding the Activation of the Crime of Aggression at the International Criminal Court: Progress and Pitfalls*, 36 WIS. INT'L L.J. 518, 547-50 (2019). *See generally* Heller, *supra* note 74 (speaking to the limits of the crime of aggression).

For many who opposed activation of the ICC's jurisdiction over aggression, the calculation is different, but the conclusion is the same. To be sure, some States' opposition to the aggression amendments reflected a self-serving concern that they themselves would be subject to an aggression prosecution.[78] These opponents would likewise oppose my proposal because anyone who plausibly fears an aggression prosecution also would seek to prevent an enhanced likelihood of prosecution for related crimes. However, many opposed the aggression amendments for reasons that were beyond reproach. Indeed, although, non-governmental organizations ("NGOs") provided united and enthusiastic support for the creation of the ICC in 1998,[79] by 2010, when the question concerned activation of the ICC's jurisdiction over aggression, the NGO community had badly splintered.[80] Certainly, some supported activating jurisdiction over aggression;[81] however, others expressed significant concerns.[82] Indeed, such major players as Amnesty

[78] *See* VIJAY PADMANABHAN, FROM ROME TO KAMPALA: THE U.S. APPROACH TO THE 2010 INTERNATIONAL CRIMINAL COURT REVIEW CONFERENCE (Council on Foreign Rels., Council Special Rep. No. 55, 2010), https://www.cfr.org/report/rome-kampala [https://perma.cc/YZP6-6FUS].

[79] Beth Van Schaack, *Negotiating at the Interface of Power and Law: The Crime of Aggression*, 49 COLUM. J. TRANSNAT'L L. 505, 513 (2011). *See generally* William Pace & Mark Thieroff, *Participation of Non-Governmental Organizations*, *in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 391, 391-95 (Roy S. Lee ed., 1999) (describing NGO contributions to the adoption of the Rome Statute); William Pace & Jennifer Schense, *Coalition for the International Criminal Court at the Preparatory Commission*, *in* THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 705 (Roy S. Lee ed., 2001) (describing the contribution of NGOs to the Preparatory Commissions drafting the Elements of Crimes and the Rules of Procedure and Evidence).

[80] *See* Noah Weisbord, *Civil Society*, *in* THE CRIME OF AGGRESSION: A COMMENTARY 1310, 1313-14 (describing NGOs' "overall ambivalence" towards the aggression project).

[81] *Id.* at 1313; Van Schaack, *supra* note 79, at 514-15.

[82] Some maintained, for instance, that the use of armed force is best addressed in the political realms than in a court, *see* Weisbord, *supra* note 80, at 1315-16, whereas others were concerned that the ICC's prosecution of aggression would undermine the Court's legitimacy and its ability to advance its other goals. Letter from Aryeh Neier, President of the Open Soc'y Inst., to Foreign Minister (May 10, 2010), https://www.justiceinitiative.org/uploads/80f6741a-bb3b-4b91-a186-642765895b05/icc-aggression-letter-20100511.pdf [https://perma.cc/DG6G-YRP8] [hereinafter Letter from Aryeh Neier] (letter on behalf of Open Society and 40 other NGOs).

International and Human Rights Watch[83] refused to adopt a position for or against the aggression amendments,[84] and they expressly justified their neutrality by invoking the logic of the equal application doctrine. Human Rights Watch asserted that its "institutional mandate includes a position of strict neutrality on issues of *jus ad bellum,* because we find it the best way to focus on the conduct of war, or *jus in bello*, and thereby . . . promote our primary goal of encouraging all parties to a conflict to respect international humanitarian law."[85]

Indeed, between 2010, when the definition of aggression was adopted, and 2018 when the ICC's jurisdiction over the crime was activated, many otherwise ardent supporters of international criminal law continued to express qualms. Whereas advocates of aggression jurisdiction predicted that it would help to deter aggressive warfare[86] and to strengthen international criminal justice more generally,[87] skeptics raised a multitude of concerns. Some feared that the ICC's aggression jurisdiction would deter well-meaning States from engaging in desirable humanitarian intervention.[88] Others worried that the ICC would set the

[83] *See, e.g.*, *Making Kampala Count*, HUM. RTS. WATCH (May 10, 2010), http://www.hrw.org/en/reports/2010/05/10/making-kampala-count [https://perma.cc/2GRV-JYTG] ("[W]e fear that inclusion of a definition and jurisdictional filter could diminish or appear to diminish the court's role [and the perceptions of that role] as an impartial judicial arbiter of international criminal law.").

[84] AMNESTY INT'L, INTERNATIONAL CRIMINAL COURT: MAKING THE RIGHT CHOICES AT THE REVIEW CONFERENCE 11-15 (2010), https://www.amnesty.org/en/wp-content/uploads/2021/06/ior400082010en.pdf [https://perma.cc/U6K2-B6Y6].

[85] Memorandum by the Hum. Rts. Watch for the Sixth Session of the International Criminal Court Assembly of States Parties (Nov. 2007), https://www.hrw.org/sites/default/files/reports/asp1107.pdf [https://perma.cc/R4SN-M9GM]; *see also* Schabas, *supra* note 44, at 359 (noting that Human Rights Watch imported the equal application doctrine to the field of human rights).

[86] Jennifer Trahan, *From Kampala to New York — The Final Negotiations to Activate the Jurisdiction of the International Criminal Court Over the Crime of Aggression*, 18 INT'L CRIM. L. REV. 197, 221-24 (2018).

[87] *See* Noah Weisbord, *Judging Aggression*, 50 COLUM. J. TRANSNAT'L L. 82, 109-12 (2011).

[88] *See* Leslie Esbrook, *Exempting Humanitarian Intervention from the ICC's Definition of the Crime of Aggression: Ten Procedural Options for 2017*, 55 VA. J. INT'L L. 791, 803 (2015) (arguing that the definition of aggression should be narrowed to ensure that States are not prevented from resulting to "limited use of force in the form of [humanitarian intervention]"); Harold Hongju Koh & Todd F. Buchwald, *The Crime of Aggression: The*

bar for aggression prosecutions too high and would thereby encourage uses of force that are undesirable but that do not satisfy the stringent definition of aggression.[89] Still others were concerned that aggression prosecutions would politicize the ICC and undermine its already-fragile legitimacy.[90]

My proposal helps to bridge the gap between proponents and opponents of aggression prosecutions and to ameliorate the latter's concerns. To be sure, considering aggressor status in allocating prosecutions of other crimes is no substitute for a successful prosecution for the crime of aggression. The latter identifies a leader

United States Perspective, 109 AM. J. INT'L L. 257, 271-72 (2015) ("[S]tates may become . . . reluctant to risk involvement even in military actions that are lawful and appropriate . . . prolonging violence and abuses of human rights by deterring future military actions."); W. Michael Reisman, *Reflections on the Judicialization of the Crime of Aggression*, 39 YALE J. INT'L L. ONLINE 66, 73 (2014). The United States was sufficiently concerned about preventing aggression prosecutions for humanitarian interventions that it put forward a draft understanding that provided that "an act cannot be considered to be a manifest violation of the United Nations Charter unless it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith, and thus an act undertaken in connection with an effort to prevent the commission of [genocide, war crimes, or crimes against humanity] would not constitute an act of aggression." CARRIE MCDOUGALL, THE CRIME OF AGGRESSION UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 120 (2013); *see also* Cedric Ryngaert, *The Understandings Regarding the Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression, in* FROM ROME TO KAMPALA: THE FIRST TWO AMENDMENTS TO THE ROME STATUTE 1(f)-(g) (Gérard Dive, Benjamin Goes & Damien Vandermeersch eds., 2013); David Scheffer, *States Parties Approve New Crimes for International Criminal Court*, 14 ASIL INSIGHTS (2010), https://www.asil.org/insights/volume/14/issue/16/states-parties-approve-new-crimes-international-criminal-court [https://perma.cc/FX2S-5BNY]. The proposal did not gain sufficient support. Ruys, *supra* note 73, at 890. This fear may also have been of concern to some NGOs. Schabas, *supra* note 44, at 358 (noting that "[a] militaristic tendency has infiltrated the human rights movement in recent years, encouraged by talk of 'humanitarian intervention' and the 'responsibility to protect'").

[89] Ruys, *supra* note 73, at 916; *see also* Andreas Paulus, *Second Thoughts on the Crime of Aggression*, 20 EUR. J. INT'L L. 1117, 1124 (2010). The Assembly of State's Parties also transformed a political standard guiding the Security Council's consideration of State acts of aggression into a legal definition for the crime of aggression, leading Michael Reisman to worry that this ahistorical move "could undermine belief in the relevance of international law." Reisman, *supra* note 88, at 73.

[90] *See* de Hoon, *supra* note 73, at 933; Cowell & Magini, *supra* note 74, at 542 (asserting that the aggression amendments will present the ICC with a "fresh crisis of functional legitimacy").

and holds him criminally responsible for what many believe to be the supreme international crime.[91] Each successful aggression prosecution more firmly entrenches the norm against aggressive warfare and expresses in a particularly clear and powerful way the international community's commitment to adding legal measures to the arsenal of methods employed to end the scourge of war. My proposal, by contrast, merely stacks the prosecutorial deck against defendants from aggressor parties in relation to the other crimes they committed.

However, those concerned about the deleterious consequences of an aggression prosecution may find stacking the prosecutorial deck against aggressors to be just what the doctor ordered. When prosecutors consider aggressor status when allocating prosecutions, they do not make the bold statement that is proclaimed when they launch an aggression prosecution. Nor does it advance the goals of an aggression prosecution in the same direct and robust way. But it does advance those goals indirectly, and it avoids many of the negative consequences that aggression-prosecution opponents fear. Indeed, my proposal differs from an aggression prosecution in two key respects: first, under my proposal, the harm facing the putative aggressor is reduced; second, it is less public. That is, whereas a defendant prosecuted for the crime of aggression faces conviction for a serious crime, my proposal subjects aggressors, at most, to a greater likelihood of prosecution for a different crime. Even more notably, prosecutions for aggression are highly public affairs whereas the mechanics of prosecutorial allocation decisions are entirely non-transparent.[92] These differences allow my proposal to

[91] As Robert Jackson famously said: "To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole." 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 427 (1948); *see also International Military Tribunal for the Far East, Majority Judgment*, *reprinted in* DOCUMENTS ON THE TOKYO INTERNATIONAL MILITARY TRIAL: CHARTER, INDICTMENT AND JUDGMENTS 71, 658 (Neil Boister & Robert Cryer eds., 2008) (claiming that "no more grave crimes can be conceived of than a conspiracy to wage a war of aggression or the waging of a war of aggression").

[92] *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, 725 (2017).

advance, albeit indirectly and to a lesser extent, the goals of an aggression prosecution while generating fewer negative consequences.

Consider deterrence, for instance. Prosecuting leaders for aggression may deter the launching of aggressive warfare, but the prosecutions may also deter desirable humanitarian intervention. Allocating prosecutions on the basis of aggressor status will not effectuate the same level of deterrence — either positive or negative — but it also does not give rise to the understandable concerns of aggression jurisdiction opponents: that aggression prosecutions will increase the ICC's politicization, diminish its independence, and reduce the support it can expect to receive from States.[93]

For all of these reasons, taking aggressor status into account when deciding whom to prosecute makes a lot of sense. Part II, next, explores the optimal way of doing so.

II. JUST WHO STARTED IT ANYWAY? DEVELOPING AN AGGRESSOR STANDARD FOR CASE-SELECTION DECISIONS

Taking aggressor status into account in prosecutorial selection decisions is a good idea, but like many good ideas, it confronts difficult implementation challenges. In particular, if prosecutors are to consider aggressor status when deciding which cases to bring, then they need to determine who *is* the aggressor in the relevant conflict. Doing so, however, does not necessarily require prosecutors to develop, let alone publicize, a formal standard by which to make that determination. ICC prosecutors generally make their case-selection decisions behind closed doors and pursuant to non-public criteria. Even national prosecutors of ordinary crimes — who are expected to prosecute the vast majority of violent criminals — still decline to bring some prosecutions, and they typically do so without referring to public guidelines.[94] National authorities prosecuting international crimes pursuant to universal jurisdiction are even more likely to exercise their discretion to decline

[93] *See* David Kaye, Opinion, *Prosecuting Aggression*, N.Y. TIMES (May 26, 2010), https://www.nytimes.com/201Kaye0/05/27/opinion/27iht-edpoint.html [https://perma.cc/4ZRF-5FMW]; *see also* Letter from Aryeh Neier, *supra* note 82.

[94] Angela J. Davis, Arbitrary Justice: The Power of the American Prosecutor 5 (2007); Jessica A. Roth, *Prosecutorial Declination Statements*, 110 J. Crim. L. & Criminology 447, 479 (2020).

well-supported cases.[95] Different countries bestow this discretion on different governmental officials, who make their decisions pursuant to different criteria.[96] But, as Human Rights Watch has noted, most such decisions are not transparent.[97]

Indeed, compared to national prosecutors, ICC prosecutors are already dramatically more transparent about their case selection decision-making.[98] In 2017, the ICC's Office of the Prosecutor ("OTP") promulgated a Policy Paper on Case Selection[99] that describes the criteria the OTP considers when deciding which cases to pursue.[100] The Policy Paper identifies the gravity of a crime as the prosecution's "predominant" case selection criterion;[101] it notes, moreover, that gravity should be assessed both qualitatively and quantitatively,[102] by considering such factors as the nature, scale, manner of commission, and impact of the crimes.[103] The Policy Paper goes on to briefly describe each of these factors,[104] along with other criteria relevant to case selection, including the degree of responsibility of the alleged perpetrators[105] and the relevant charges.[106]

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[95] Hum. Rts. Watch, Universal Jurisdiction in Europe: The State of the Art: III.D. Prosecutorial Discretion (2006), https://www.hrw.org/reports/2006/ij0606/3.htm#_Toc137876504 [https://perma.cc/ES3M-KDD4].

[96] *Id.*

[97] *Id.*

[98] The ICC Prosecutor's case selection is also more transparent than that of the *ad hoc* international criminal tribunals that preceded the ICC. *See* Ambos & Stegmiller, *supra* note 34, at 392 (noting that, unlike the ICTY and ICTR, the ICC "initiated a process of public consultations to develop consistent [and transparent case] selection criteria"); *see also* de Vlaming, *supra* note 34, at 563.

[99] OFF. OF THE PROSECUTOR, POLICY PAPER ON CASE SELECTION, *supra* note 32.

[100] Prior to the promulgation of the Policy Paper on Case Selection and Prioritisation, the OTP was criticized for its non-transparent case-selection processes. INDEPENDENT EXPERT REVIEW OF THE INTERNATIONAL CRIMINAL COURT AND THE ROME STATUTE SYSTEM, FINAL REPORT ¶ 660 (2020) [hereinafter INDEPENDENT EXPERT REVIEW OF THE ICC].

[101] OFF. OF THE PROSECUTOR, POLICY PAPER ON CASE SELECTION, *supra* note 32, ¶ 6.

[102] *Id.* ¶¶ 32, 37.

[103] *Id.* ¶¶ 35, 37.

[104] *Id.* ¶¶ 38-41.

[105] *Id.* ¶¶ 34, 42-44.

[106] *Id.* ¶¶ 34, 45-46.

Because the OTP has already delineated a series of factors that guide its case selection, it would be easy to add "aggressor status" to the list without further elaboration. After all, the other listed criteria are somewhat amorphous, and the Policy Paper does not bind the prosecution to weigh the factors in any particular way. Indeed, in 2019, I remarked on the indeterminacy of the inquiry, observing that the Policy Paper:

> 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)." 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.[107]

For these reasons, adding aggressor status to the list of factors relevant to case selection, without more, would be in keeping with the scant detail already provided by the Policy Paper; additionally, it would put aggressors on notice that they run a greater risk of prosecution without unduly tying the prosecution's hands. At the same time, determining the alleged aggressor status of a party to the conflict is apt to be more difficult and more controversial than assessing the OTP's already-existing case-selection factors. Therefore, even though prosecutors would consider aggressor status, like the other factors, behind closed doors and would take account of evidence not available to the public, it would nonetheless be beneficial to devote some thought to the appropriate standard for aggressor status and its application.

To that end, I suggest that in developing a standard for aggressor status in case selection, prosecutors should consider three broad questions. First, should there be restrictions on the nature of the parties

[107] Combs, *supra* note 24, at 192.

who can be considered aggressors? Second, should there be restrictions on the kinds of attacks that can be considered aggressive for purposes of case selection? Finally, should there be a threshold that must be exceeded before prosecutors can conclude that a party initiated the conflict? In answering these questions, prosecutors should keep firmly in mind the purposes served by considering aggressor status in case-selection decisions.

The following sections address each question in turn. In the end, they recommend that prosecutors take a broad view of the parties who might be considered aggressors and the way in which a conflict may be initiated. Yet, they also suggest that prosecutors employ a stringent threshold and consider aggressor status only when there is clear and convincing evidence that one party acted manifestly wrongfully in initiating the conflict.

A. Limitations on Parties

Should prosecutors limit their consideration of aggressor status to conflicts initiated by certain individuals or groups? The crime of aggression has always been so restricted; it can be committed only by a leader[108] who is acting on behalf of a State and who initiates an attack

[108] The post-World-War II tribunals, which were the first to prosecute aggression (then known as Crimes Against the Peace) limited potential defendants to those who were in a position to shape or influence the policy that brings about its initiation or its continuance. *United States v. von Leeb et al.*, *in* MILITARY TRIBUNAL XII, *in* 11 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 486 (1950) ("[T]he criminality which attaches to the waging of an aggressive war should be confined to those who participate in it at the policy level."). The drafters of the ICC's aggression amendments limited the crime still further by requiring that potential defendants be "in a position effectively to exercise control over or to direct the political or military action of a State." Rome Statute, *supra* note 67, art. 8*bis*(2). The drafters of the Rome Statute considered adopting the broader standard applied by the World War II tribunals, but in the end opted for a more restrictive formulation. Nikola Hajdin, *The Nature of Leadership in the Crime of Aggression: The ICC's New Concern?*, 17 INT'L CRIM. L. REV. 543, 545, 559-60 (2017) (describing the change in the leadership clause from the "shape or influence" language of customary international law established at Nuremberg to the ICC's "control or direct").

against another State.[109] Prosecutors could apply these or other restrictions when considering aggressor status for purposes of case selection; however, for the reasons detailed below, I suggest that they do not.

For one thing, most of the restrictions that currently constrain the crime of aggression rest far more on pragmatism than on principle. To be sure, limiting the crime of aggression to leaders who made the decision to go to war is appropriate because it would be unfair to hold non-decision-makers responsible for decisions they had no power to make.[110] However, many of aggression's other restrictions, including those requiring state action against other states, derive primarily from historical practice[111] and the intense — and often self-interested — contestation that has always surrounded the crime.[112] Maintaining state-actor requirements for the crime of aggression may or may not be justified.[113] But such requirements are clearly not justified for purposes

[109] According to the Rome Statute, aggression requires "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State." Rome Statute, *supra* note 67, art. 8*bis*(2).

[110] *United States v. von Leeb et al.*, *supra* note 108, at 489 (noting the "individual soldier or officer below the policy level is but the policy makers' instrument, finding himself, as he does, under the rigid discipline which is necessary for and peculiar to military organization").

[111] Eliav Lieblich, *Internal* Jus ad Bellum, 67 HASTINGS L.J. 687, 696-704 (2016).

[112] Criminalizing acts of aggression has remained highly controversial, whether in Nuremberg in 1946, in Rome in 1998, or in Kampala in 2010. For that reason, most consider it achievement enough for the international community to criminalize the initiation of warfare by States against other States. At least that criminal prohibition can be understood to reflect customary international law. Kreß, *supra* note 44, at 412, 421-22. Understandably, States, always seeking to protect their sovereignty, have had no interest in criminalizing their initiation of war against non-state armed groups agitating in their territory. Indeed, States tend to be reluctant even to subject themselves to *jus in bello* obligations concerning their non-international armed conflicts. Roberts, *The Equal Application of the Laws of War*, *supra* note 18, at 934.

[113] Some commentators believe the prohibition on the use of force should be extended to non-international armed conflicts. Lieblich, *supra* note 111, at 705-06; Ruth Wedgwood, *The Use of Force in Civil Disputes*, 26 ISR. Y.B. ON HUM. RTS. 239 (1997); *see also* David Scheffer, *Amending the Crime of Aggression Under the Rome Statute, in* THE CRIME OF AGGRESSION: A COMMENTARY, *supra* note 44, at 1480, 1482 (suggesting that the actions of transnational groups like ISIS should be included within the definition of the crime of aggression).

of case selection both because they would undermine the goals intended to be served by considering aggressor status in case selection and because they would sharply diminish the proposal's real-world impact.

Limiting consideration of aggression status to State-to-State conflict would dramatically reduce the relevance of my proposal because the vast majority of armed conflicts that have occurred during the last half century have been non-international;[114] that is, they have either involved two non-State parties or a State and one or more non-State parties. Thus, if prosecutors took account of aggressor status in case-selection only when one State attacked another State, they would rarely take account of aggressor status. Second, considering aggressor status in case-allocation decisions is intended to serve a number of penological goals, but these goals would be undermined if aggression status were considered only in State-to-State conflicts. For instance, we can hope that prosecuting a larger number of aggressors will deter some acts of aggression. Moreover, even if no deterrence results, prosecuting more aggressors than defenders advances retributive ends. We generally consider those who commit bad acts in furtherance of immoral goals to be more blameworthy and deserving of punishment than those who commit bad acts in furtherance of moral goals; thus, retributive norms are served by visiting more criminal sanctions on aggressors than defenders. But neither of these goals turns on the status of the warring parties as State or non-State actors. That is, it is desirable to deter the launching of any war: a war between two States, two rebel forces or a State and a rebel force. Likewise, our retributive intuitions instruct that aggressors should face a greater likelihood of prosecution than defenders, regardless of whether those aggressors are State or non-State actors. In short, when selecting cases, there is no reason to limit consideration of aggressor status to State-on-State conflicts and many reasons not to.

[114] Lieblich, *supra* note 111, at 689 ("Of the 254 armed conflicts recorded between 1946 and 2013, . . . only twenty-four have been categorized as interstate conflicts."); Roberts, *The Laws of War*, *supra* note 55, at 13 ("Most conflicts since 1945 have been civil wars, or at least have contained a major element of civil war.").

B. Restrictions on the Forms of Attack

A similar analysis applies when determining whether to limit the kinds of attacks that should be considered when assessing aggressor status for purposes of case selection. Just as the crime of aggression can be committed only by certain perpetrators, it also can be committed only through certain armed attacks.[115] For that reason, other forms of

[115] Rome Statute, *supra* note 67, art. 8*bis*(2). These are:

> (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
>
> (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
>
> (c) The blockade of the ports or coasts of a State by the armed forces of another State;
>
> (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
>
> (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
>
> (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
>
> (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

hostility, such as economic embargoes[116] and possibly cyber-attacks,[117] do not constitute the crime of aggression. Aggressor status for case-selection purposes could be limited in the same or other ways. However, just as the case-selection inquiry should not turn on the status of the perpetrator, it also should not turn on the nature of the attack. Rather, the core question relevant to case selection is this: did one party initiate the conflict in a manifestly wrongful way? That question is central because it is the affirmative answer to that question that justifies differential treatment in case selection.

As noted above, international criminal prosecutors will always confront far more cases than they have the resources to prosecute. Taking account of aggressor status in case selection allows prosecutors to factor in wrongful conduct that may be unrelated to the crime under prosecution but that is nonetheless relevant to the overall case-selection equities and the allocation of scarce resources. That is, all things being equal, an individual who commits a war crime in the service of the party that wrongfully initiated the conflict should run a greater risk of prosecution than an individual who perpetrated the same war crime in the service of a party that did not. Given the equitable nature of the inquiry, it makes no difference what kind of manifestly wrongful act initiated the conflict. So long as the initiation of warfare *is* manifestly wrongful, then it doesn't matter that the act was an aerial bombardment that levels an army barracks or a cyber-attack that disrupts a city's water supply.

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[116] Some delegates advocating including in the definition of the crime of aggression "acts that are not of military nature, such as economic embargoes." Assemb. of States Parties to the Rome Statute of the Int'l Crim. Ct., Rep. of the Special Working Grp. on the Crime of Aggression, Annex II, ¶ 17, ICC-ASP/7/20/Add.1 (Jan. 23, 2009), https://asp.icc-cpi.int/sites/asp/files/asp_docs/ICC-ASP-7-20-Add.1%20English.pdf [https://perma.cc/C728-BFXF] [hereinafter Annex II of the 2009 Rep. of the Special Working Grp.]. But this proposal was not accepted. *See* Rome Statute, *supra* note 67, art. 8*bis*(2); *see also* Kreß, *supra* note 44, at 425 ("Armed force refers to a physical effect and therefore excludes, for example, economic coercion.").

[117] Some experts are skeptical that a cyber-attack can satisfy the elements of the crime of aggression, see Kai Ambos, *International Criminal Responsibility in Cyberspace*, *in* RESEARCH HANDBOOK ON INTERNATIONAL LAW AND CYBERSPACE 152 (Nicholas Tsagourias & Russell Buchan eds., 2d ed. 2021), whereas others are more open to the possibility, see Kreß, *supra* note 112, at 443; Scheffer, *supra* note 113, at 1483-85; Weisbord, *Judging Aggression*, *supra* note 87, at 134-67.

This Section and its predecessor maintain that prosecutors need not restrict their inquiry to conflicts that were initiated by certain parties or through certain means, even though the crime of aggression is so limited. However, that does not mean that the crime of aggression can teach us nothing. The following Section recommends that, just as the drafters of the aggression amendments included a stringent substantive threshold for the crime of aggression, prosecutors should similarly consider aggression for purposes of case selection only if that aggression meets high substantive and evidentiary standards.

C. Aggressor Status Threshold

The ICC has defined the crime of aggression as including an act of aggression "which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations."[118] This formulation — requiring a *manifest* violation — was a compromise between States that saw no need for any severity threshold[119] and States that wanted aggression to be defined even more stringently to require a *flagrant* violation.[120] Regardless of how they got there, in settling on the "manifest violation" threshold, the drafters of the aggression amendments made clear their desire to restrict prosecutions to "unambiguously illegal instances of a use of force"[121] and thereby to exclude "borderline" cases,[122] "grey" cases, and cases of "insufficient gravity."[123] Limiting the crime to "the most serious acts of aggression

[118] Rome Statute, *supra* note 67, art. 8*bis*(1).

[119] *See* Assemb. of States Parties to the Rome Statute of the Int'l Crim. Ct., Rep. of the Special Working Grp. on the Crime of Aggression, Annex II, ¶ 26, ICC-ASP/6/20/Add.1 (June 6, 2008), https://asp.icc-cpi.int/sites/asp/files/asp_docs/ICC-ASP-6-20-Add.1%20English.pdf [https://perma.cc/V9EQ-CWED] [hereinafter Annex II of the 2008 Rep. of the Special Working Grp.].

[120] Assemb. of States Parties to the Rome Statute of the Int'l Crim. Ct., Informal Inter-Sessional Meeting of the Special Working Grp. on the Crime of Aggression, ¶¶ 18-20, ICC-ASP/5/SWGCA/INF.1 (Sept. 5, 2006), https://asp.icc-cpi.int/sites/asp/files/asp_docs/SWGCA/ICC-ASP-5-SWGCA-INF1_English.pdf [https://perma.cc/AMS8-BN7T].

[121] LIECH. INST. ON SELF-DETERMINATION, HANDBOOK: RATIFICATION AND IMPLEMENTATION OF THE KAMPALA AMENDMENTS TO THE ROME STATUTE OF THE ICC: CRIME OF AGGRESSION, WAR CRIMES 8 (2012).

[122] Annex II of the 2009 Rep. of the Special Working Grp., *supra* note 116, ¶ 13.

[123] Annex II of the 2008 Rep. of the Special Working Grp., *supra* note 119, ¶ 24.

under customary international law," they believed, would enable the definition to obtain "the widest possible support."[124]

Prosecutors considering aggressor status for case-selection purposes have no need to compromise; nonetheless, they should employ a similarly rigorous threshold to their aggressor-status determinations. To be sure, the actual threshold must differ simply because the crime of aggression is limited to certain forms of State-on-State warfare,[125] whereas aggressor-status determinations for case-selection purposes need not be. Nevertheless, this Section suggests that prosecutors would nonetheless do well to consider a defendant's aggressor status only when the initiation of that conflict is manifestly wrongful and the facts surrounding the initiation can be established to a relatively high evidentiary standard. Restricting consideration of aggressor status to situations that meet high substantive and evidentiary standards appropriately acknowledges that the initiation of an armed conflict is typically mired in intense factual and legal controversies. Moreover, these high standards are supported by precedent and will help to preserve the ICC's financial resources and reputational capital while advancing the penological goals that consideration of aggressor status is intended to promote.

I'll start with epistemological challenges. The fact is, prosecutors are apt to find an aggressor-status determination to be uniquely challenging. To be sure, in some conflicts, the aggressor is readily apparent. No reasonable person can dispute, for instance, that Russia initiated the conflict with Ukraine in February 2022.[126] However, the

[124] *Id.* As Kreß put it, the threshold, though controversial, was "indispensable in order to reach a consensus." Kreß, *supra* note 44, at 507.

[125] Rome Statute, *supra* note 67, art. 8*bis*(2).

[126] *See, e.g.*, Council of Eur. Parl. Assemb. Res. 2482, *supra* note 76, ¶ 1 (proclaiming that "the Parliamentary Assembly reiterates that the Russian Federation's armed attack and large-scale invasion of Ukraine launched on 24 February 2022 constitute an 'aggression' under the terms of Resolution 3314 (XXIX) of the United Nations General Assembly adopted in 1974 and are clearly in breach of the Charter of the United Nations"). That said, Russia has employed state-controlled media propaganda and global disinformation campaigns in an effort to change the narrative of its invasion of Ukraine; in particular, Russia has claimed that its offensive was a lawful act of self-defense consistent with Article 51 of the U.N. Charter in response to Ukrainian acts committed in the Donbas region, a territory long in dispute between the two countries.

circumstances surrounding the initiation of most conflicts tend to be far less obvious and far more contested, even to unbiased observers. For example, the initiation of some conflicts — such as the late-1990s war between Ethiopia and Eritrea — turn on the interpretation of esoteric and contested legal doctrines.[127] With respect to other conflicts, such as the current war in Ethiopia[128] or the 2013–2018 war in South Sudan,[129] the determination turns on highly contested facts that have no easy determination. No warring party ever considers itself the aggressor,[130]

Disinformation About Russia's Invasion of Ukraine — Debunking Seven Myths Spread by Russia, DELEGATION OF THE EUR. UNION TO THE PEOPLE'S REPUBLIC OF CHINA (Mar. 18, 2022), https://www.eeas.europa.eu/delegations/china/disinformation-about-russias-invasion-ukraine-debunking-seven-myths-spread-russia_en?s=166 [https://perma.cc/8CYZ-7RC2]; Kathrin Wesolowski, *Fact Check: Russia Falsely Blames Ukraine for Starting War*, DEUTSCHE WELLE (Mar. 4, 2022), https://www.dw.com/en/fact-check-russia-falsely-blames-ukraine-for-starting-war/a-60999948 [https://perma.cc/46EZ-SHDM].

[127] *See* Federal Democratic Republic of Ethiopia v. State of Eritrea, Partial Award: *Jus Ad Bellum* — Ethiopia's Claims Nos. 1-8, 26 R.I.A.A. 457 (Eri.-Eth. Cl. Comm'n 2005); *cf.* Roberts, *The Equal Application of the Laws of War*, *supra* note 18, at 956 ("There is a notable lack of reliable objective standards as to what constitutes the crime of aggression.").

[128] *See generally* Declan Walsh, *"I Didn't Expect to Make It Back Alive": An Interview with Tigray's Leader*, N.Y. TIMES (July 3, 2021), https://www.nytimes.com/2021/07/03/world/africa/tigray-leader-interview-ethiopia.html [https://perma.cc/7BWT-LCUC] (reporting that Mr. Debretsion, leader of Tigray, maintained that Ethiopian troops had been massing on Tigray's borders for days in preparation for an assault whereas Mr. Abiy, Ethiopian Prime Minister, contended that he had no choice but to launch military action after Tigrayan forces attacked a military base on Nov. 4); Declan Walsh & Abdi Latif Dahir, *Why Is Ethiopia at War With Itself?*, N.Y. TIMES (Mar. 16, 2022), https://www.nytimes.com/article/ethiopia-tigray-conflict-explained.html [https://perma.cc/852M-9BWC] (noting that the Tigray People's Liberation Front ("TPLF") attacked "in what they called a pre-emptive strike against federal forces preparing to attack [the T.P.L.F]").

[129] *See generally* Billy Agwanda & Uğur Yasin Asal, *State Fragility and Post-Conflict State-Building: An Analysis of South Sudan Conflict (2013–2019)*, 9 GÜVENLIK BILIMLERI DERGISI 125, 126 (2020) (Turk.) ("President Kiir had accused his deputy Machar of masterminding a coup attempt; an allegation that Machar vehemently denied.").

[130] DINSTEIN, *supra* note 28, at 157; 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, 246 (Michael Schmitt & Jelena Pejic eds., 2007) ("Most belligerents and those who fight for them are convinced their cause is just."); de Hoon, *supra* note 73, at 933.

and evidence of aggression, which is already difficult to come by in the confusion of the battlefield,[131] may also be concealed by governments claiming national security prerogatives.[132] Finally, in virtually every case, the timeline of the inquiry is contested. Although Serbia stands as an extreme example in that it continues to find the Battle of Kosovo — occurring more than 600 years ago — a turning point in its relations with Kosovo,[133] armed conflicts commonly feature a series of belligerent acts, responses, and hiatuses, such that isolating the conflict's starting point can be nearly impossible. Adam Roberts highlighted the problem when he noted that the initiation of warfare rarely can be conceptualized in simple terms of right versus wrong because:

> A war which begins with a plainly wrong act, such as aggression out of the blue against a recognized independent state, or a wilful act of violence which is self-evidently contrary to an international treaty regime, is a rarity — as are military responses that are free of taint in one form or another. Wars much more commonly begin with deep fears and grievances on both sides, understandable but clashing interests, conflicting understandings of key events and the responsibility for them,

[131] Roberts, *The Equal Application of the Laws of War*, *supra* note 18, at 956.

[132] The Rome Statute enables a state party to deny a request for evidence "in whole or in part" if disclosure would implicate its national security. *See* Rome Statute, *supra* note 67, art. 93(4). Although "a state invoking the national security exemption is required to demonstrate reasonableness and good faith in its discourse with the Court . . . [i]t is widely agreed . . . that [t]he final decision on whether to disclose national security information rests essentially with the State and not the Court, and that the ICC statute emphasizes the right of States to refuse to cooperate with the ICC in relation to such information . . . even if [the Court] finds that the national security concerns invoked by the state are not genuine or if the state refused to take all reasonable steps to resolve the matter by cooperative means, as required by Article 72." Ariel Zemach, *National Security Evidence: Enhancing Fairness in View of the Non-Disclosure Regime of the Rome Statute*, 47 ISR. L. REV. 331, 336-37 (2014) (internal quotations omitted).

[133] *See* Sandra Obradović & Caroline Howarth, *The Power of Politics: How Political Leaders in Serbia Discursively Manage Identity Continuity and Political Change to Shape the Future of the Nation*, 48 EUR. J. SOC. PSYCH. O25, O29-O31, O33 (2018) (describing speeches by Serbian politicians over the past twenty-five years that evoke the Battle of Kosovo).

> and rival complaints about violations of international law by the adversary.[134]

Indeed, the difficulty of determining who started an armed conflict is so well-known that it has been invoked by those opposed to the criminalization of aggression[135] and as an alternative justification for the equal application doctrine.[136] To be sure, some commentators find these epistemological concerns to be overblown,[137] but prosecutors considering aggressor status for purposes of case selection should be cognizant of the fact-finding controversies they will face and seek to minimize them by adopting rigorous substantive and evidentiary standards, such as I outlined above.

Adopting a high substantive threshold for aggressor-status determinations is different from subjecting that determination to a high evidentiary standard of proof, but both are supported by precedent. As noted, in defining the crime of aggression, States insisted on a "manifest" violation, which provides a useful substantive precedent for prosecutors considering aggressor status for case-selection. Standards of proof, for their part, are well-established to be high for any criminal

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[134] Roberts, *The Equal Application of the Laws of War*, *supra* note 18, at 956. It is likewise for this reason that Judge Kooijmans of the International Court of Justice observed that a simple answer about the initiation of armed conflict is so often hard to come by. He noted that maintaining "objectivity in the face of confusing and contradictory evidence is particularly difficult [and] the results are likely to be tentative, partial and complex, and therefore less than totally satisfying." Case Concerning Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J 168, 306, ¶ 2 (Separate Opinion of Judge Kooijmans) (quoting John F. Clark, *Explaining Ugandan Intervention in Congo: Evidence and Interpretations*, 39 J. MOD. AFR. STUD. 262 (2001)).

[135] *See 1996 PrepCom Report* (*Excerpts*), *in* THE TRAVAUX PRÉPARATOIRES OF THE CRIME OF AGGRESSION 211-12 (Stefan Barriga & Claus Kreß eds., 2012); Koh & Buchwald, *supra* note 88, at 271-72.

[136] The primary reason to apply IHL rules equally to all sides to a conflict is to safeguard the reciprocity on which IHL depends. Some commentators maintain in addition that we need to apply IHL rules to all parties to a conflict simply because it is so difficult to determine who *did* start any given conflict. *See* Combs, *supra* note 24, at 168-69 (citing sources).

[137] *See* Michael Mandel, *Aggressors' Rights: The Doctrine of "Equality Between Belligerents" and the Legacy of Nuremberg*, 24 LEIDEN J. INT'L L. 627, 649 (2011) (arguing that there is "no reason to suppose that *jus in bello* crimes are easier to prove than *jus ad bellum* ones").

conviction for the crime of aggression,[138] and they also can be burdensome in international law civil cases. Indeed, although the International Court of Justice ("ICJ") has not always clearly defined the applicable standard of proof,[139] it is well-established that the Court imposes a high standard when State responsibility is at issue[140] and a particularly high standard when the claimant seeks to prove especially wrongful State conduct — such as the illegal initiation of force.[141] To be sure, these precedents do not apply as such when prosecutors consider aggressor status for case selection. Not only is there no rule of *stare decisis* in international law,[142] but the inquiries in question are markedly different. In particular, prosecutors who consider aggressor status for case-selection purposes will necessarily conduct a less formal, less rigorous inquiry than factfinders deciding civil and/or criminal cases. This reduced rigor is appropriate because the stakes of the prosecution's finding of aggressor status — a greater allocation of prosecutions to one party to the conflict — are dramatically lower, and they do not justify the expenditure of time and resources for gathering evidence or conducting comprehensive inquiries. But although these inquiries are different, the subject-matter is the same, and the contested and controversial nature of that subject matter argues in favor of caution, regardless of who or why the inquiry is being conducted.

[138] The standard of proof for a criminal conviction at the ICC is "beyond a reasonable doubt." *See* Rome Statute, *supra* note 67, art. 66(3).

[139] The ICJ Statute does not set forth any standards of proof. Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 933 [hereinafter ICJ Statute]; *see also* STEPHEN WILKINSON, STANDARDS OF PROOF IN INTERNATIONAL HUMANITARIAN AND HUMAN RIGHTS FACT-FINDING AND INQUIRY MISSIONS 20 (2012) ("The wording used by the Court varies and has been expressed in some fifteen different forms."); Gian Maria Farnelli, *Consistency in the ICJ's Approach to the Standard of Proof: An Appraisal of the Court's Flexibility*, 21 LAW & PRAC. INT'L CTS. & TRIBUNALS 98, 99-101, 105 (2022) (remarking on the "many statements by Members of the Court expressing doubts about the way in which the ICJ handles the standard of proof").

[140] WILKINSON, *supra* note 139, at 19-20.

[141] Katherine Del Mar, *The International Court of Justice and Standards of Proof*, *in* THE ICJ AND THE EVOLUTION OF INTERNATIONAL LAW: THE ENDURING IMPACT OF THE CORFU CHANNEL CASE 98, 101 (Karine Bannelier, Theodore Christakis & Sarah Heathcote eds., 2012); WILKINSON, *supra* note 139, at 20; Farnelli, *supra* note 139, at 107.

[142] ICJ Statute, *supra* note 139, art. 59.

Moreover, the reasons that support high standards in other contexts also apply here. For one thing, rigorous substantive and evidentiary standards make financial sense. In adopting a high threshold for the crime of aggression, States took account of limited ICC resources and chose to devote them only to serious violations of the prohibition of the use of force. These financial considerations are likewise relevant when allocating scarce prosecutorial resources to case selection. The ICC's budget has been woefully and notoriously inadequate for the investigations and prosecutions expected of it.[143] Given that, it would be wholly unwarranted to devote considerably more resources to the fact-finding necessary for case selection.

Stringent substantive and evidentiary standards will also help to preserve the ICC's limited reputational capital. It is no exaggeration to say that case selection is among the most contested and controversial tasks that ICC prosecutors undertake.[144] From the ICC's very first situation in Uganda, commentators have criticized the prosecution's selection of cases — for being too one-sided,[145] for focusing too heavily

[143] *See* INDEPENDENT EXPERT REVIEW OF THE ICC, *supra* note 100, ¶¶ 642-46; Alison Smith, *Opening of Ukraine Investigation Should Be a Wake-up Call to Look Again at ICC's Budget*, COAL. OF THE INT'L CRIM. CT. (Mar. 7, 2022), https://www.coalitionfortheicc.org/news/20220307/opening-ukraine-investigation-icc-budget [https://perma.cc/WYW9-V27N]; *see also* HUM. RTS. WATCH, HUMAN RIGHTS WATCH BRIEFING NOTE FOR THE 21ST SESSION OF THE INTERNATIONAL CRIMINAL COURT ASSEMBLY OF STATES PARTIES 6-9 (2022), https://www.hrw.org/sites/default/files/media_2022/11/Human%20Rights%20Watch%20Briefing%20Note%20for%20the%20Twenty-First%20Session%20of%20the%20International%20Criminal%20Court%20Assembly%20of%20States%20Parties_0.pdf [https://perma.cc/G3NL-LRGF].

[144] Asad G. Kiyani, *Re-Narrating Selectivity*, *in* THE ELGAR COMPANION TO THE INTERNATIONAL CRIMINAL COURT 307, 307 (Margaret M. deGuzman & Valerie Oosterveld eds., 2020); Birju Kotecha, *The International Criminal Court's Selectivity and Procedural Justice*, 18 J. INT'L CRIM. JUST. 107, 135 (2020) ("Prosecution selectivity has been described as the 'greatest problem of international criminal justice.'").

[145] *See, e.g.*, HUM. RTS. WATCH, COURTING HISTORY: THE LANDMARK INTERNATIONAL CRIMINAL COURT'S FIRST YEARS 52, 65-66 (2008), https://www.hrw.org/report/2008/07/11/courting-history/landmark-international-criminal-courts-first-years [https://perma.cc/4VXJ-4MQW] [hereinafter COURTING HISTORY] (noting the perception that Hema defendants have been subject to more limited ICC charges compared to the "comprehensive set of charges" against Lendu defendants has fueled tensions between the two groups and undermined ICC credibility); Kasaija Phillip Apuuli, *The ICC Arrest Warrants for the Lord's Resistance Army Leaders and Peace Prospect for Northern Uganda*, 4

on low-level offenders[146] or high-level offenders[147] — among a host of other complaints.[148] Case selection is thus highly controversial even without consideration of aggressor status. Because aggressor status is itself so contested and controversial, it makes sense to consider aggressor status only when unbiased observers are satisfied to a high evidentiary standard that the putative aggressor acted manifestly wrongfully.

Finally, high standards are appropriate because the purposes of considering aggressor status are not apt to be served unless those high standards are met. An increased proportion of prosecutions for aggressors will serve retributive and deterrence goals but only when we have a high level of confidence that the party in question *was* the aggressor and that its conduct *was* manifestly wrongful. Introducing aggressor status to the case-selection process does not eliminate the many other appropriate factors — such as gravity of the crimes and the level of responsibility of alleged perpetrators[149] — and these equally legitimate and appropriate factors should not have to compete with aggressor status unless our confidence about the factual basis and the immorality of the conflict's initiation is high.

J. INT'L CRIM. JUST. 179, 185 (2006) (reporting on the claims of civil society organizations that the "ICC has shown bias by ignoring evidence" of the government army's culpability, while "issuing . . . warrants only to the LRA"); Clark, *supra* note 34, at 42 ("[T]he ICC's investigations into LRA and not UPDF crimes create a perception of the ICC as one-sided and heavily politicised.").

[146] *See* HUM. RTS. WATCH, COURTING HISTORY, *supra* note 145, at 61; INDEPENDENT EXPERT REVIEW OF THE ICC, *supra* note 100, ¶ 658; Pascal Kalume Kambale, *A Story of Missed Opportunities: The Role of the International Criminal Court in the Democratic Republic of Congo*, *in* CONTESTED JUSTICE: THE POLITICS AND PRACTICE OF INTERNATIONAL CRIMINAL COURT INTERVENTIONS 171, 173, 179, 183 (Christian De Vos, Sara Kendall & Carsten Stahn eds., 2015).

[147] *See* INDEPENDENT EXPERT REVIEW OF THE ICC, *supra* note 100, ¶ 666; Kambale, *supra* note 146, at 179 (describing the rightful criticism of the ICC Prosecutor for targeting President al-Bashir of Sudan).

[148] INDEPENDENT EXPERT REVIEW OF THE ICC, *supra* note 100, ¶ 658; Clark, *supra* note 34, at 39 (criticizing the ICC prosecutor's "flawed or inconsistent case selection policy").

[149] OFF. OF THE PROSECUTOR, POLICY PAPER ON CASE SELECTION, *supra* note 32, ¶ 34.

III. BEEN THERE, DONE THAT: AGGRESSOR STATUS AS A *SUB SILENTIO* FACTOR IN ICC CASE SELECTION

Case selection at the ICC is impossibly challenging. Resources are meagre, so the court can prosecute at most a handful of offenders for each situation,[150] even when the pool of potential defendants may number in the hundreds or thousands. Further, in deciding which few offenders to charge, prosecutors often must balance a number of compelling yet conflicting values. The desire to prosecute the gravest crimes (such as murder), for instance, can conflict with the desire to prosecute historically under-prosecuted crimes (such as sexual violence).[151] Similarly, the desire to prosecute those at the top of the leadership pyramid can conflict with the desire to bring particularly brutal or notorious offenders to justice.[152] Mediating conflicts such as these would be difficult enough, but prosecutors must also consider the political ramifications of their actions[153] along with the limits of their practical power.[154] With respect to the latter, ICC prosecutors appeared

[150] *See* Kai Ambos, *Introductory Note to the Office of the Prosecutor: Policy Paper on Case Selection and Prioritisation*, 57 INT'L LEGAL MATERIALS 1131, 1131 (2018).

[151] Bådagård & Klamberg, *supra* note 92, at 647; *id.* at 681 (describing the Prosecutor's decision not to prosecute gender-based crimes in the *Lubanga* case); *see also* OFF. OF THE PROSECUTOR, INT'L CRIM. CT., POLICY PAPER ON SEXUAL AND GENDER-BASED CRIMES ¶ 23 (2014) (reporting that, although the OTP will ordinarily prosecute "those most responsible for the most serious crimes," it will sometimes "also prosecute middle- or even low-ranking" defendants responsible for particularly "notorious crimes, including sexual and gender-based crimes . . . in order to give full effect to the object and purpose of the Statute and maximise the deterrent impact of the Court's work").

[152] *See* de Vlaming, *supra* note 34, at 571.

[153] For instance, ICC prosecutions have been accused of enhancing or, more commonly, harming peace processes. *See* Apuuli, *supra* note 145, at 183-85; Janine Natalya Clark, *Peace, Justice and the International Criminal Court*, 9 J. INT'L CRIM. JUST. 521, 521-22 (2011); Chandra Lekha Sriram, *Conflict Mediation and the ICC: Challenges and Options for Pursuing Peace with Justice at the Regional Level, in* BUILDING A FUTURE ON PEACE AND JUSTICE: STUDIES ON TRANSITIONAL JUSTICE, PEACE AND DEVELOPMENT 303, 305 (Kai Ambos, Judith Large & Marieke Wierda eds., 2009).

[154] *See* Louise Parrott, *The Role of the International Criminal Court in Uganda: Ensuring that the Pursuit of Justice Does Not Come at the Price of Peace*, 1 AUSTL. J. PEACE STUD. 8, 17-18 (2006) ("There is no denying that the moves that can feasibly be made by the Prosecutor depend upon 'the manifold realities of international politics, not the least of which will be the practical and financial limits those realities may place upon investigation and prosecution."). The Expert Group that evaluated every aspect of the

to select some defendants at least in part because they were able to gain custody over them[155] or because they already possessed clear and compelling evidence of their crimes.[156] Prosecutors have also seemingly considered the benefits of State cooperation[157] and the appearance of fairness when selecting cases.[158]

In Part II, I proposed adding aggressor status to the panoply of factors ICC prosecutors consider when selecting cases. In this Part, I suggest

ICC's functioning labeled this consideration "feasibility." *See* INDEPENDENT EXPERT REVIEW OF THE ICC, *supra* note 100, ¶ 634.

[155] A number of the ICC's Congolese defendants were already detained at the time that the ICC filed charges against them, see Clark, *supra* note 34, at 39-41, or they were in States that were likely to surrender them to the ICC, see Press Release, Int'l Crim. Ct., Callixte Mbarushimana Arrested in France for Crimes Against Humanity and War Crimes Allegedly Committed in the Kivus (Oct. 11, 2010), https://www.icc-cpi.int/news/callixte-mbarushimana-arrested-france-crimes-against-humanity-and-war-crimes-allegedly [https://perma.cc/3G2U-GSGA]; Press Release, Int'l Crim. Ct., ICC Appeals Chamber Acquits Mr Bemba from Charges of War Crimes and Crimes Against Humanity (June 8, 2018), https://www.icc-cpi.int/news/icc-appeals-chamber-acquits-mr-bemba-charges-war-crimes-and-crimes-against-humanity [https://perma.cc/9SR4-E8VJ].

[156] For instance, the crimes of Malian defendant Ahmad Al Faqi Al Mahdi and Libyan defendant Mahmoud Mustafa Busayf Al-Werfalli had been captured on videotape. *See* Prosecutor v. Al-Werfalli, ICC-01/11-01/17, Warrant of Arrest, ¶¶ 11-22 (Aug. 15, 2017), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2017_05031.PDF [https://perma.cc/AE7K-3WJM] (describing the numerous executions committed or ordered by Al-Werfalli, which were captured on videos posted to social media); Marie Forestier, *ICC to War Criminals: Destroying Shrines is Worse than Rape*, FOREIGN POL'Y (Aug. 22, 2016, 1:43 PM), https://foreignpolicy.com/2016/08/22/icc-to-war-criminals-destroying-shrines-is-worse-than-rape-timbuktu-mali-al-mahdi/ [https://perma.cc/Q3XR-CWJB] (calling Al Mahdi's case "[f]rom an evidentiary perspective, . . . a slam dunk," due to video footage showing Al Mahdi damaging and encouraging his men to demolish religious shrines).

[157] *See* INT'L REFUGEE RTS. INITIATIVE, STEPS TOWARDS JUSTICE, FRUSTRATED HOPES: SOME REFLECTIONS ON THE EXPERIENCE OF THE INTERNATIONAL CRIMINAL COURT IN ITURI (Civil Society, International Justice and the Search for Accountability in Africa, Discussion Paper No. 2, 2012); Clark, *supra* note 34, at 40.

[158] *See* HUM. RTS. WATCH, COURTING HISTORY, *supra* note 145, at 64 ("Given the ethnic tensions between the Hema and Lendu in Ituri, it was essential to move toward bringing a case against FNI leaders."); Adam Hochschild, *The Trial of Thomas Lubanga*, ATLANTIC (Dec. 2009), https://www.theatlantic.com/magazine/archive/2009/12/the-trial-of-thomas-lubanga/307762/ [https://perma.cc/DME2-8CH2] (noting that in Ituri the ICC picked warlords from different ethnicities "in part to demonstrate that justice for war crimes can be impartial").

that aggressor status may have been in the mix all along — at least *sub silentio*. Admittedly, this Part does not contend that aggressor status has been a primary driver of ICC case selection. Factors that the ICC has publicly identified, such as the gravity of the crime and the accused's level of responsibility almost certainly played a more prominent role.[159] And factors that the ICC has not publicly identified, such as the need for State cooperation and ability to conduct investigations and obtain evidence may have played an even more prominent role.[160] Nonetheless, this Part shows that ICC case selection decisions in all of the situations that have progressed to at least one trial[161] have been wholly consistent with my unequal enforcement doctrine. In particular, these ICC situations can be divided into two groups: those where the ICC has charged members of only one party to the conflict and those where the ICC has charged members of more than one party to the conflict. In all of the former situations, the initiation of the conflict was both clear and wrongful, and the only defendants charged were members of the party that initiated the conflict. In the latter situations, the genesis of the conflict was either factually or normatively muddy, and prosecutors seemingly responded to that muddiness by charging members of more than one party to the conflict.

A. Who Knows Who Started It? Prosecutorial Selection Decisions in Muddy Conflicts

Part II recommends that prosecutors consider aggressor status when selecting defendants, but only when stringent substantive and evidentiary thresholds have been met; that is, only when the conflict's aggressor is clearly identifiable and has acted in a manifestly wrongful manner. Those standards will not be met in every case. Indeed, this Section highlights the several ICC situations where prosecutors charged members of more than one party to the conflict and seemingly took no

[159] *Cf.* Alette Smeulers, Maartje Weerdesteijn & Barbora Holá, *The Selection of Situations by the ICC: An Empirically Based Evaluation of the OTP's Performance*, 15 INT'L CRIM. L. REV. 1 (2015) (arguing that gravity has driven the ICC's selection of situations).

[160] INDEPENDENT EXPERT REVIEW OF THE ICC, *supra* note 100, ¶¶ 666-70.

[161] To date, in only two situations have charges been brought without any subsequent trials: Libya and Georgia. This Part focuses on the much larger set of situations in which prosecutors have taken at least one case to trial.

account of aggressor status. Although the decision to charge these defendants presumably was influenced by a host of factors additional to aggressor status, the charging decisions were also consistent with the unequal enforcement doctrine. Consequently, this Part asserts that aggressor status exerts a real, if covert, influence on charging decisions.

ICC Prosecutors charged members of more than one party to the conflict in four situations: The Democratic Republic of the Congo ("DRC"), Central African Republic ("CAR"), Kenya, and Darfur. The conflicts in the DRC and CAR are similar in that they began long before the ICC came into existence, and they involved large numbers of constantly changing warring parties. Multi-party, fluid conflicts such as these rarely feature an easily identifiable aggressor that initiates the conflict in a manifestly wrongful manner, as Subsection 1 explicates. Subsection 2 explores two very different conflicts: Kenya and Darfur. Compared to the DRC and CAR, the genesis of Kenyan and Darfur conflicts was more straightforward, and the conflicts themselves involved more stable and defined parties. Nonetheless, these conflicts also did not feature a clearly identifiable, manifestly wrongful aggressor. It should come as no surprise, then, that for all four of these situations, prosecutors charged members of multiple parties. That is, under my proposal, prosecutors would not have considered aggressor status in their case-selection decisions for these situations, and it does not appear as though they did.

1. Conflicts Without End: Shifting Alliances and Unending Warfare in the DRC and the CAR

a. The DRC

The ICC Prosecutor charged six defendants in the DRC situation. The first four were members of three different ethnic militias that were engaged in an armed conflict. These defendants were Thomas Lubanga, who was President of a Hema political group and militia;[162] Mathieu

[162] Lubanga's group was the Union des Patriotes Congolais. Prosecutor v. Lubanga, ICC-01/04-01/06, Judgment pursuant to Art. 74 of the Statute, ¶ 22 (Mar. 14, 2012), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2012_03942.PDF [https://perma.cc/2H2X-AQC5].

Ngudjolo, who was involved with a Lendu militia;[163] Germain Katanga, who was commander of a Ngiti political group and militia[164] that was aligned with the Lendu forces;[165] and Bosco Ntaganda.[166] Ntaganda, an ethnic Tutsi, was born in Rwanda[167] but fled to the DRC as a teenager.[168] At the time of the crimes, Ntaganda was the deputy chief of staff of the Hema group's military arm.[169] Next, the ICC Prosecutor charged Callixte Mbarushimana and Sylvestre Mudacumura, both Rwandan nationals, for crimes committed several years later.[170] Mbarushimana served as the de facto leader of the Forces Démocratiques pour la Libération du Rwanda ("FDLR"),[171] a rebel group formed to overthrow the Rwandan government,[172] whereas Mudacumura was the FDLR's top military commander.[173] The crimes allegedly committed by these six defendants occurred during the armed conflict that has raged nearly continuously in the Eastern DRC for almost thirty years.

[163] The Lendu militia was the Front des Nationalistes et Intégrationnistes. *Id.* ¶ 137.

[164] Katanga's group was the Force de resistance patriotique en Ituri. Prosecutor v. Katanga & Ngudjolo, ICC-01/04-01/07, Decision on the Confirmation of Charges, ¶ 6 (Sept. 30, 2008), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2008_05172.PDF [https://perma.cc/WSS9-D9B4].

[165] *Id.* ¶¶ 13, 19.

[166] Prosecutor v. Ntaganda, ICC-01/04-02/06, Decision pursuant to Art. 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, ¶ 9 (June 9, 2014), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2014_04750.PDF [https://perma.cc/4LA4-2F6D].

[167] Penny Dale, *Bosco Ntaganda — The Congolese "Terminator"*, BBC NEWS (July 8, 2019), https://www.bbc.com/news/world-africa-17689131 [https://perma.cc/3KLG-RRD6].

[168] *Id.*

[169] The military branch was the Forces Patriotiques pour la libération du Congo. *Ntaganda*, ICC-01/04-02/06, ¶ 15.

[170] Prosecutor v. Mbarushimana, ICC- 01/04-01/10-465-Red, Decision on the Confirmation of Charges, ¶ 1 (Dec. 16, 2011), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2011_22538.PDF [https://perma.cc/SSP9-GPLW]; *DRC Army Says Rwandan Hutu Rebel Commander Mudacumura Killed*, AL JAZEERA (Sept. 18, 2019), https://www.aljazeera.com/news/2019/9/18/drc-army-says-rwandan-hutu-rebel-commander-mudacumura-killed [https://perma.cc/4R3Y-RPSS].

[171] *Mbarushimana*, ICC-01/04-01/10-465-Red, ¶ 5.

[172] *Id.* ¶¶ 2-4.

[173] Prosecutor v. Mudacumura, ICC-01/04-01/12-1-Red, Decision on the Prosecutor's Application under Article 58, ¶ 64 (July 13, 2013), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2012_07502.PDF.

Although nearly every aspect of the DRC conflict is subject to contestation, the one fact about which everyone agrees is that the conflict got its start in the aftermath of the Rwandan genocide.[174] After the Tutsi-led Rwandan Patriotic Front put an end to the genocide, two million Rwandan Hutu fled to Eastern Zaïre, where they established refugee camps. Amongst these Hutu refugees were large numbers of *genocidaires* who used the refugee camps as bases to launch incursions into Rwanda.[175] Believing Zairian President Mobutu Seke Seko to support these Hutu rebels, Rwandan forces began occupying portions of Eastern Zaire[176] and eventually joined with Uganda to back Congolese rebel leader, Laurent Kabila.[177] In 1997, Kabila took control of Zaïre, renaming it the Democratic Republic of the Congo ("DRC").[178] Kabila broke ties with Uganda and Rwanda in 1998, inspiring those countries to back rebel forces[179] opposed to Kabila.[180] Thus began the Second

[174] AFR. RTS., A WELCOME EXPRESSION OF INTENT: THE NAIROBI COMMUNIQUE AND THE EX-FAR/INTERAHAMWE 6 (2007), https://genocidearchiverwanda.org.rw/index.php/A_welcome_expression_of_the_Intent:_The_Nairobi_communique_Ex-FAR/_Interahamwe [https://perma.cc/9NDB-477A] [hereinafter WELCOME EXPRESSION] (explaining that "there is little doubt that the . . . crisis in the Kivus dates from the arrival of more than two million Rwandese refugees in July 1994"); Ctr. for Preventative Action, *Conflict in the Democratic Republic of the Congo*, COUNCIL ON FOREIGN RELS., https://www.cfr.org/global-conflict-tracker/conflict/violence-democratic-republic-congo (last updated Dec. 18, 2023) [https://perma.cc/W9M7-7ZFP].

[175] Kai Peter Ziegler, *Democratic Republic of the Congo: The Transitional Constitution of April 1, 2003*, 3 INT'L J. CONST. L. 662, 664 (2005); RIGOBERT MINANI BIHUZO, UNFINISHED BUSINESS: A FRAMEWORK FOR PEACE IN THE GREAT LAKES (Afr. Ctr. for Strategic Stud., Afr. Sec. Brief No. 21, 2012), https://reliefweb.int/report/democratic-republic-congo/unfinished-business-framework-peace-great-lakes [https://perma.cc/J4ZK-XMLZ].

[176] Ziegler, *supra* note 175, at 664.

[177] Bihuzo, *supra* note 175, at 2.

[178] *See* Prosecutor v. Katanga, ICC-01/04-01/07-3436-Teng, Judgement pursuant to Art. 74 of the Statute, ¶ 428 (Mar. 7, 2014), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2015_04025.PDF; *Justice in the Democratic Republic of Congo: A Background*, THE HAGUE JUST. PORTAL (Dec. 17, 2009) [hereinafter *Justice in the Democratic Republic of Congo*]; SIGALL HOROVITZ, DR CONGO: INTERACTION BETWEEN INTERNATIONAL AND NATIONAL JUDICIAL RESPONSES TO THE MASS ATROCITIES 16 (DOMAC Project 2012), https://en.ru.is/media/domac/DRC-DOMAC-14-SH.pdf [https://perma.cc/XCQ8-WUHG].

[179] *Justice in the Democratic Republic of Congo*, *supra* note 178, at 2.

[180] *Katanga*, ICC-01/04-01/07-3436-Teng, ¶ 432; William W. Burke-White, *Complementarity in Practice: The International Criminal Court as Part of a System of Multi-*

Congo War, which pitted the armed forces of the DRC, which were supported by Angola, Zimbabwe, and Namibia, against several rebel movements supported by Rwanda, Uganda, and Burundi.[181] During the early 2000s, the eastern DRC was entirely controlled by these rebel groups, which themselves frequently shifted and splintered.[182]

The Prosecutor's charges in the DRC situation pertain to two discrete periods: 2002–2003 and 2009–2010. The 2002–2003 charges centered on violence between the militias of the Hema, Lendu, and Ngiti ethnic groups in the Ituri region of the DRC.[183] Although the specific conflict between the Hema and Lendu can be traced to 1999, when a small number of Hema allegedly attempted to bribe local authorities into modifying land ownership registers in their favor,[184] the fighting that occurred in 2002 and 2003 between the Hema and Lendu cannot be understood in isolation from the larger war that had engulfed the

Level Global Governance in the Democratic Republic of Congo, 18 LEIDEN J. INT'L L. 557, 561 (2005); *Justice in the Democratic Republic of Congo*, *supra* note 178, at 2.

[181] HUM. RTS. WATCH, ITURI: "COVERED IN BLOOD": ETHNICALLY TARGETED VIOLENCE IN NORTHEASTERN DR CONGO 5 (2003), https://www.hrw.org/sites/default/files/reports/DRC0703.pdf [https://perma.cc/7BC9-TN5L] [hereinafter COVERED IN BLOOD]; *see also* HOROVITZ, *supra* note 178, at 14, 16.

[182] *See generally* AFR. RTS., WELCOME EXPRESSION, *supra* note 174 (referring to the bewildering array of acronyms); HUM. RTS. WATCH, COVERED IN BLOOD, *supra* note 181 ("The RCD-ML split off from the original RCD in 1999."); HUM. RTS. WATCH, WORLD REPORT 2003: DEMOCRATIC REPUBLIC OF CONGO 25 (2003), https://www.hrw.org/legacy/wr2k3/pdf/drc.pdf [https://perma.cc/7SSE-VQRU] (referring to the "ever-splintering rebel groups"); 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 ¶ 752 (2010), https://digitallibrary.un.org/record/709895?ln=en [https://perma.cc/J9TU-E6QN] [hereinafter REPORT OF THE MAPPING EXERCISE] (noting that "[a]rmed groups proliferated and alliances between them were constantly made and unmade, amplifying the chaos").

[183] HUM. RTS. WATCH, COVERED IN BLOOD, *supra* note 181, at 14.

[184] HUM. RTS. WATCH, COVERED IN BLOOD, *supra* note 181, at 18; *DRC: IRIN Focus on Hema-Lendu Conflict*, UNIV. OF PA. AFRICAN STUD. CTR. (Nov. 5, 1999), https://www.africa.upenn.edu/Hornet/irin_111599b.html [https://perma.cc/6BZG-QXFR]. At the same time, some commentators caution that the 1999 conflict must be viewed not as an isolated incident but as a continuation of previous conflicts, including one that had occurred just three years before. FRANÇOIS NGOLET, CRISIS IN THE CONGO: THE RISE AND FALL OF LAURENT KABILA 131 (2011).

region.[185] Indeed, in previous years, similar small-scale land disputes between the Hema and Lendu had been resolved peacefully through government-backed arbitration.[186] Not only was the central government no longer functioning in Ituri by 2002,[187] but the large-scale multi-state armed conflict fueled and dramatically exacerbated the inter-ethnic conflict.[188] The foreign-backed rebel groups as well as Ugandan government forces forged ties with the Hema and Lendu militias[189] and intensified the dissension among them.[190]

The final two ICC cases from the DRC centered on crimes committed in 2009 and 2010 in the Kivus region of the eastern DRC, by members of the FDLR, an anti-Rwanda rebel group. As noted, thousands of Hutu who had participated in the Rwandan genocide fled to the DRC in 1994 and had reorganized into groups seeking to overthrow the new Tutsi government in Rwanda.[191] These anti-Rwanda groups went through several iterations before the FDLR was founded in 1999.[192] Over the

[185] *See* NGOLET, *supra* note 184, at 131 (describing the Hema-Lendu conflict as a "war within a war"); *id.* at 132 ("The presence of various Congolese and foreign armed groups, the easy availability of weapons, the war-ravaged economy, and the rise in 'ethnic ideology' in the Ituri area provided fodder for a ferocious escalation of the conflict.").

[186] HUM. RTS. WATCH, COVERED IN BLOOD, *supra* note 181, at 18; HUM. RTS. WATCH, UGANDA IN EASTERN DRC: FUELING ETHNIC AND POLITICAL STRIFE 33 (2001), https://www.hrw.org/report/2001/03/01/uganda-eastern-drc/fueling-politcal-and-ethnic-strife [https://perma.cc/JW8R-HN3G] [hereinafter FUELING POLITICAL AND ETHNIC STRIFE].

[187] HUM. RTS. WATCH, COVERED IN BLOOD, *supra* note 181, at 18.

[188] NGOLET, *supra* note 184, at 132.

[189] HUM. RTS. WATCH, COVERED IN BLOOD, *supra* note 181, at 5, 10.

[190] HUM. RTS. WATCH, FUELING ETHNIC AND POLITICAL STRIFE, *supra* note 186, at 4, 6-7 ("The interaction between local leaders and actors in the broader war has exacerbated local ethnic tensions and created a volatile mix of inter-ethnic conflict that continues to have devastating consequences both in terms of violations of human rights and general suffering for the civilian population."). The blatant pro-Hema partiality of Uganda and its proxies was particularly incendiary. HUM. RTS. WATCH, COVERED IN BLOOD, *supra* note 181, at 18; *see also* NGOLET, *supra* note 184, at 132 ("[R]eports indicated that Ugandan soldiers had fought during the conflict on the side of the Hema in exchange for cash payments.").

[191] AFR. RTS., WELCOME EXPRESSION, *supra* note 174, at 9.

[192] *Id.* at 11, 19. As African Rights put it: "Behind the bewildering array of acronyms, the reality is simple: the names change, but the people remain the same. From the first association to the most recent, the core political and military objective remains the

years, the government of the DRC alternatively supported and opposed the FDLR and its predecessors.[193] During the Second Congo War, for instance, the DRC was fully allied with the FDLR in its fight against Rwanda and a Rwanda-backed Tutsi rebel force, the Congress for the Defense of the People ("CNDP").[194] However, in October 2008, the CNDP came close to taking the Congolese city of Goma, so to prevent that, the DRC formed an alliance with Rwanda and with the CNDP.[195] Specifically, in January 2009, the DRC and Rwanda entered into a coalition to defeat the FDLR, and the DRC incorporated members of the CNDP into the Congolese military.[196]

At this point, the FDLR began committing brutal attacks on civilians they believed to support the DRC/CNDP/Rwanda alliance.[197] On January 20, 2009, the DRC and Rwanda launched a joint offensive against the FDLR,[198] and on that same day, ICC defendant Sylvestre Mudacumura allegedly issued "an order to create . . . a 'humanitarian catastrophe.'"[199]

same, namely to deny the genocide, to provide a sanctuary to genocide suspects, to change the government in Rwanda, or at the very least to force it into political negotiations." *Id.* at 11.

[193] During the Second Congo War, the DRC backed the earlier iterations of the FDLR, but after the transitional government was established in 2003 and foreign troops withdrew, DRC support for the FDLR waned. HUM. RTS. WATCH, "YOU WILL BE PUNISHED": ATTACKS ON CIVILIANS IN EASTERN CONGO 27 (2009), https://www.hrw.org/report/2009/12/13/you-will-be-punished/attacks-civilians-eastern-congo [https://perma.cc/DF3L-HNT3] [hereinafter YOU WILL BE PUNISHED]. That support rekindled in 2006, with the emergence of a Rwandan-backed, Tutsi rebel group, the National Congress for the Defense of the People ("CNDP"). The CNDP was established to protect Congolese Tutsi interests and fight the FDLR Hutu militias. *Id.* at 30. From 2006 to 2008, the CNDP gained influence and territory in the Kivu provinces, with Rwanda providing support by recruiting soldiers, supplying weapons, and on at least one occasion, providing Rwandan army troops as backup in a fight against DRC forces. *Id.* at 32. Multiple peace efforts were undertaken between President Kabila and the CNDP and Rwanda throughout 2007 and 2008, but all failed. *Id.* at 32-34.

[194] *See supra* note 193 and accompanying text.

[195] HUM. RTS. WATCH, YOU WILL BE PUNISHED, *supra* note 193, at 39-41.

[196] *Id.* at 11.

[197] *Id.* at 12, 30.

[198] *Id.* at 42.

[199] Prosecutor v. Mudacumura, ICC-01/04-01/12-1-Red, Decision on the Prosecutor's Application under Article 58, ¶ 25 (July 13, 2012), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2012_07502.PDF.

In carrying out that order, the FDLR launched attacks during which they murdered, raped, and abducted civilians and pillaged and destroyed property.[200] These were the crimes for which the ICC charged Mudacumura[201] and Mbarushimana.[202]

Throughout these time periods, the armed conflict in the Eastern DRC was not only among the most brutal in the world,[203] it was also among the most complicated.[204] A 2003 Human Rights Watch report features a section entitled "Who's Who: Armed Political Groups in Ituri," which lists and describes no fewer than eleven armed groups.[205] The report also contains a complicated visual, entitled "Web of Alliances in Ituri," which seeks to depict the relationships and interrelationships both between the various armed groups themselves and between those

[200] *Id.* Human Rights Watch accused FDLR combatants of "deliberately target[ing] Congolese civilians with what they considered punishment for their government's policy and for what the FDLR perceived as the population's 'betrayal.'" HUM. RTS. WATCH, YOU WILL BE PUNISHED, *supra* note 193, at 51.

[201] *Mudacumura*, ICC-01/04-01/12-1-Red, ¶¶ 35-56.

[202] Prosecutor v. Mbarushimana, ICC-01/04-01/10-11-Red, Prosecution's Application under Article 58, ¶¶ 1-16 (Aug. 20, 2010), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2011_01367.PDF [https://perma.cc/AQ27-2DGH].

[203] Erika Carlsen, *Ra/pe and War in the Democratic Republic of the Congo*, 21 PEACE REV. 474, 474 (2009); *Legacy of War: An Epidemic of Sexual Violence in DRC*, U.N. POPULATION FUND (Nov. 26, 2008), https://www.unfpa.org/news/legacy-war-epidemic-sexual-violence-drc [https://perma.cc/7FJR-SDE2] (describing the brutal rapes characteristic of the conflict and identifying the DRC conflict to be the "deadliest conflict since World War II," killing "5.4 million people and displac[ing] a million more"); Raphael Parens, *Conflict in Eastern Congo: A Spark Away From a Regional Conflagration*, FOREIGN POL'Y RSCH. INST. (Sept. 8, 2022), https://www.fpri.org/article/2022/09/conflict-in-eastern-congo-a-spark-away-from-a-regional-conflagration/ [https://perma.cc/LE99-K5KY] (marking the ongoing conflict in the Eastern DRC as "one of the deadliest conflicts in world history," extinguishing "approximately six million lives since 1996").

[204] HUM. RTS. WATCH, COVERED IN BLOOD, *supra* note 181, at 14 (describing the DRC as one of the world's most complex conflict areas); U.N. OFF. OF THE HIGH COMM'R FOR HUM. RTS., REPORT OF THE MAPPING EXERCISE, *supra* note 182; HUM. RTS. WATCH, DEMOCRATIC REPUBLIC OF CONGO: EASTERN CONGO RAVAGED: KILLING CIVILIANS AND SILENCING PROTEST ch. I (2000), https://www.hrw.org/legacy/reports/2000/drc/Drc005.htm#TopOfPage [https://perma.cc/5DG9-F4YW] (describing as "complex" the conflict in eastern Congo and "the many combatant forces [that] have attacked civilians").

[205] HUM. RTS. WATCH, COVERED IN BLOOD, *supra* note 181, at 15-16.

groups and the various States sponsoring and opposing them.[206] A conflict featuring nearly a dozen armed groups, acting independently or as proxies for powerful States is bound to be a complex conflict. Further complicating the DRC conflict has been the ever-shifting alliances between the various warring groups.[207] As Human Rights Watch put it in December 2009

> The ongoing conflict in eastern Congo has been marked by a constant shift in alliances between a confusing array of belligerents. One-time enemies turn into allies and back into enemies again in swift succession, confusing Congolese citizens and political analysts alike.[208]

Because the war in the DRC is considered among the most complex on the planet,[209] it stands as the perfect example of a conflict without an easily identifiable, manifestly wrongful aggressor. Turning first to the Hema-Lendu conflict, even if there was enough evidence to date its start to the allegedly fraudulent land records, that start was of relatively

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[206] *Id.* at 16.

[207] HUM. RTS. WATCH, COVERED IN BLOOD, *supra* note 181, at 5 ("The RCD-ML split off from the original RCD in 1999."); HUM. RTS. WATCH, WORLD REPORT 2003: DEMOCRATIC REPUBLIC OF CONGO 25 (2003), https://www.hrw.org/legacy/wr2k3/pdf/drc.pdf [https://perma.cc/7SSE-VQRU] (referring to the "ever-splintering rebel groups"); U.N. OFF. OF THE HIGH COMM'R FOR HUM. RTS., REPORT OF THE MAPPING EXERCISE, *supra* note 182, ¶ 601 (noting that "[a]rmed groups proliferated and alliances between them were constantly made and unmade, amplifying the chaos"); *id.* ¶ 611; *id.* ¶ 752; HUM. RTS. WATCH, WELCOME EXPRESSION, *supra* note 174, at 11 (referring to the bewildering array of acronyms).

[208] HUM. RTS. WATCH, YOU WILL BE PUNISHED, *supra* note 193, at 27. The Human Rights Watch Report visual described in the text at note 206 includes the following disclaimer: "Please note that alliances change frequently. This is accurate as of May 2003." HUM. RTS. WATCH, COVERED IN BLOOD, *supra* note 181, at 16.

[209] HUM. RTS. WATCH, COVERED IN BLOOD, *supra* note 181, at 14 (describing the DRC as one of the world's most complex conflict areas); Peter Biro, *The E.U. Scales Up Assistance to Victims of Forgotten Conflict in Eastern Congo*, EUR. CIV. PROT. & HUMANITARIAN AID OPERATIONS (Dec. 09, 2023), https://civil-protection-humanitarian-aid.ec.europa.eu/news-stories/stories/eu-scales-assistance-victims-forgotten-conflict-eastern-congo_en#:~:text=Wracked%20by%20decades%20of%20conflict,also%20considered%20a%20forgotten%20crisis [https://perma.cc/G5NN-SKKM] ("Wracked by decades of conflict, the Democratic Republic of the Congo (DRC) is the most complex and protracted humanitarian crisis in Africa.").

minor note. It involved a small number of individuals and was not the sort of military act that typically launches an armed conflict. Instead, it *was* the sort of non-military act that previously had been resolved through peaceful means. Finally, the armed conflict between these two ethnic groups was entirely enmeshed in and intertwined with the larger war in the DRC as a whole.[210] The drivers of the larger armed conflict themselves seemed far more blameworthy both in initiating and in continuing the armed conflict than the individual ethnic groups involved in the ICC's early cases;[211] for that reason, it would be both difficult and distortive to view either the Hema or the Lendu as aggressors for purposes of case selection. Indeed, contemporaneous commentators strongly urged the ICC to bring charges against both Hema and Lendu,[212] advice the ICC sensibly took. Finally, although the 2009–2010 violence featured a different cast of characters, that component of the armed conflict likewise was enmeshed in the overall war and similarly featured a large number of warring groups and ever-shifting alliances. For all of these reasons, the situation in the DRC does not come close to meeting the standards set out in Part II for considering aggressor status in case selection. Prosecutors acted consistently with these standards by charging members of numerous groups to the conflict.

[210] *See* HUM. RTS. WATCH, UNFINISHED BUSINESS: CLOSING GAPS IN THE SELECTION OF ICC CASES 12-14 (2011), https://www.hrw.org/sites/default/files/reports/icc0911webwcover.pdf [https://perma.cc/N4Z7-8KAR].

[211] Prosecutor v. Katanga, ICC-01/04-01/07-3436-Anxl, Minority Opinion of Judge Wyngaert, ¶¶ 239, 318 (Mar. 7, 2014), https://www.icc-cpi.int/sites/default/files/RelatedRecords/CR2014_02619.PDF. Indeed, many commentators denominated the particular rebel leaders who were indicted "small fish" in comparison to the more culpable offenders who were not charged. Kambale, *supra* note 146, at 179. Congolese citizens also expressed this view. *See* PHIL CLARK, DISTANT JUSTICE: THE IMPACT OF THE INTERNATIONAL CRIMINAL COURT ON AFRICAN POLITICS 133, 135 (2018).

[212] HUM. RTS. WATCH, COURTING HISTORY, *supra* note 145, at 64. Indeed, even though the ICC did bring charges against individuals from each of the ethnic groups, commentators criticized ICC prosecutors for bringing a broader range of charges against the Lendu defendant — Germain Katanga — than they brought against Hema defendant Thomas Lubanga. *Id.* at 64-65.

b. CAR

Since gaining independence in 1960, CAR has been "trapped in a cycle of military coup attempts and violent political transitions."[213] In 1993, Ange-Félix Patassé became the first CAR President to gain power through a democratic election,[214] but his tenure, like those of his predecessors and successors, was characterized by ethnicization,[215] mismanagement, corruption,[216] and the settling of disagreements through violence.[217] These failings prompted a series of attempted military coups[218] and the eventual involvement of a small U.N. force.[219] After an unsuccessful coup attempt in 2001,[220] Patassé accused his chief of staff, François Bozizé, of disloyalty.[221] Bozizé escaped arrest and fled to Chad,[222] but he returned in 2002 to launch another offensive to overthrow Patassé.[223] Recognizing that CAR's army would be unable to fend off Bozizé's attack, Patassé requested help from Congolese warlord Jean-Pierre Bemba and his *Mouvement de libération du Congo* forces

[213] HUM. RTS. WATCH, STATE OF ANARCHY: REBELLION AND ABUSES AGAINST CIVILIANS 25 (2007), https://www.hrw.org/report/2007/09/14/state-anarchy/rebellion-and-abuses-against-civilians [https://perma.cc/923Z-6TG9] [hereinafter REBELLION AND ABUSES AGAINST CIVILIANS]; Patrick Vinck & Phuong N. Pham, *Outreach Evaluation: The International Criminal Court in the Central African Republic*, 4 INT'L J. TRANSITIONAL JUST. 421, 426 (2010); Gino Vlavonou, *Understanding the "Failure" of the Séléka Rebellion*, 23 AFR. SEC. REV. 318, 318 (2014).

[214] Marlies Glasius, *"We Ourselves, We Are Part of the Functioning": The ICC, Victims, and Civil Society in the Central African Republic*, 108 AFR. AFFS. 49, 51 (2009) [hereinafter *Civil Society in the Central African Republic*].

[215] Henry Kam Kah, *The Séléka Insurgency and Insecurity in the Central African Republic, 2012–2014*, 1 BRAZ. J. AFR. STUD. 40, 45 (2016).

[216] *Id.* at 47.

[217] Vlavonou, *supra* note 213, at 319.

[218] Kah, *supra* note 215, at 47.

[219] Emizet F. Kisangani, *Social Cleavages and Politics of Exclusion: Instability in the Central African Republic*, 32 INT'L J. WORLD PEACE 33, 42-43 (2015); Vinck & Pham, *supra* note 213, at 426.

[220] HUM. RTS. WATCH, REBELLION AND ABUSES AGAINST CIVILIANS, *supra* note 213, at 26.

[221] Vinck & Pham, *supra* note 213, at 426; Kisangani, *supra* note 219, at 43.

[222] Marielle Debos, *Fluid Loyalties in a Regional Crisis: Chadian "Ex-Liberators" in the Central African Republic*, 107 AFR. AFFS. 225, 228 (2008); Kisangani, *supra* note 219, at 43-44.

[223] HUM. RTS. WATCH, REBELLION AND ABUSES AGAINST CIVILIANS, *supra* note 213, at 26.

("MLC").[224] Bemba and the MLC helped Patassé to repel Bozizé's offensive,[225] but the MLC committed widespread and horrific atrocities in the process.[226] Bemba's troops engaged in what has been described as "a five-month reign of terror;"[227] thus, it came as no surprise when the ICC selected Bemba as its first defendant in the CAR situation.[228]

The ICC subsequently charged four additional defendants for crimes occurring nearly a decade later, but that decade featured the same violence and political instability as the decade preceding it. Although with the help of Bemba's forces, Patassé had been able to repulse Bozizé's 2002 offensive, Bozizé returned in March 2003, and this time, he took control of the country.[229] Rebel groups continued to pressure CAR's government under Bozizé,[230] however, and despite the conclusion of a global and inclusive agreement between the government and rebels in 2008,[231] armed conflict continued.[232] Bozizé remained in power until 2013, when a group of predominantly Muslim rebel groups known as the Séléka, under the leadership of Michel Djotodia, overthrew him.[233] Djotodia declared himself president and a few months later, he sought

[224] Vinck & Pham, *supra* note 213, at 426.

[225] Glasius, *Civil Society in the Central African Republic*, *supra* note 214, at 51.

[226] HUM. RTS. WATCH, REBELLION AND ABUSES AGAINST CIVILIANS, supra note 213, at 27; Marlies Glasius, *What Is Global Justice and Who Decides? Civil Society and Victim Responses to the International Criminal Court's First Investigations*, 31 HUM. RTS. Q. 496, 504 (2009) [hereinafter *What is Global Justice*] (reporting that the "behavior of Jean-Pierre Bemba's troops . . . was particularly atrocious").

[227] Vinck & Pham, *supra* note 213, at 426.

[228] Glasius, *What Is Global Justice, supra* note 226, at 504.

[229] Andreas Mehler, *Rebels and Parties: The Impact of Armed Insurgency on Representation in the Central African Republic*, 49 J. MOD. AFR. STUD. 115, 125 (2011).

[230] Kisangani, *supra* note 219, at 45. The conflict occurring between 2004 and 2007 is sometimes called the CAR Bush War. Kah, *supra* note 215, at 49.

[231] Kisangani, *supra* note 219, at 45-46.

[232] The rebels accused the government of failing to honor its obligations under the agreement. Kisangani, *supra* note 219, at 46. The government, for its part, failed to sufficiently attend to the threat posed by the armed groups. Kah, *supra* note 215, at 49; Vlavonou, *supra* note 213, at 320.

[233] ANDREAS MEHLER, A DECADE OF CENTRAL AFRICAN REPUBLIC: POLITICS, ECONOMY AND SOCIETY, 2009–2018, at 40-41 (2020); Kisangani, *supra* note 219, at 46; Vlavonou, *supra* note 213, at 320.

to dissolve the Séléka coalition;[234] however, by this time, Djotodia had already lost control of the Séléka groups,[235] which continued to commit atrocities.[236] Recognizing that the government was unable to protect them from Séléka violence, some members of the population took up arms and formed self-defense militia, known as the anti-Balaka (translated as anti-machetes).[237] Anti-Balaka groups began committing widespread revenge attacks targeting Muslim civilians.[238] Initially, the anti-Balaka could be described as "loosely organized groups of roving bandits,"[239] but members of Bozizé's former presidential brigade saw an opportunity to regain power, so they began to organize and finance the anti-Balaka[240] and eventually joined forces with them.[241] Séléka groups also grew in size and strength in response,[242] and the country descended into a large-scale and brutal civil war.[243]

The ICC brought charges against three members of the anti-Balaka and one member of the Séléka. The Séléka defendant — Mahamat Said

[234] Kisangani, *supra* note 219, at 46.

[235] FIDH, WHAT PROSPECTS FOR JUSTICE IN THE CENTRAL AFRICAN REPUBLIC? 10 (2022); Vlavonou, *supra* note 213, at 322.

[236] "Soon after the Séléka coalition took over the leadership of the CAR, its fighters went on a rampage, executing opponents, raping women and looting homes." Kah, *supra* note 215, at 53.

[237] FIDH, *supra* note 235, at 10; *see also* Vlavonou, *supra* note 213, at 323.

[238] Ctr. for Preventive Action, *Conflict in the Central African Republic*, COUNCIL ON FOREIGN RELS., https://www.cfr.org/global-conflict-tracker/conflict/violence-central-african-republic (last updated Aug. 10, 2023) [https://perma.cc/MRL4-86NN].

[239] Kisangani, *supra* note 219, at 46; Amnesty Int'l, *Central African Republic: Time for Accountability* 16, Index AFR 19/006/2014 (July 10, 2014), https://www.amnesty.org/en/documents/afr19/006/2014/en/ [https://perma.cc/8KUW-ZR5C] [hereinafter *Time for Accountability*].

[240] Thanks to the resources provided by pro-Bozizé groups, the anti-Balaka soon possessed powerful arms (such as AK-47s, rocket-propelled grenade launchers, and hand grenades). Kisangani, *supra* note 219, at 47; Amnesty Int'l, *Time for Accountability*, *supra* note 239, at 17.

[241] Prosecutor v. Said, ICC-01/14-01/21, Decision on the Confirmation of Charges against Mahamat Said Abdel Kani, ¶¶ 51-52 (Dec. 9, 2021), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_1 1432.PDF [https://perma.cc/YMD7-FECL].

[242] *Id.* ¶ 51; Kisangani, *supra* note 219, at 47.

[243] MEHLER, *supra* note 233, at 51-57; Amnesty Int'l, *Time for Accountability*, *supra* note 239, at 6-7.

— was a senior member of the Séléka coalition who ran a detention facility,[244] where crimes against humanity were allegedly committed against the facility's Christian detainees.[245] The charges against the anti-Balaka defendants allege a criminal agreement between former President Bozizé and two high-level anti-Balaka defendants — Patrice-Edouard Ngaïssona[246] and Maxim Mokom[247] — to regain control of the country by "instrumentalising pre-existing [Anti-Balaka] groups."[248] The third anti-Balaka defendant — Alfred Yekatom — commanded a militia force of approximately 3,000 fighters.[249] The specific crimes charged to anti-Balaka defendants involve ethnic cleansing and other attacks on Muslim civilians,[250] which resulted in thousands of deaths[251] and the largescale exodus of Muslims from CAR.[252]

[244] *Said*, ICC-01/14-01/21, ¶¶ 69-122; *see also* FIDH, *supra* note 235, at 28.

[245] *Said*, ICC-01/14-01/21, ¶¶ 29, 60-65, 110.

[246] Ngaïssona served as anti-Balaka coordinator, Amnesty Int'l, *Time for Accountability*, *supra* note 239, at 13, and in that capacity is alleged to have provided the funds to create the Anti-Balaka militia, to have conveyed finances from Bozizé to the militia, and to have procured ammunition and orders relating to particular attacks, Wairagala Wakabi, *Judges Confirm Charges Against Two Former Central African Militiamen*, INT'L JUST. MONITOR (Jan. 2, 2020), https://www.ijmonitor.org/2020/01/judges-confirm-charges-against-two-former-central-african-militiamen/ [https://perma.cc/GV84-Z2AK].

[247] Mokom was a National Coordinator of Operations of the Anti-Balaka. *Chad/CAR: Maxime Jeoffroy Eli Mokom Gawaka Must Face Justice at the ICC*, AMNESTY INT'L (Mar. 15, 2022), https://www.amnesty.org/en/latest/ news/2022/03/chad-car-maxime-jeoffroy-eli-mokom-gawaka-must-face-justice-at-the-icc/ [https://perma.cc/H2PL-EQL3].

[248] Prosecutor v. Yekatom & Ngaïssona, ICC-01/14-01/18, Corrected Version of "Decision on the Confirmation of Charges Against Alfred Yekatom and Patrice-Edouard Ngaïssona," ¶ 56 (May 14, 2020), https://www.icc-cpi.int/sites/default/files/Court Records/CR2021_05873. PDF [https://perma.cc/EQ6K-5L2K].

[249] *Id.* ¶ 65; Prosecutor v. Yekatom, ICC-01/14-01/18, Warrant of Arrest for Alfred Yekatom, ¶¶ 13, 18 (Nov. 11, 2018), https://www.icc-cpi.int/sites/default/files/Court Records/CR2018_05412.PDF [https://perma.cc/P7T3-S3RP].

[250] *Id.* ¶¶ 13, 18-20.

[251] Press Release, Int'l Crim. Ct., Situation in Central African Republic II: Alfred Yekatom Surrendered to the ICC for Crimes Against Humanity and War Crimes (Nov. 17, 2018), https://www.icc-cpi.int/news/situation-central-african-republic-ii-alfred-yekatom-surrendered-icc-crimes-against-humanity [https://perma.cc/75R7-B64F].

[252] Amnesty Int'l, *Time for Accountability*, *supra* note 239, at 19 ("Most Muslims who lived in CAR have left the country.").

CAR has been embroiled in internal armed conflicts literally for decades.[253] Between CAR's independence in 1960 and 2014, the country has had seven presidents but only one peaceful transfer of power. Coups and attempted coups have otherwise been the order of the day.[254] The violence in CAR has been perpetrated by large numbers of increasingly fragmented,[255] often shifting armed groups.[256] International Crisis Group noted that in CAR, it can be "difficult to differentiate the armed groups, the criminal gangs, the self-defence militias and even sometimes the country's armed forces" some of whom "are past masters of the art of switching sides when it suits them."[257] Indeed, even when confining the discussion to the two main parties to the post-2012 conflict — the Séléka and anti-Balaka — the Swedish Defense Research Agency described them as characterized by "a high level of internal division, with disagreement within the leadership, unclear command structures and lack of control of the soldiers."[258]

Amidst this nearly unceasing armed conflict, the ICC Prosecutor isolated two periods of violence: during 2002–2003 when Jean-Pierre Bemba and the MLC were retained to fend off a coup attempt, and in 2013–2014 when the Séléka and anti-Balaka went on a murderous spree of attacks and counterattacks. Isolating a clearly identifiable, manifestly wrongful aggressor among these warring parties would have been impossible. And given the prosecution's decision to charge multiple parties, we have no reason to believe that it sought to do so.

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[253] Vinck & Pham, *supra* note 213, at 426.

[254] Erik Männik, *Central African Republic: A Weak Country with a Long Border*, INT'L CTR. FOR DEF. & SEC. (Jan. 29, 2014), https://icds.ee/en/central-african-republic-a-weak-country-with-a-long-border/ [https://perma.cc/E9JZ-URV3].

[255] INT'L CRISIS GRP., AFR. REP. NO. 230, CENTRAL AFRICAN REPUBLIC: THE ROOTS OF VIOLENCE, at I (2015), https://www.crisisgroup.org/africa/central-africa/central-african-republic/central-african-republic-roots-violence [https://perma.cc/8TFN-UMJP] [hereinafter ROOTS OF VIOLENCE].

[256] Debos, *supra* note 222, at 226 (noting that combatants' loyalties are "extremely fluid" and they "may easily shift allegiance"); Glasius, *Civil Society in the Central African Republic, supra* note 214, at 58 (observing that "hostilities and alliances are fluid in Central African politics").

[257] INT'L CRISIS GRP., ROOTS OF VIOLENCE, *supra* note 255, at 2.

[258] Memorandum by Gabriella Ingerstad, Violence in the Central African Republic: Causes, Actors and Conflict Dynamics (Stud. In Afr. Sec., FOI Memo No. 4976, 2014), https://www.foi.se/rest-api/report/FOI%20MEMO%204976 [https://perma.cc/288F-94XW].

2. More Contained in Time and Space: Conflicts in Darfur and Kenya

The DRC and CAR conflicts were long-standing, messy, and involved large numbers of frequently shifting parties. When it comes to conflicts such as these, it is nearly impossible to identify a particular aggressor, let alone one that clearly launched the conflict in a manifestly wrongful manner. This Subsection turns to conflicts in Darfur and Kenya, which have more clearly identifiable geneses and involve fewer parties. As in the DRC and CAR, however, prosecutors also charged members of both parties to the conflict, and these allocations were also consistent with my proposal. In Kenya, both parties appeared to play a role in launching the conflict; for that reason, we would expect prosecutors to ignore aggressor status, and their case allocations suggest that they did. Specifically, the Prosecutor allocated prosecutions equally between the two parties. In Darfur, rebel forces launched the conflict, but the crimes the government committed in response were massive, heinous, and wildly disproportionate. Without taking account of aggressor status, we might have expected the Prosecutor to charge only Sudanese government defendants or to charge a significantly disproportionate number of government defendants. In fact, the Prosecutor allocated prosecutions almost equally between the two parties, suggesting the influence of the rebels' aggressor status.

a. Kenya

Although the Kenya conflict arose out of a multiplicity of long-standing causes and circumstances,[259] the large-scale violence that gave rise to the ICC's charges arose suddenly in the aftermath of the 2007 Presidential election.[260] During his presidency, incumbent President

[259] TRUTH, JUST. & RECONCILIATION COMM'N, COMMISSIONS OF INQUIRY — CIPEV REPORT 21-36 (2008); HUM. RTS. WATCH, BALLOTS TO BULLETS: ORGANIZED POLITICAL VIOLENCE AND KENYA'S CRISIS OF GOVERNANCE 2 (2008), https://www.hrw.org/report/2008/03/17/ballots-bullets/organized-political-violence-and-kenyas-crisis-governance [https://perma.cc/4QYR-GQZA] [hereinafter BALLOTS TO BULLETS] ("The ethnic divisions laid bare in the aftermath of the elections have roots that run much deeper than the presidential poll.").

[260] The violence ended almost as precipitously as it began. *See* Stefan Dercon & Roxana Gutiérrez-Romero, *Triggers and Characteristics of the 2007 Kenyan Electoral*

Mwai Kibaki was believed to have favored those of his Kikuyu ethnicity,[261] so, not surprisingly, Kibaki's opponent in the 2007 election, Raila Odinga, became popular with Kenyans of other ethnicities.[262] Indeed, pre-election polls predicted that Odinga would easily prevail.[263] The run-up to the election saw inflammatory rhetoric, ethnic instigations,[264] and isolated instances of violence;[265] therefore, in order to ensure the election's fairness and impartiality, the Kenya National Commission on Human Rights urged President Kibaki to continue a decade-old practice of permitting all parliamentary parties to make nominations for appointment to the Electoral Commission of Kenya.[266] Rejecting this suggestion just days before the election, Kibaki unilaterally appointed nineteen of the Electoral Commission's twenty-two members.[267]

Kenyans voted on December 27, 2007, and early results very much accorded with the pre-election polling; that is, Odinga led Kibaki by more than 1 million votes.[268] Suddenly, however, Odinga's lead ostensibly evaporated.[269] Signs of fraud were everywhere,[270] and

Violence, 40 WORLD DEV. 731, 735 (2012) (noting that the violence "swiftly ceased" following the conclusion of the peace agreement).

[261] Johannes Langer, *The Responsibility to Protect: Kenya's Post-Electoral Crisis*, 19 J. INT'L SERV. 1, 10 (2011).

[262] TED DAGNE, CONG. RSCH. SERV., RL34378, KENYA: THE DECEMBER 2007 ELECTIONS AND THE CHALLENGES AHEAD 2 (2008), https://www.everycrsreport.com/files/20080917_RL34378_a1924cc669bf807094f5772f5f5252e48aad383d.pdf [https://perma.cc/MHR8-Z27H] [hereinafter KENYA CRS REPORT].

[263] *Id.*

[264] Elizabeth Kimundi, *Post-Election Crisis in Kenya and the Implications for the International Criminal Court's Development as a Legitimate Institution*, 7 EYES ON ICC 85, 94 (2010).

[265] HUM. RTS. WATCH, BALLOTS TO BULLETS, *supra* note 259, at 19; Dercon & Gutiérrez-Romero, *supra* note 260, at 733; TRUTH, JUST. & RECONCILIATION COMM'N, *supra* note 259, at 40.

[266] Kimundi, *supra* note 264, at 94.

[267] *Id.*; DAGNE, KENYA CRS REPORT, *supra* note 262, at 3.

[268] DAGNE, KENYA CRS REPORT, *supra* note 262, at 3; Dercon & Gutiérrez-Romero, *supra* note 260, at 734.

[269] Langer, *supra* note 261, at 10.

[270] *See* DAGNE, KENYA CRS REPORT, *supra* note 262, at 3 (reporting that "international and domestic election observers declared the elections as rigged and deeply flawed"); Dercon & Gutiérrez-Romero, *supra* note 260, at 735.

independent observers concluded that the tallying process was so flawed that it was impossible to determine the winner.[271] Despite this, the Election Commission — stacked with Kibaki supporters — announced that Kibaki had won and hurriedly swore him in for his second term.[272] Mere hours after Kibaki was crowned the winner, violence erupted throughout Kenya.[273] Odinga's supporters launched an "orgy of violence,"[274] largely targeting Kikuyus.[275] This violence spurred counterattacks by police,[276] security forces,[277] and pro-government gangs,[278] along with revenge killings committed by individual Kikuyu supporters of Kibaki.[279] Human rights groups and commissions of inquiry concluded that persons in positions of power on both sides of the conflict had been instrumental in encouraging, organizing, and financing the violence.[280] In all, more than 1,100 Kenyans were killed, 300,000 injured and as many as 600,000 forcibly displaced.[281]

With respect to the situation in Kenya, the ICC launched two cases, each featuring three defendants. In one, the ICC charged three pro-Kibaki officials: Francis Kirimi Muthaura, a close ally to President Kibaki

[271] Kimundi, *supra* note 264, at 95. Even the Chairman of the Election Commission was reported as referring to the possibility that the results had "been cooked," Njoki S. Ndungu, *Kenya: The December 2007 Election Crisis*, 19 MEDITERRANEAN Q. 111, 114-15 (2008), and as acknowledging that he did not know whether or not Kibaki was elected President, Kimundi, *supra* note 264, at 95. The chief EU observer of the elections announced that "the presidential elections were flawed." Langer, *supra* note 261, at 10.

[272] DAGNE, KENYA CRS REPORT, *supra* note 262, at 3; Dercon & Gutiérrez-Romero, *supra* note 260, at 735.

[273] Dercon & Gutiérrez-Romero, *supra* note 260, at 735.

[274] *Id.*

[275] INT'L CRISIS GRP., AFR. REP. NO. 137, KENYA IN CRISIS 9 (2008), https://www.crisisgroup.org/africa/horn-africa/kenya/kenya-crisis [https://perma.cc/Z9M9-HD79] [hereinafter KENYA IN CRISIS]; Peter Kagwanja & Roger Southall, *Introduction: Kenya — A Democracy in Retreat?*, 27 J. CONTEMP. AFR. STUD. 259, 260 (2009).

[276] Kimundi, *supra* note 264, at 99.

[277] Langer, *supra* note 261, at 10.

[278] DAGNE, KENYA CRS REPORT, *supra* note 262, at 7.

[279] Dercon & Gutiérrez-Romero, *supra* note 260, at 735; Langer, *supra* note 261, at 10; Susanne D. Mueller, *Kenya and the International Criminal Court (ICC): Politics, the Election and the Law*, 8 J. E. AFR. STUD. 25, 27 (2014).

[280] Kimundi, *supra* note 264, at 98.

[281] Mueller, *supra* note 279, at 27.

and Chairman of the National Security Committee during the post-2007 election violence;[282] Mohamed Hussein Ali, Commissioner of Police at that time;[283] and Uhuru Muigai Kenyatta, who recently served as President of Kenya[284] but who, during the post-election violence, was alleged to have mobilized members of an armed gang ("Mungiki") to attack Odinga supporters.[285] The second ICC case charged three Odinga supporters: William Samoei Ruto, then-MP for Eldoret North;[286] Henry Kiprono Kosgey, then-MP for Tinderet Constituency;[287] and Joshua Arap Sang, a popular Kenyan radio broadcaster.[288]

The case-selection decisions in the Kenya situation — which allocated prosecutions equally between the two parties to the conflict — very much accord with my proposal in that there is not one clearly wrongful party that initiated the conflict. Certainly, the evidence suggests that Kibaki and his supporters engaged in election fraud. Domestic and international observers immediately objected to the Election Commission's decision to award the presidency to Kibaki,[289] with

[282] Prosecutor v. Muthaura, ICC-01/09-02/11, Decision on the Confirmation of Charges pursuant to Art. 61(7)(a) and (b) of the Rome Statute, ¶ 293 (Jan. 23, 2012), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2012_01006.PDF [https://perma.cc/LD7U-2BEQ].

[283] *Id.* ¶ 49.

[284] *Kenyatta Burnishes His Statesman Credentials as Presidential Reign in Kenya Ends*, RFI (Aug. 2, 2022, 10:48 AM), https://www.rfi.fr/en/africa/20220802-kenyatta-burnishes-his-statesman-credentials-as-presidential-reign-in-kenya-ends [https://perma.cc/7LT3-NEDR].

[285] *Muthaura*, ICC-01/09-02/11, ¶¶ 102-05.

[286] *Ruto*, INT'L CRIM. CT., https://www.icc-cpi.int/defendant/ruto (last updated Sept. 18, 2020) [https://perma.cc/HZ4F-F4KH].

[287] Prosecutor v. Ruto, ICC-01/09-01/11, Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey, and Joshua Arap Sang, ¶ 42 (Mar. 8, 2011), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2011_02585.PDF [https://perma.cc/7U38-TEVP].

[288] *Id.* ¶ 53.

[289] HUM. RTS. WATCH, BALLOTS TO BULLETS, *supra* note 259, at 22; INT'L CRISIS GRP., KENYA IN CRISIS, *supra* note 275, at 6 ("All national and international observers, including the Kenya Democratic Elections Forum (KEDOF), the European Union (EU), the Commonwealth secretariat, the East African community and the International Republican Institute (IRI), reported that . . . the tallying and compiling of the results was manipulated, dramatically undermining the credibility of the results."); Press Release, Eur. Union Elections Observation Mission, Doubts About the Credibility of the Presidential Results Hamper Kenya's Democratic Progress (Jan. 1, 2008),

Human Rights Watch labeling it "a desperate last-minute attempt to rig the contest in favor of . . . Kibaki."[290] At the same time, Odinga supporters were also accused of engaging in election irregularities, albeit on a smaller scale.[291] More importantly, the evidence suggests that Odinga supporters launched the violent response to the election rigging.[292] With blame for initiating the conflict attributable to both parties, one would not expect aggressor status to factor into the prosecutors' case-selection decisions.

b. Darfur

The people of the Darfur region of Sudan have long felt politically and economically marginalized.[293] As a result, two rebel groups — the Sudan Liberation Army ("SLA") and the Justice and Equity Movement ("JEM") — were created,[294] and in 2002, they began attacking police

https://reliefweb.int/report/kenya/doubts-about-credibility-presidential-election-results-hamper-kenyas-democratic-process [https://perma.cc/F8SJ-77G8]. Two commentators noted that "in a rather surprising move the international community stood united, did not endorse the presidential election results and put strong pressure on Kenya's political leaders to solve the crisis." Axel Harneit-Sievers & Ralph-Michael Peters, *Kenya's 2007 General Election and Its Aftershocks*, 43 AFRIKA SPECTRUM 133, 133 (2008) (Ger.). In that vein, the U.N. High Commissioner for Human Rights subsequently concluded that Kenyan voters were deprived of their right to free and fair elections. U.N. OFF. OF THE HIGH COMM'R FOR HUM. RTS., REPORT FROM OHCHR FACT-FINDING MISSION TO KENYA, 6-28 FEBRUARY 2008, at 5 (2008), https://www.ohchr.org/sites/default/files/Documents/Press/OHCHRKenyareport.pdf [https://perma.cc/RR4X-2H4P] [hereinafter REPORT FROM OHCHR FACT-FINDING MISSION TO KENYA]; INT'L CRISIS GRP., KENYA IN CRISIS, *supra* note 275, at 9.

[290] HUM. RTS. WATCH, BALLOTS TO BULLETS, *supra* note 259, at 22. For a detailed description of the rigging, see INT'L CRISIS GRP., KENYA IN CRISIS, *supra* note 275, at 6.

[291] HUM. RTS. WATCH, BALLOTS TO BULLETS, *supra* note 259, at 21 ("There were serious irregularities reported on both sides in some areas."); INT'L CRISIS GRP., KENYA IN CRISIS, *supra* note 275, at 2.

[292] U.N. OFF. OF THE HIGH COMM'R FOR HUM. RTS., REPORT FROM OHCHR FACT-FINDING MISSION TO KENYA, *supra* note 289, at 8; INT'L CRISIS GRP., KENYA IN CRISIS, *supra* note 275, at 9; Dercon & Gutiérrez-Romero, *supra* note 260, at 735.

[293] Prunier described Darfur as an "increasingly marginalized, violent and frustrated place." GÉRARD PRUNIER, DARFUR: THE AMBIGUOUS GENOCIDE 81 (2005).

[294] *See* Kamal O. Salih, *The Internationalization of the Communal Conflict in Darfur and its Regional and Domestic Ramifications: 2001–2007*, 30 ARAB STUD. Q. 1, 7-8 (2008).

installations.[295] These attacks surprised the government of Sudan ("GoS"), but it did little to respond, both because it did not view the rebels as a significant threat[296] and because its resources were already stretched thin by the more serious conflict it was fighting in the South of Sudan.[297] The SLA and JEM stepped up their offensive in Spring 2003, however,[298] destroying several military aircraft and killing scores of soldiers[299] and civilians.[300] Still preoccupied by the war in the South, the Sudanese government did not have the capacity to mount a robust response,[301] so the Darfuri rebels were initially able to gain the upper hand.[302]

Finally recognizing that the rebels posed a serious military threat that it was unable to meet, the GoS enlisted pre-existing Arab militia — denominated the Janjaweed — to fend off the rebellion.[303] But the Janjaweed did far more than merely neutralize the rebel threat.

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[295] REPORT OF THE INTERNATIONAL COMMISSION OF INQUIRY ON DARFUR TO THE UNITED NATIONS SECRETARY-GENERAL ¶ 62 (2005), https://reliefweb.int/report/sudan/report-international-commission-inquiry-darfur-united-nations-secretary-general [https://perma.cc/W75P-SW9K] [hereinafter DARFUR COMMISSION OF INQUIRY REPORT]; *see also* John E. Tanagho & John P. Hermina, *The International Community Responds to Darfur: ICC Prosecution Renews Hope for International Justice,* 6 LOY. U. CHI. INT'L L. REV. 367, 376 (2009).

[296] PRUNIER, *supra* note 293, at 81 ("A certain 'acceptable' level of violence in [Darfur] had been routine, and nobody was very worried by 'normal' killings.").

[297] DARFUR COMMISSION OF INQUIRY REPORT, *supra* note, 295, ¶ 63.

[298] *Id.* ¶ 65; Philipp Kastner, The ICC in Darfur — Savior or Spoiler, 14 ILSA J. INT'L & COMP. L. 145, 157 (2007).

[299] DARFUR COMMISSION OF INQUIRY REPORT, *supra* note 295, ¶ 65; John Prendergast & Colin Thomas-Jensen, *Darfur*, *in* CRIMES OF WAR 2.0: WHAT THE PUBLIC SHOULD KNOW 146, 148 (Roy Gutman, David Rieff & Anthony Dworkin eds., rev. ed. 2007).

[300] Salih, *supra* note 294, at 9.

[301] DARFUR COMMISSION OF INQUIRY REPORT, *supra* note 295, ¶ 66; Tanagho & Hermina, *supra* note 295, at 376. In addition, "the rank and file of the Sudanese armed forces was largely composed of Darfurians, who were probably reluctant to fight 'their own' people." DARFUR COMMISSION OF INQUIRY REPORT, *supra* note 295, ¶ 66.

[302] TED DAGNE, CONG. RSCH. SERV., IB98043, SUDAN: HUMANITARIAN CRISIS, PEACE TALKS, TERRORISM, AND U.S. POLICY 3 (2006), https://sgp.fas.org/crs/row/IB98043.pdf [https://perma.cc/SNP7-VJSX] [hereinafter SUDAN CRS BRIEF]. Some commentators described Khartoum as "humiliated." Prendergast & Thomas-Jensen, *supra* note 299, at 148.

[303] PRUNIER, *supra* note 293, at 97; *see also* DARFUR COMMISSION OF INQUIRY REPORT, *supra* note 295, ¶ 67.

Financed and armed by the GoS,[304] the Janjaweed unleashed "a campaign of terror" against Darfuri civilians,[305] particularly those who hailed from the same tribes as the SLA and JEM.[306] The Janjaweed destroyed whole villages, and killed, raped, burned, and looted as they went.[307] In a mere eighteen months, the Janjaweed's attacks had produced what has been termed "a demographic catastrophe,"[308] with one-third of Darfur's population forced to flee to other parts of Sudan.[309] Experts estimate that hundreds of thousands of Darfuris died,[310] virtually all at the hands of the government and its agents, the Janjaweed.[311]

[304] Kastner, *supra* note 298, at 160.

[305] DAGNE, SUDAN CRS BRIEF, *supra* note 302, at 2.

[306] HUM. RTS. WATCH, TARGETING THE FUR: MASS KILLINGS IN DARFUR 2 (2005), https://www.hrw.org/legacy/backgrounder/africa/darfur0105/darfur0105.pdf [https://perma.cc/3JV5-QB8Y]; Scott Straus, *Darfur and the Genocide Debate*, FOREIGN AFFS. (Jan. 1, 2005), https://www.foreignaffairs.com/articles/sudan/2005-01-01/darfur-and-genocide-debate [https://perma.cc/YUP7-HU7S].

[307] Straus, *supra* note 306.

[308] *Id.*

[309] *Id.* In November 2004, the U.N. Commission of Inquiry on Sudan reported that 1.65 million Darfuris had been internally displaced and more than 200,000 had fled from Darfur to Chad. DARFUR COMMISSION OF INQUIRY REPORT, *supra* note 295, ¶ 226.

[310] *See, e.g.*, Louis Charbonneau, *U.N. Says Darfur Dead May Be 300,000; Sudan Denies*, REUTERS (Apr. 22, 2008, 4:44 PM PDT), https://www.reuters.com/article/us-sudan-darfur-un/u-n-says-darfur-dead-may-be-300000-as-sudan-denies-idUSN22308543200804 22 [https://perma.cc/G4K6-T4YY] (reporting that experts estimate 300,000 people died in the Darfur conflict).

[311] *Darfur: A "Plan B" to Stop Genocide? Hearing Before the Senate Comm. on Foreign Relations*, 110th Cong. 9 (Apr. 11, 2007) (statement of Andrew S. Natsios, President's Special Envoy to Sudan, Department of State).

ICC Prosecutors charged seven defendants in the Darfur situation: four members of the GoS and/or Janjaweed[312] and three rebels.[313] This allocation of cases is consistent with a consideration of aggressor status. The rebels appeared to initiate the conflict.[314] Although commentators had accused the GoS of neglecting Darfur,[315] there were no active hostilities in the region before the JEM and SLA launched their attacks in 2002 and 2003.[316] Assuming this initiation of armed conflict was manifestly wrongful, then under my proposal, aggressor status would be relevant to the allocation of prosecutions.

The GoS crimes were massive and egregious.[317] They were so massive and egregious, indeed, that they generated intense international

[312] The four are: Omar al-Bashir, then-President of Sudan, *see* Summary of Prosecutor's Application Under Art. 58, ICC-02/05, Situation in Darfur, the Sudan, ¶ 1 (July 14, 2008), https://www.icc-cpi.int/sites/default/files/RelatedRecords/CR2008_04753.PDF; Ahmad Harun and Ali Kushayb, former Minister of State for the Interior and leader of the Janjaweed, respectively, *see* Prosecutor's Application under Art. 58(7), ICC-02/05, 4-5 (Feb. 27, 2007) https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2007_02083.PDF; and Abdel Hussein, former Minister of the Interior and Special Representative of the President in Darfur, *see* Prosecutor's Application under Art. 58 filed on 2 December 2011, ICC-02/05, ¶ 5 (Jan. 24, 2012), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2012_01050.PDF.

[313] The three rebel defendants were Bahr Abu Garda, Abdallah Banda, Saleh Jerbo, see Prosecutor's Application Under Article 58 filed on 20 November, Case No. ICC-02/05, ¶¶ 12-23 (Nov. 20, 2008).

[314] Molly J. Miller, *The Crisis in Darfur*, 18 MEDITERRANEAN Q. 112, 112-13 (2007) (reporting that many observers cite the rebel attacks as the beginning of the conflict); Salih, *supra* note 294, at 5 (noting that although the conflict had its roots in a host of circumstances that had been brewing for decades, "the conflict gained momentum when brutal military strikes were waged in 2003 against the government army units which were stationed in the three Darfur states").

[315] Miller, *supra* note 314, at 122 (noting Darfur's "economic exclusion"); Prendergast & Thomas-Jensen, *supra* note 299, at 148 (describing Darfur as "one of the poorest and most neglected regions of the North"); Salih, *supra* note 294, at 7.

[316] See Jared Genser, *The United Nations Security Council's Implementation of the Responsibility to Protect: A Review of Past Interventions and Recommendations for Improvement*, 18 CHI. J. INT'L L. 420, 457 (2017) (finding that active hostilities began in 2002 and 2003, with the "SLM/A and JEM stag[ing] increasingly successful attacks against the SAF."); *But see* Prendergast & Thomas-Jensen, *supra* note 299, at 148.

[317] Although hyperbolic, one commentator described the GoS's crimes in Darfur as "the worst human disaster ever witnessed by the world." Salih, *supra* note 294, at 10.

condemnation,[318] which was backed up by arms embargoes[319] and other significant sanctions.[320] The U.N. Security Council established a Commission of Inquiry[321] to investigate crimes occurring in Darfur, and the Commission found that the GoS had targeted innocent civilians[322] and had engaged in widespread acts of murder, torture, enforced disappearances, rape, destruction of villages, pillaging, and forced displacement.[323] Indeed, the international community was sufficiently disturbed about the Darfur situation that the U.N. Security Council referred the situation to the ICC,[324] making it the first Security Council referral to the Court. To be sure, rebel forces also committed some crimes,[325] and they were particularly criticized for a 2007 attack on African Union peacekeepers,[326] an attack which formed the basis for the ICC's charges against the three rebel defendants.[327] However, because the government was well-understood to be responsible for virtually all of the death and destruction visited upon the civilians of Darfur,[328] it

[318] S.C. Res. 1556 ¶ 7 (July 30, 2004); Salih, *supra* note 294, at 9-16. Indeed, Salih notes that the Darfur conflict attracted unprecedented international attention: "A year into the Darfur conflict, the international media made it a focal point in its reporting and it became the hottest issue in the 2004 American presidential election." Salih, *supra* note 294, at 10.

[319] S.C. Res. 1556, *supra* note 318, ¶ 7; S.C. Res. 1591 ¶ 3 (Mar. 29, 2005).

[320] S.C. Res. 1591, *supra* note 319, ¶ 3.

[321] S.C. Res. 1564 ¶12 (Sep. 18, 2004).

[322] DARFUR COMMISSION OF INQUIRY REPORT, *supra* note 295, at 3 (finding that most government attacks "were deliberately and indiscriminately directed against civilians").

[323] *Id.*

[324] S.C. Res. 1593 ¶ 1 (Mar. 31, 2005).

[325] DARFUR COMMISSION OF INQUIRY REPORT, *supra* note 295, ¶ 190.

[326] Prosecutor v. Garda, ICC-02/05-02/09, Opening Statement of Deputy Prosecutor Fatou Bensouda at The Confirmation of Charges Hearing, 5-6 (Oct. 19, 2009), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2010_00753.PDF [https://perma.cc/2HJZ-6CJL] (reporting that the U.N. Security Council "condemned the murderous attack on African Union peacekeepers in Haskanita, South Darfur"); Opheera McDoom, *Darfur Attack Kills 10 AU Troops, 50 Missing*, REUTERS (Sept. 30, 2007, 1:53 PM), https://www.reuters.com/article/idUSL30342985/ [https://perma.cc/S3ZV-L4ED].

[327] Summary of the Prosecutor's Application under Art. 58, ICC-02/05, Situation in Darfur, the Sudan, ¶ 3 (Nov. 20, 2008), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2008_06998.PDF.

[328] Salih, *supra* note 294, at 10.

would have been both reasonable and even predictable for ICC prosecutors to bring charges only against defendants affiliated with the government. That prosecutors also elected to prosecute an almost equal number of rebel defendants gives rise to the inference that they took account of the rebels' aggressor status.

B. We Know Who Started It: Prosecutions of Only One Side to the Conflict

Prosecutors charged only one party to the conflict in three ICC situations that have gone to trial: Mali, Côte d'Ivoire, and Uganda. The prosecuted parties in Mali and Côte d'Ivoire were the parties that unambiguously and wrongfully initiated the conflict. The genesis of the Uganda conflict was more complex, but in all three situations, prosecuting only one side to the conflict was consistent with my proposal.

1. Mali

Mali presents the quintessential situation in which we might expect prosecutors to charge only one party to the conflict. The war in Mali began in January 2012, when Islamic groups Al Qaeda in the Islamic Maghreb ("AQIM") and Ansar Dine joined with a local Malian rebel movement, the MNLA, to launch a take-over of northern Mali.[329] Two months into that conflict, Captain Amadou Sanogo led the Malian military to overthrow the democratically elected Malian President, citing his poor response to the uprising in the north.[330] The coup, and the subsequent collapse of Mali's military presence in the north, allowed the rebels to consolidate their gains;[331] consequently, by early April 2012, the rebels controlled several of the north's largest cities — including the

[329] DONA J. STEWART, WHAT IS NEXT FOR MALI? THE ROOTS OF CONFLICT AND CHALLENGES TO STABILITY 37 (2013), https://press.armywarcollege.edu/monographs/514/ [https://perma.cc/DW9E-RCEK].

[330] *Id.*

[331] *Id.*; HUM. RTS. WATCH, MALI CONFLICT AND AFTERMATH: COMPENDIUM OF HUMAN RIGHTS WATCH REPORTING, 2012–2017, at 162 (2017), https://www.hrw.org/sites/default/files/supporting_resources/malicompendium0217.pdf [https://perma.cc/5DDG-FKSJ] [hereinafter MALI CONFLICT AND AFTERMATH]; U.N. Secretary-General, *Report of the Secretary-General on Children and Armed Forces in Mali*, ¶ 7, U.N. Doc. S/2014/267 (Apr. 14, 2014) [hereinafter *Report of the Secretary-General on Children and Armed Forces in Mali*].

famed Timbuktu —[332] and they were able to declare northern Mali the independent State of Azawad.[333] Due to ideological differences, the alliance between the secular MNLA and the Islamist groups soon crumbled,[334] leaving the Islamist groups in control of Timbuktu.[335]

In capturing and governing Northern Mali, the Islamist groups reportedly committed summary executions, torture, rapes, and forced marriages,[336] and they enlisted large numbers of child soldiers.[337] Moreover, AQIM and Ansar Dine imposed a harsh interpretation of sharia law: they jailed women who did not wear the veil[338] and they meted out beatings, floggings, arbitrary arrests, and stonings upon those whose behavior deviated from their interpretation of Sharia.[339] Finally, Timbuktu was home to one of the most extensive collections of ancient manuscripts in the world as well as many religious and cultural sites of

[332] HUM. RTS. WATCH, MALI CONFLICT AND AFTERMATH, *supra* note 331, at 162.

[333] U.N. Secretary-General, *Report of the Secretary-General on the Situation in Mali*, ¶ 6, U.N. Doc. S/2012/894 (Nov. 29, 2012) [hereinafter *Report of the Secretary-General on the Situation in Mali*].

[334] STEWART, *supra* note 329, at 41-42.

[335] *Id.* at 41.

[336] U.N. Secretary-General, *Report of the Secretary-General on Children and Armed Conflict in Mali*, *supra* note 331, ¶¶ 58-60; HUM. RTS. WATCH, MALI CONFLICT AND AFTERMATH, *supra* note 331, at 115.

[337] U.N. Secretary-General, Report of the Secretary-General on Children and Armed Conflict in Mali, supra note 331, ¶¶ 39-42; U.N. Secretary-General, Report of the Secretary-General on the Situation in Mali, supra note 333, ¶ 21.

[338] U.N. Secretary-General, *Report of the Secretary-General on Children and Armed Conflict in Mali*, *supra* note 331, ¶¶ 21, 69; Pew Research Center, *Restrictions on Women's Religious Attire*, Apr. 5, 2016, https://www.pewresearch.org/religion/2016/04/05/restrictions-on-womens-religious-attire/#fn-25485-22 (reporting that "women in Mali who did not wear full-face veils were subjected to beatings, floggings and arbitrary arrest at the hands of [AQIM]").

[339] HUM. RTS. WATCH, MALI CONFLICT AND AFTERMATH, *supra* note 331, at 140. These behaviors included "smoking or selling cigarettes; consuming or selling alcoholic beverages; listening to music on portable audio devices; having music or anything other than Quranic verse readings as the ringer on cellphones, and failing to attend daily prayers." *Id.* Women were also punished for interacting with men other than family members, and for not adhering to a dress code, "which requires women to cover their heads, wear long skirts, and desist from wearing jewelry or perfume." *Id.* Alleged thieves had limbs amputated. *Id.*

international significance.[340] Of particular note were Timbuktu's ancient mausoleums, which were revered throughout the world and especially by the inhabitants of Timbuktu.[341] The Islamist groups considered the mausoleums idolatrous, however, so members of Ansar Dine demolished them along with a holy mosque door that "had not been opened for 500 years."[342]

As a result of these crimes, the humanitarian situation in Mali seriously deteriorated.[343] Eight months after the take-over, approximately 200,000 Malians had fled to other parts of the country to escape the fighting and repressive rule of Ansar Dine and AQIM, whereas another 200,000 had escaped to neighboring countries.[344] In early January 2013, the Islamist groups began advancing southwards toward the Malian capital of Bamako, which led the new transitional government to seek international military assistance.[345] Thereafter, the Malian military, assisted by French and African forces, retook control of much of the north.[346]

ICC prosecutors charged two defendants in the Mali situation, both members of Ansar Dine. They first charged Ahmad Al Faqi Al Mahdi, who served as the head of the *Hesbah*, Ansar Dine's morality brigade in Timbuktu. Al Mahdi was accused of directing and participating in the destruction of Timbuktu's mausoleums, all but one of which was a protected UNESCO World Heritage site.[347] ICC prosecutors brought

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[340] STEWART, *supra* note 329, at 12.

[341] The mausoleums were "frequently visited by the residents — they are places of prayer and, for some, places of pilgrimage." Prosecutor v. al Mahdi, ICC-01/12-01/15, Judgement and Sentence, ¶ 34 (Sept. 27, 2016), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2016_07244.PDF [https://perma.cc/UJW7-6FKR].

[342] *Id.* ¶¶ 36-37, 38(viii); *see also* STEWART, *supra* note 329, at 12-13.

[343] U.N. Secretary-General, *Report of the Secretary-General on Children and Armed Conflict in Mali*, *supra* note 331, ¶ 10.

[344] U.N. Secretary-General, *Report of the Secretary-General on the Situation in Mali*, *supra* note 333, ¶ 18; *see also* HUM. RTS. WATCH, MALI CONFLICT AND AFTERMATH, *supra* note 331, at 115.

[345] U.N. Secretary-General, *Report of the Secretary-General on the Situation in Mali*, ¶ 3-4, U.N. Doc. S/2013/189 (Mar. 26, 2013).

[346] *Id.* ¶¶ 5-6.

[347] *Al Mahdi*, ICC-01/12-01/15, ¶¶ 2, 10. Video footage showed the militants — including Al Mahdi — tearing down the tombs spread worldwide. Channel 4 News, *Mali:*

their second set of charges against Al Hassan Ag Abdoul Aziz Ag Mohamed, who served as Ansar Dine's de facto police chief.[348]

Little question exists that the international community considered Ansar Dine, along with other rebel groups, responsible for wrongfully launching the conflict in Mali. Numerous Security Council reports,[349] along with NGO reports,[350] blamed the rebel groups for having "initiated" the attacks in the north and even for precipitating the subsequent coup,[351] which was labeled "a disaster for Mali and for all West Africa."[352] That international forces were willing to come to Mali's assistance to oust the rebels also indicates the international

Footage of Cultural Destruction in Timbuktu, YOUTUBE (Jan. 29, 2013), https://www.youtube.com/watch?v=PeL8gVAFPhA [https://perma.cc/FD5E-KYBA]; CNN, *Militants Destroying Mali History*, YOUTUBE (July 24, 2012), https://www.youtube.com/watch?v=d7eDHXN3-tg [https://perma.cc/M8QT-DXNR]; IBTimes UK, *Islamist Rebels Damage Timbuktu World Heritage Site*, YOUTUBE (July 2, 2012), https://www.youtube.com/watch?v=vE06cGy0byg [https://perma.cc/X3JW-V38H].

348 *See Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmound*, COAL. FOR INT'L CRIM. CT., https://www.coalitionfortheicc.org/al-hassan-ag-abdoul-aziz-ag-mohamed-ag-mahmoud-0 (last visited Dec. 23, 2023) [https://perma.cc/6PSK-QNMJ]; Susan Kendi, *First Witness in Al Hassan Trial Testifies at the ICC*, JOURNALISTS FOR JUST. (Sep. 11, 2020), https://jfjustice.net/first-witness-in-al-hassan-trial-testifies-at-the-icc/ [https://perma.cc/SY7E-NWST].

349 See U.N. Secretary-General, Report of the Secretary-General on the Situation in Mali, supra note 333, ¶ 4; U.N. Secretary-General, Report of the Secretary-General on Children and Armed Conflict in Mali, supra note 331, ¶¶ 6-7.

350 *See* AMNESTY INT'L, MALI: FIVE MONTHS OF CRISIS, ARMED REBELLION AND MILITARY COUP 5 (2012), https://www.amnesty.org/en/documents/afr37/001/2012/en/#:~:text=Mali%20is%20facing%20its%20worst,Mali%20and%20in%20neighbouring%20countries [https://perma.cc/QEM6-8KMD] [hereinafter FIVE MONTHS OF CRISIS]; Ctr. for Preventative Action, *Violent Extremism in the Sahel*, COUNCIL ON FOREIGN RELS. https://www.cfr.org/global-conflict-tracker/conflict/destabilization-mali (last updated Aug. 10, 2023) [https://perma.cc/99U4-TRK3] [hereinafter *Violent Extremism in the Sahel*]; *Putting Mali Back on the Constitutional Track*, INT'L CRISIS GRP. (Mar. 26, 2012), https://www.crisisgroup.org/africa/west-africa/mali/putting-mali-back-constitutional-track [https://perma.cc/655A-B8JA] (noting that the "Tuareg rebellion had plunged the north into armed conflict . . . .")

351 AMNESTY INT'L, FIVE MONTHS OF CRISIS, *supra* note 350, at 7-8 (noting that the coup leaders justified the coup by highlighting the government's inability to effectively defend national territory); *Violent Extremism in the Sahel*, *supra* note 350 (reporting that President "Toure was deposed in a March 2012 coup by the army, which disapproved of the government's failure to suppress the rebellion").

352 *Putting Mali Back on the Constitutional Track*, *supra* note 350.

community's view that the takeover was wrongful. Under my proposal, prosecutors would factor in Ansar Dine's wrongful initiation of the conflict in allocating cases. The Prosecutor's eventual decision to charge only members of Ansar Dine thus accords entirely with my proposal.

2. Côte d'Ivoire

On the surface, the Côte d'Ivoire situation resembles the Kenya situation in that both involved sudden bursts of violence following contested elections. However, whereas in Kenya, one party engaged in election fraud and the opposing party launched the violence in response to the fraud, in Côte d'Ivoire, the same party that engaged in election misconduct was primarily responsible for launching the violence. Thus, it was predictable that ICC prosecutors charged members of both parties to the conflict in Kenya but only one party in Côte d'Ivoire.

The conflict that formed the basis for ICC charges in Côte d'Ivoire stemmed from the country's disputed 2010 presidential election between incumbent Laurent Gbagbo and challenger Alassane Ouattara. Côte d'Ivoire's Independent Electoral Commission ("IEC") initially declared Ouattara the winner with 54.1% of the vote.[353] Gbagbo, however, appealed the IEC's decision to the Constitutional Council, which was dominated by his supporters.[354] The Constitutional Council nullified the voting in seven northern departments (where most votes had been cast for Ouattara),[355] claiming that they had been procured by fraud. It thereafter declared Gbagbo the winner with fifty-one percent of the vote.[356]

[353] NICOLAS COOK, CONG. RSCH. SERV., RS 21989, CÔTE D'IVOIRE POST-GBAGBO: CRISIS RECOVERY 17 (2011), https://www.everycrsreport.com/files/20110503_RS21989_026106ba25116d9aead5c636d9ad6708b0134e63.pdf [https://perma.cc/NZ7P-7VT6]; 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. 251, 254-55 (2015).

[354] Butler, *supra* note 353, at 255 (noting the Constitutional Council was dominated by Gbabgo's supporters); Cook, *supra* note 353 at 17.

[355] *See* 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).

[356] Butler, *supra* note 353, at 255.

However, the international community quickly and decisively rejected Gbagbo's claim of victory.[357] The United Nations,[358] the African Union,[359] and the Economic Community of West African States ("ECOWAS")[360] recognized Ouattara as the President-elect and called on Gbagbo to step down.[361] When Gbagbo refused,[362] the U.N. Security Council issued Resolution 1962, which "condemn[ed] in the strongest possible terms" Gbagbo's attempt to usurp the will of the people.[363]

Violent clashes were relatively rare during the first few months of the stand-off;[364] however, by March 2011, the security situation in Côte d'Ivoire had greatly deteriorated. The Security Council and ECOWAS expressly blamed Gbagbo for the increasing violence both because he refused to cede the presidency,[365] and because his security forces were

[357] *See* Rim, *supra* note 355, at 685. For one thing, the United Nations had carried out a tally process independent of the IEC's but which reached the same conclusion as the IEC: that Ouattara had won. In addition, the U.N. Secretary General for Côte d'Ivoire, along with other international actors, seriously doubted the accuracy of the Constitutional Council's findings. Press Release, Y.J. Choi, Special Rep. of the Sec'y Gen., United Nations Operation in Côte d'Ivoire, Statement on the Second Round of the Presidential Election Held on 28 November 2010 ¶ 11, U.N. Press Release (Dec. 8, 2010), https://peacekeeping.un.org/sites/default/files/past/unoci/documents/unoci_pr_elections08122010.pdf [https://perma.cc/V58T-HCHP]; COOK, *supra* note 353, at 18. For an in-depth discussion of the U.N. certification process in Côte d'Ivoire, see LORI-ANNE THÉROUX-BÉNONI, LESSONS FOR UN ELECTORAL CERTIFICATION FROM THE 2010 DISPUTED PRESIDENTIAL POLL IN CÔTE D'IVOIRE (CIGI-Afr. Initiative, Policy Brief No. 1, 2012).

[358] Choi, *supra* note 357, ¶¶ 14-16.

[359] African Union [AU], *Communique of the 252nd Meeting of the Peace and Security Council*, ¶¶ 4-5, PSC/PR/COMM.1(CCLII) (Dec. 9, 2010).

[360] Economic Community of West African States [ECOWAS], *Final Communiqué, Extraordinary Session of the Authority of Heads of State and Government on Cote D'Ivoire* ¶¶ 7-9, ECW/CEG/ABJ/EXT/FR./Rev.2 (Dec. 7, 2010).

[361] Rim, *supra* note 355, at 685-86.

[362] THÉROUX-BÉNONI, *supra* note 357, at 2.

[363] S.C. Res. 1962 (Dec. 20, 2010).

[364] *See* COOK, *supra* note 353, at 25; Butler, *supra* note 353, at 256.

[365] REPERTOIRE OF THE PRACTICE OF THE SECURITY COUNCIL SUPPLEMENT 2010-2011 pt. I, ch. 10, at 43, U.N. Doc. ST/PSCA/1/ADD.17 (Mar. 30, 2011) (chapter on the situation in Côte d'Ivoire), https://www.un.org/securitycouncil/sites/www.un.org.securitycouncil/files/repertoire_17th_supplement.pdf [https://perma.cc/3939-VGKE] [hereinafter On the Situation in Côte d'Ivoire]; Press Release, Economic Community of West African States [ECOWAS], Resolution A/RES1/03/11 of the Authority of the Heads of State and Government of ECOWAS on the situation in Côte d'Ivoire (Mar. 25, 2011).

perpetrating attacks on unarmed civilians.[366] In late March 2011, the Security Council unanimously passed Resolution 1975, again recognizing Ouattara as the rightful President and condemning Gbagbo's refusal to step down.[367] Soon after, pro-Ouattara forces advanced on Abidjan with the assistance of U.N. forces.[368] Finally, on April 11, 2011, the pro-Ouattara forces, with the help of U.N. and French contingents, arrested Gbagbo.[369]

The ICC prosecutor ostensibly investigated crimes committed by both pro-Gbagbo and pro-Ouattara forces,[370] but ultimately charged Gbagbo,[371] his wife Simone,[372] and Gbagbo's key ally, Charles Blé Goudé.[373] Focusing charges only on Gbagbo and his allies is consistent with my proposal to consider aggressor status in case selection, given Gbagbo's primary and wrongful role in initiating the conflict, a role well recognized by the international community. The United Nations, African Union, and ECOWAS not only condemned Gbagbo verbally and in no uncertain terms, but they also backed up that condemnation by providing Ouattara valuable military assistance to defeat Gbagbo. My proposal certainly would not have precluded ICC prosecutors from also

366 On the Situation in Côte d'Ivoire, *supra* note 365, at 43; *see also* Butler, *supra* note 353, at 256 (reporting on security forces' attacks against peaceful pro-Ouattara demonstrators with heavy weapons, which prompted violent retaliation by armed groups supporting Ouattara).

367 S.C. Res. 1975 (Mar. 30, 2011).

368 Butler, *supra* note 353, at 258.

369 *Id.*

370 Situation in the Republic of Côte d'Ivoire, ICC-02/11-14-Corr 15-11-2011 1/86 CB PT, Corrigendum to "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire," ¶ 26 (Nov. 15, 2011), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2011_18794. pdf [https://perma.cc/8LHT-LC5Z].

371 Prosecutor v. Gbagbo, ICC-02/11-01/11, Warrant of Arrest for Laurent Koudou Gbagbo (Nov. 23, 2011), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2011_20023.pdf [https://perma.cc/6EWJ-SCL3].

372 Prosecutor v. Gbagbo, ICC-02/11-01/12-1, Warrant of Arrest for Simone Gbagbo (Feb. 29, 2012), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2012_03549.pdf [https://perma.cc/7GK6-29X2].

373 Prosecutor v. Blé Goudé, ICC-02/11-02/11-30, Warrant of Arrest for Charles Blé Goudé, ¶ 10 (Dec. 21, 2011), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2015_05632.pdf [https://perma.cc/29XR-Y9CA].

charging pro-Ouattara forces, but given the prosecution's scarce resources, it is unsurprising that it did not.

3. Uganda

Tensions between North and South Uganda date back many decades.[374] During the colonial era, the British drew sharp divisions between the north and south, by introducing industry and cash crop production in the south while drawing laborers and soldiers from the Acholi people of the north.[375] This proclivity to staff Uganda's army with Acholi people from North Uganda persisted after decolonization; although the infamous Idi Amin was just as likely to target the Acholi as to employ them,[376] Amin's brutal predecessor[377] and his successors staffed their armies almost entirely with Acholi and indeed used them to perpetrate notorious mass atrocities.[378]

In 1981, Yoweri Museveni launched the National Resistance Army ("NRA") aimed at overtaking the Milton Obote government.[379] The NRA had considerable popular support,[380] particularly after the Acholi-led Uganda National Liberation Army ("UNLA") perpetrated massacres that left 300,000 dead.[381] In 1985, Acholi General Tito Okello overthrew

[374] When describing the conflict in Northern Uganda, many commentators start at Uganda's colonization by the British. *See* Ruddy Doom & Koen Vlassenroot, *Kony's Message: A New Koine? The Lord's Resistance Army in Northern Uganda*, 98 AFR. AFFS. 5, 7-8 (1999); Anthony Vinci, *Existential Motivations in the Lord's Resistance Army's Continuing Conflict*, 30 STUD. IN CONFLICT & TERRORISM 337, 338 (2007). However, some go back as far as the 14th century, see Adrian Traylor, *Uganda and the ICC: Difficulties in Bringing the Lord's Resistance Army Leadership Before the ICC*, 6 EYES ON ICC 23, 24 (2009).

[375] Manisuli Ssenyonjo, *Accountability of Non-State Actors in Uganda for War Crimes and Human Rights Violations: Between Amnesty and the International Criminal Court*, 10 J. CONFLICT & SEC. L. 405, 409 (2005); Doom & Vlassenroot, *supra* note 374, at 7-8.

[376] Doom & Vlassenroot, *supra* note 374, at 8-9.

[377] Milton Obote both preceded and succeeded Idi Amin as president of Uganda. Frank Schubert, *"Guerrillas Don't Die Easily": Everyday Life in Wartime and the Guerrilla Myth in the National Resistance Army in Uganda, 1981–1986*, 51 INT'L REV. SOC. HIST. 93, 94 (2006).

[378] *See* Tim Allen, *Understanding Alice: Uganda's Holy Spirit Movement in Context*, 61 AFR. 370, 371 (1991); Doom & Vlassenroot, *supra* note 374, at 9.

[379] Doom & Vlassenroot, *supra* note 374, at 9; Schubert, *supra* note 377, at 94.

[380] *See* Doom & Vlassenroot, *supra* note 374, at 9.

[381] *Id.*

the unpopular Obote government,[382] but in January 1986, his government was itself overthrown by Museveni and the NRA.[383] The UNLA fled north to Sudan, regrouped as the Ugandan People's Defense Army ("UPDA"),[384] and sought to regain control of the country.[385] Although the UPDA initially saw some military successes, its prospects soon dimmed, and in 1988, the Government of Uganda ("GoU") signed the Gulu Peace Accord with the UPDA, thereby ending the UPDA's armed struggle.[386]

Other anti-government forces were forming during this period,[387] and among the most publicized was Alice Lakwena's Holy Spirit Movement.[388] Claiming to be possessed by the Holy Spirit, Alice Auma re-christened herself Alice Lakwena[389] and launched the Holy Spirit Movement ("HSM") with the aim of overthrowing Museveni's government.[390] The HSM inflicted embarrassing defeats on the Ugandan

[382] Allen, *supra* note 378, at 371.

[383] Milt Freudenheim & Richard Levine, *Uganda Swears in a Leader and Buries Its Dead*, N.Y. TIMES (Feb. 2, 1986), https://www.nytimes.com/ 1986/02/02/weekinreview/the-world-uganda-swears-in-a-leader-and-buries-its-dead.html [https://perma.cc/68TV-AMRP].

[384] HUM. RTS. WATCH, THE SCARS OF DEATH: CHILDREN ABDUCTED BY THE LORD'S RESISTANCE ARMY IN UGANDA 74 (1997), https://www.hrw.org/reports/uganda979.pdf [https://perma.cc/FZ28-DPZT] [hereinafter SCARS OF DEATH]; Allen, *supra* note 378, at 371; Doom & Vlassenroot, *supra* note 374, at 13-14.

[385] *See* Doom & Vlassenroot, *supra* note 374, at 14; Vinci, *supra* note 374, at 338.

[386] Doom & Vlassenroot, *supra* note 374, at 14-15; *see also* HUM. RTS. WATCH, SCARS OF DEATH, *supra* note 384, at 81, 86 ("By early 1989, the UPDA had virtually ceased to exist.").

[387] Traylor, *supra* note 374, at 24 (reporting that "shortly following Museveni's coup, no fewer than five major rebel movements began operation").

[388] *See* Allen, *supra* note 378, at 373 (noting that the "period between August and October 1987 was Alice Lakwena's moment of fame" and noting that her exploits were "regularly discussed on the BBC" and "reported in the international media"); *see also* MAREIKE SCHOMERUS, THE LORD'S RESISTANCE ARMY: VIOLENCE AND PEACEMAKING IN AFRICA 35 (2021) (reporting that after the GoU signed a peace accord with the UPDA, Lakwena's HSM became "the most prominent and supported armed group in northern Uganda").

[389] Lakwena means messenger, HUM. RTS. WATCH, SCARS OF DEATH, *supra* note 384, at 77, and Alice claimed to be possessed by the spirit of an Italian who died during World War I. Doom & Vlassenroot, *supra* note 374, at 16; Vinci, *supra* note 374, at 338.

[390] HUM. RTS. WATCH, SCARS OF DEATH, *supra* note 384, at 12.

army in 1986,[391] but it was ultimately defeated in November 1987.[392] Many thought that the peace agreement with the UPDA and the defeat of the HSM spelled the long-awaited beginning of peaceful times in Northern Uganda,[393] but at this moment Joseph Kony appeared on the scene.

Kony launched his rebel movement — the Lord's Resistance Army ("LRA") — in 1987.[394] Initially, the LRA, like previous Acholi groups, sought to oust the Museveni government.[395] But two developments changed the LRA's trajectory and its fundamental purpose. First, the LRA became enmeshed in the larger inter-state conflict between Uganda and Sudan. In particular, to retaliate against Museveni for his support of Sudanese rebel groups, the GoS began to arm and finance the LRA as a proxy force fighting the GoU.[396] Second, the LRA broke completely from the goals of the broader Acholi community. Believing that the Acholi people had betrayed him, Kony and the LRA targeted brutal attacks against the Acholi.[397] In the mid-to-late 1990s, the LRA massacred large numbers of Acholi civilians,[398] and it began the widespread practice of

[391] *See id.* at 80; Doom & Vlassenroot, *supra* note 374, at 16.

[392] Doom & Vlassenroot, *supra* note 374, at 16; Vinci, *supra* note 374, at 338.

[393] Doom & Vlassenroot, *supra* note 374, at 20.

[394] Kevin C. Dunn, *Uganda: The Lord's Resistance Army*, 31 REV. AFR. POL. ECON. 139, 140 (2004). Although some commentators incorrectly assert that Kony's Lord's Resistance Army was the continuation of Alice Lakwena's Holy Spirit Movement. *Id.* Alice in fact had rejected Kony, claiming that he "was possessed by an evil spirit" and later that he was cooperating with Museveni. Doom & Vlassenroot, *supra* note 374, at 21; *see also* Allen, *supra* note 378, at 372 ("Kony seems to have operated independently of Alice Lakwena's Holy Spirit Battalion . . . .").

[395] Apuuli, *supra* note 145, at 181-82.

[396] In doing so, Sudan facilitated "the makeover of what had been a motley group of rebels into a coherent, well-supplied military enterprise." Frank Van Acker, *Uganda and the Lord's Resistance Army: The New Order No One Ordered*, 103 AFR. AFFS. 335, 338 (2004); *see also* HUM. RTS. WATCH, SCARS OF DEATH, *supra* note 384, at 85 (reporting that Sudan replaced the LRA's pangas and rifles with machine guns and land mines and thereby increased its "ability to terrorize and kill . . . many times over"); Apuuli, *supra* note 145, at 182.

[397] Doom & Vlassenroot, *supra* note 374, at 25; Vinci, *supra* note 374, at 339.

[398] These massacres occurred at the Atiak, Lokung-Palabek, and the Karuma and Acholpi camps. Doom & Vlassenroot, *supra* note 374, at 25; Vinci, *supra* note 374, at 339.

child abductions.[399] The LRA routinely forced abducted girls into sexual slavery, and it routinely required abductees of both sexes to torture and kill their family members.[400] By mid-2002, when the ICC came into existence, the LRA had already abducted approximately 10,000 children.[401]

The ICC Prosecutor brought charges against Joseph Kony and four of his senior LRA commanders.[402] The conflict in Uganda is lengthier and more complicated than those in Mali and Côte d'Ivoire, but despite the greater complexity, the Prosecutor's decision to charge only LRA defendants is consistent with my proposal and an understanding of the LRA as the wrongful aggressor in the conflict. To be sure, poor relations between North and South Uganda — and even armed conflict — preceded the creation of the LRA, but the introduction of the LRA signified a new phase in the conflict. Just before Kony established the LRA, peace seemed to be at hand as the GoU had defeated and/or negotiated peace with previous enemies. The LRA did not just extend the conflict; it both broadened it and took the conflict in a new and particularly brutal direction. The LRA expanded the conflict by partnering with Uganda's then-enemy, Sudan, which provided the LRA

399 Doom & Vlassenroot, *supra* note 374, at 25-26; Vinci, *supra* note 374, at 339.

400 Doom & Vlassenroot, *supra* note 374, at 25-26.

401 Apuuli, *supra* note 145, at 183.

402 Situation in Uganda, ICC-02/04-01/05, Warrant of Arrest for Dominic Ongwen (July 8, 2005), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2006_01112.pdf [https://perma.cc/P2NC-GCPZ]; Situation in Uganda, ICC-02/04-01/05, Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005 (Sept. 27, 2005), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2006_01096.pdf [https://perma.cc/GW24-F4PQ]; Situation in Uganda, ICC-02/04-01/05, Warrant of Arrest for Okot Odhiambo (July 8, 2005), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2006_01108.pdf [https://perma.cc/3Y9Q-EWKV]; Situation in Uganda, ICC-02/04-01/05, Warrant of Arrest for Raska Lukwiya (July 8, 2005), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2006_01104.pdf [https://perma.cc/59WM-4WRR]; Situation in Uganda, ICC-02/04-01/05, Warrant of Arrest for Vincent Otti (July 8, 2005), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2006_01100.pdf [https://perma.cc/KVZ4-BEVW]. The Pre-Trial Chamber II later terminated the proceedings against Lukwiya based upon reliable evidence that he was killed on August 12, 2006. *See* Prosecutor v. Kony, ICC-02/04-01/05, Decision to Terminate the Proceedings Against Raska Lukwiya ¶¶ 9-10, 18-19 (July 11, 2007), https://www.icc-cpi.int/court-record/icc-02/04-01/05-248 [https://perma.cc/JG79-Z626].

with significant assistance and rendered it a far more formidable opponent.[403] The LRA transformed the nature of the conflict by its own transformation from an Acholi rebel group that sought to advance Acholi political aims to an Acholi rebel group whose goal was its own survival and whose primary victims were also Acholi.[404] Indeed, by the time that the ICC charged the five LRA commanders, the LRA posed little existential threat to the GoU,[405] but it was still unleashing unspeakable terror and brutality against powerless Acholi civilians.[406]

The Uganda situation was unquestionably the most complex of the situations in which only one side the conflict was charged, and it presents the closest case. Given its long length and considerable complexity, the Uganda conflict bears surface resemblance to the conflicts in the DRC and CAR. However, by the time the ICC had temporal jurisdiction, the conflict between the GoU and the LRA was more straightforward. Despite the government's efforts to neutralize it, the LRA was abducting large numbers of children and was committing other, large-scale atrocities. It is reasonable under these circumstances to view the LRA as the aggressor such that it would be targeted with a disproportionate quantity of prosecutions.

CONCLUSION

It matters who starts a conflict. The world's immediate and overwhelming opposition to Russia's invasion of Ukraine[407] shows that

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[403] HUM. RTS. WATCH, SCARS OF DEATH, *supra* note 384, at 85-86.

[404] *See* Christopher E. Bailey, *The Quest for Justice: Joseph Kony & the Lord's Resistance Army*, 40 FORDHAM INT'L L.J. 247, 248-49 n.3 (2017) (describing Kony's "major change of strategy" after "developing a support relationship with Sudan, switching to terror tactics against the Acholi people, and abducting children"); Doom & Vlassenroot, *supra* note 374, at 26; Cecily Rose, *Looking Beyond Amnesty and Traditional Justice and Reconciliation Mechanisms in Northern Uganda: A Proposal for Truth-Telling and Reparations*, 28 B.C. THIRD WORLD L.J. 345, 348 (2008).

[405] Michael Wilkerson, *Why Can't Anyone Stop the LRA?*, FOREIGN POL'Y (Apr. 15, 2010, 6:10 PM), https://foreignpolicy.com/2010/04/15/why-cant-anyone-stop-the-lra/ [https://perma.cc/NR49-5U4U] (noting that the "rebels had mostly been driven out of northern Uganda in 2005 by government troops, and the last LRA attacks on Ugandan soil were in 2006").

[406] PAMELA FABER, CTR. FOR NAVAL ANALYSES, SOURCES OF RESILIENCE IN THE LORD'S RESISTANCE ARMY 13 (2017).

[407] *See supra* text accompanying notes 2–12.

Presidents, foreign ministers, and diplomats know what any six-year-old on a playground could tell you: it matters who starts a conflict.

In a better-functioning world with better-functioning international law, it would matter even more. In such a world, substantive laws governing warfare could take appropriate account of aggressor status so as to better deter and punish those who start armed conflicts. In the actual world in which we live, however, taking account of aggressor status in the substantive laws governing warfare would lead our poorly functioning world to function even more poorly. So, we must content ourselves with considering aggressor status only in enforcement decisions.

On the surface, taking account of aggressor status when allocating international criminal prosecutions is a no-brainer. International prosecutors take account of a host of other considerations, so why not also include a factor that is unquestionably relevant to the equities of case allocation? Part II shows, however, that the surface simplicity of considering aggressor status belies a far more complex and controversial reality. Few factual determinations are as contested as who started an armed conflict. It is for that reason that this Article develops a blueprint for carrying out the inquiry. Which parties? Which kinds of attacks? And how bad must they be? These are just a few of the questions that this Article answers.

The answers are intended to guide case selection practices going forward, but Part III's retrospective examination of case selection at the ICC indicates that aggressor status has been in play all along. Admittedly, case selection is highly complex. No one factor is determinative, and numerous relevant considerations combine and coalesce differently in different contexts. Further, scholars like me who retrospectively examine case selection necessarily lack much relevant information that may have proven highly influential to the prosecutors who actually decided to charge one defendant instead of another. Those caveats aside, in every ICC situation that has proceeded to at least one trial, prosecutors' case allocations were consistent with the unequal enforcement doctrine developed in this Article. This body of evidence thus suggests that the intuitive interest in "who started it" has been exercising considerable, if concealed, influence throughout the life of the ICC.

Although one of this Article's key takeaways pertains to the challenges of considering aggressor status in case selection, an equally central — though contradictory — takeaway is the ease of its consideration. That is, although ICC prosecutors have delineated a host of factors relevant to case selection and these many factors decidedly do not include aggressor status, prosecutors almost certainly have been considering aggressor status, at least subconsciously, when selecting cases. This should come as no surprise. An impressive body of research shows that people evaluate whether violence is justified largely by means of the ends that the violence seeks to attain; in particular, people find 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.[408] These empirical findings are so robust and consistent across cultures that some leading scholars believe the relevant moral intuitions to "have some biological roots"[409] or to reflect a "universal moral code, common to all humanity."[410] In other words: evidentiary lacunas and geo-political posturing notwithstanding, it matters who starts a conflict.

[408] *See* Adam Fraczek, *Moral Approval of Aggressive Acts: A Polish-Finnish Comparative Study*, 16 J. CROSS-CULTURAL PSYCH. 41, 41 (1985); 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); Kirsti M.J. Lagerspetz & Martin Westman, *Moral Approval of Aggressive Acts: A Preliminary Investigation*, 6 AGGRESSIVE BEHAV. 119, 125 (1980); 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); J. Martin Ramirez, José M. Andreu, Takehiro Fujihara, Zoreh Musazadeh & Sunil Saini, *Justification of Aggression in Several Asian and European Countries with Different Religious and Cultural Background*, 31 INT'L J. BEHAV. DEV. 9, 9 (2007).

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

[410] Ramirez et al., *supra* note 408, at 4.