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# The Crime of Aggression's Show Trial Catch-22

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## Abstract

*The crime of aggression amendment to the statute of the International Criminal Court (ICC) that was adopted in Kampala in 2010 was activated on 17 July 2018. This article argues that this new criminal provision is open enough to allow legally equally sound, but mutually exclusive, arguments that lead to opposite positions on whether the use of force in a particular situation is or is not a crime of aggression. It thereby enables the translation of political contestation on the causes of war and legitimacy of use of force into the moralized language of international criminal law, in the setting of a criminal court of law. This article shows how and why the crime of aggression norm is left open to allow contrary argumentation, in particular through its 'manifest violation' criterion, how the openness of the norm is used in argumentation about the lawfulness/legitimacy as well as aggressiveness of Russia's role in separating Crimea from Ukraine as well as what it means to transpose political contestation into a criminal courtroom setting. The article forebodes that it puts the ICC in a Catch-22 position. Whether it allows the accused to argue its counter-narrative or not, it will be accused of holding a show trial when prosecuting for the crime of aggression. In a time when the ICC's legitimacy is under great stress, this article warns that if prosecutions for the crime of aggression will take place, they are more likely to leave behind the bad taste of a show trial than achieve much in terms of administering justice, suppressing aggression and contributing to more peaceful interaction between states.*

Since 17 July 2018, the International Criminal Court (ICC) may prosecute individual state leaders for their state's use of armed force against other states or, in other words, their role in the commission of the crime of aggression.<sup>1</sup> What armed force this crime

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<sup>1</sup> On 11–12 June 2010, the Assembly of States Parties to the International Court of Justice (ICC) adopted a definition and jurisdictional regime for the crime of aggression during the Review Conference of the ICC's Rome Statute, in Kampala, Uganda. This amendment to the Rome Statute provided that the Court may exercise jurisdiction after 30 states parties have ratified the amendment and subject to an activation decision to be taken after 1 January 2017 by a majority of the Assembly of States Parties. This decision was taken on 14 December 2017 during the 16th session of the Assembly of States Parties that took place in New York on 4–14 December 2017 and provided that the ICC's jurisdiction over the crime of aggression would be activated on 17 July 2018.

of aggression includes and excludes, however, remains fundamentally contested.<sup>2</sup> This contestation goes to the very core of the crime; the essence of the criminalized behaviour – that is, resorting to armed force against another state – can be understood as a violation of the highest norms and, thus, criminal ('the supreme international crime', according to the Nuremberg Tribunal<sup>3</sup>). Yet, at the same time, it can be understood as a protection of these highest norms as well (either with humanitarian, justice or necessity arguments) and thus perceived as heroic rather than supremely criminal.<sup>4</sup>

This fundamental political contestation comes to the fore in many use-of-force discussions. For example, with regard to the 1999 bombing campaign by the North Atlantic Treaty Organization (NATO) in Belgrade, the 2003 invasion of Iraq by the United States (USA) and the United Kingdom (UK), the discussions in and out of the United Nations (UN) Security Council on whether to intervene in Darfur, on whether and at what point a right to self-defence exists against states that increase their nuclear capability, on the scope of the right to self-defence against non-state actors (including terrorists), on the interpretation of the Security Council's authorization to use force against Libya, on whether or not (and to what extent) to intervene in Syria and on Russia's assistance in effectuating secession of Abkhazia, South-Ossetia, the Crimea and Eastern Ukraine. These discussions in international politics and global public opinion demonstrate that there continues to be severe disagreements over a wide range of possible legitimations of resorting to armed force on what is and is not supposed to fall within the scope of the notion of 'aggression'.

This political contestation is translated into the crime-of-aggression provision because the provision is left open enough to allow legally often equally sound, but mutually exclusive, arguments that lead to opposite positions on whether the use of force in a particular situation is or is not aggression and whether the alleged offender is a supreme criminal or, instead, a hero. In a criminal court of law, this openness not only creates a fundamental tension with criminal law's principle of legality but also provides the ingredients for turning the criminal case into a spectacle, a show trial. This article discusses this combination between the crime-of-aggression provision's openness to political contestation and how this facilitates the ability to turn the trial into a backfiring spectacle. It argues that the crime-of-aggression norm that is included in the Rome Statute is indeterminate and that, consequently, the Court will be trapped in a 'Catch-22' when it decides to prosecute state leaders for aggression.<sup>5</sup> It is a Catch-22 because it will be perceived as a show trial and allows the defendant to take up the martyr's role notwithstanding whether it allows the defendant the space to make its case or whether it limits this space.

<sup>2</sup> This point is explored in detail by Ruys, 'Criminalizing Aggression: How the Future of the Law on the Use of Force Rests in the Hands of the ICC', in this issue 887.

<sup>3</sup> Judgment, *Göring and Others*, 1 October 1946, reprinted in 41 *American Journal of International Law* (1947) 172, at 186.

<sup>4</sup> For a discussion of the ways in which 'the unleashing of violence' might be seen as part of the 'increasingly imperative demand for justice', see Mégret, 'International Criminal Justice as a Peace Project', in this issue, 835.

<sup>5</sup> Rome Statute of the International Criminal Court (Rome Statute) 1998, 2187 UNTS 90.

To a certain extent, all trials are political as they involve questions of social power, legislative choice, prosecutorial discretion and judicial interpretation.<sup>6</sup> And many more of the international crimes are, when brought against an individual, fundamentally contested, most notably when it concerns genocide, war crimes or terrorism charges, which is when the accused will also invoke that their killings were necessary to protect a greater good. I do not argue that aggression is unique in that sense, and the analysis in this article therefore applies, to a certain extent, to the broader field of international criminal justice. International criminal justice faces significant challenges, not the least to do with its role in an international legal order that paradoxically reflects both sovereign equality and the aspiration to govern supra-nationally. While the analysis in this article applies to a certain extent to other crimes, the crime of aggression raises these issues in the extreme, as it concerns the most fundamental and very essence of a state's sovereign abilities and power: to use force to protect its way of life, in the broadest interpretation thereof. Notwithstanding the brutal consequences wars may and usually have, the resort to armed force as such is not necessarily tied to the behaviour that occurs within the wars that follow from these decisions, which is what the other international crimes address. Genocide, crimes against humanity and war crimes usually entail brutal slaughtering by the hundreds or thousands. While justifications thereof usually find willing ears here and there, they tend to be less convincing and less fundamentally contested than the array of legal justifications that the decision to resort to force as such may invoke, such as defending national security or intervening for humanitarian reasons. Consequently, states are even more likely to use all legal and political means available to challenge an accusation of aggression when brought to court. This article submits that it should be of concern what will be left of the ICC's legitimacy (and, thus, effectiveness) when on top of all its current challenges it also has to conduct crime-of-aggression trials, fought over the legitimacy and very existence of this Court, as I will discuss in the latter part of the article.

The text proceeds as follows. The first section asserts that the crime of aggression is indeterminate by demonstrating how this openness and fundamental contestation is captured in the ICC's crime-of-aggression provision. Because the crime-of-aggression norm is not actively used in courts and rarely openly in discourse either, the argument how this plays out remains inherently somewhat speculative. Therefore, the second section illustrates this indeterminacy by showing how the openness of the use-of-force norm enabled arguments that legitimized as well as condemned the role of Russia in the secession/annexation of Crimea in 2014. The third section analyses what the crime of aggression's openness and manifest criterion means for judges. The fourth relates this back to the sentiments in Kampala when the provision was negotiated, where an awareness of some fundamental challenges to judges was turned into a faith in the judges' abilities to overcome these difficulties. The fifth section moves the discussion to how this facilitates the defendant to turn the trial into a spectacle and attack the Court's independence, impartiality and legitimacy. And the final section

<sup>6</sup> For a discussion on the political nature of trials, see, e.g., G. Simpson, *Law, War and Crime* (2007), at 14.

concludes with some observations on the legitimacy of the ICC. In a time when the ICC's legitimacy is under great stress, this article warns against prosecutions of the crime of aggression because they may more likely leave behind the bad taste of a show trial than achieve much in terms of administering justice, suppressing aggression and contributing to more peaceful interaction between states.

## 1 The Openness of the ICC's Crime-of-Aggression Provision

Diplomatic negotiations on the definition of aggression throughout the 20th century have demonstrated that 'aggression' is not regarded as the equivalent of 'illegal use of force' but, rather, a narrower category. All aggression is illegal use of force, but not all illegal use of force is also regarded as aggression. The question that ensues is how to distinguish illegal use of force that is a crime of aggression from illegal use of force that is not supposed to be included within the ambit of this definition and crime. The crime-of-aggression amendment to the ICC provides that an act of aggression means the use of armed force of one state against the sovereignty, territorial integrity or political independence of another.<sup>7</sup> A crime of aggression entails 'the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations'.<sup>8</sup> Thus, despite being illegal, an illegal use of force is not a crime of aggression unless it is also a manifest violation of the UN Charter.

The idea behind the 'manifest violation'-threshold clause was that it would distinguish minor incidents and legally controversial cases from criminalization.<sup>9</sup> In abstraction, the diplomats in Kampala agreed that 'manifest' was intended to exclude grey areas from the scope of the crime of aggression. See, for instance, this statement in the report of the June 2008 Special Working Group meeting: 'Delegations supporting this threshold clause noted that it would appropriately limit the Court's jurisdiction to the most serious acts of aggression under customary international law, thus excluding cases of insufficient gravity and falling within a grey area.'<sup>10</sup> 'Gravity' and 'scale' were intended to exclude border skirmishes and the like, while 'character' needs to exclude genuinely legally controversial cases.<sup>11</sup>

Yet, inserting this threshold clause did not eradicate the disagreement on what a grey area is when the grey itself is contested. Notwithstanding the existence of some widely

<sup>7</sup> Rome Statute, *supra* note 5, Art. 8bis(2). This is an exact copy of the definition of aggression provided in *Definition of Aggression*, GA Res 3314 (XXIX), 14 December 1974.

<sup>8</sup> Rome Statute, *supra* note 5, Art. 8bis(1).

<sup>9</sup> Ambos, 'The Crime of Aggression after Kampala', in *German Yearbook of International Law* (2010) 463, at 482–483.

<sup>10</sup> S. Barriga, W. Danspeckgruber and C. Wenaweser, *The Princeton Process on the Crime of Aggression: Materials of the Special Working Group on the Crime of Aggression, 2003–2009* (2009), at 87, para. 68.

<sup>11</sup> Kress, 'Time for Decision: Some Thoughts on the Immediate Future of the Crime of Aggression: A Reply to Andreas Paulus', 20 *European Journal of International Law (EJIL)* (2009) 1129, at 1138.

agreed upon instances of aggression in discussions about use of force, such as the Nazi invasions throughout Europe and Saddam Hussein's occupation of Kuwait, there is often not even agreement on whether the situation is legally unclear. This contestation was also reflected in the many-decades of discussions on whether and how to regulate and criminalize the notion of aggression. The problem, encountered repeatedly, is the fundamental disagreement on what exactly aggression is once discussions become less abstract than 'aggression is a crime'. As soon as discussions relate concretely to one or another actual conflict, fundamental disagreement emerges regarding whether and whose invocation of the right of self-defence is actually lawful self-defence; whose humanitarian intervention is properly humanitarian and, therefore, perhaps (or not) excusable/justified and, thus, not manifest/criminal, as some may argue; and whose interpretation of what a UN Security Council authorization includes or not is correct.

This agreement in the abstract (aggression is criminal) and disagreement in the particular (this situation is or is not the crime of aggression) has been translated in the crime-of-aggression norm through its threshold clause of 'manifest violation'. Many commentators have rightly pointed to the vagueness and ambiguity of this threshold clause. According to Article 46(2) of the Vienna Convention on the Law of Treaties, a violation of domestic law can be invoked as manifest 'if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith'.<sup>12</sup> The *Oxford English Dictionary* holds that manifest means 'clearly revealed to the eye, mind, or judgement; open to view or comprehension; obvious'.<sup>13</sup> As Andreas Paulus has observed, on the one hand, this amounts to an extremely restrictive standard, but, on the other hand, it is also an unclear standard, as what 'is obvious for one is completely obscure to the other, in particular in international law'.<sup>14</sup> Pointing to this disagreement, he submits that the definition is therefore indeterminate.<sup>15</sup> Dapo Akande agrees with Paulus, asserting how this 'obviously illegal' requirement effectively provides for a 'mistake-of-law' defence that is unavailable to the other crimes.<sup>16</sup> Sean Murphy, moreover, notes that it is a remarkable development to include a provision that says that some acts of aggression are thus not criminal and that even though the UN places aggression on the high end of coercive measures, an act of aggression may not be a 'manifest' violation of the UN Charter.<sup>17</sup> And Kai Ambos holds that the lack of precision of the threshold clause is embedded in the primary norm regulating the use of force and that because it is not possible to clearly delimitate lawful from unlawful use of force, no secondary norm could be drawn any clearer.<sup>18</sup>

<sup>12</sup> Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331.

<sup>13</sup> Entry 'manifest, adj. and adv.', *Oxford English Dictionary Online*, August 2014, available at [www.oed.com/view/Entry/113483?rskey=NQGU19&result=2&isAdvanced=false#eid](http://www.oed.com/view/Entry/113483?rskey=NQGU19&result=2&isAdvanced=false#eid).

<sup>14</sup> Paulus, 'Second Thoughts on the Crime of Aggression', 20 *EJIL* (2009) 1117, at 1121.

<sup>15</sup> *Ibid.*, at 1123.

<sup>16</sup> D. Akande, 'Prosecuting Aggression: The Consent Problem and the Role of the Security Council', Oxford Legal Studies Research Paper no. 10/2011 (2010), available at <http://ssrn.com/abstract=1762806> or <http://dx.doi.org/10.2139/ssrn.1762806>.

<sup>17</sup> Murphy, 'Aggression, Legitimacy and the International Criminal Court', 20 *EJIL* (2009) 1147, at 1150–1151.

<sup>18</sup> Ambos, *supra* note 9, at 483–484.

I agree with each and would add that all of this becomes even more rickety because the crime of aggression tries to distinguish between two types of illegal uses of force – illegal and aggressive use of force, on the one hand, and illegal and not aggressive use of force, on the other – and therefore treads the realm of the legitimacy as well as the legality of the use of force, in a court of criminal law no less. While there was little agreement on how this ‘manifest violation’ threshold would actually eradicate in practice the grey areas that surround the notion of aggression, the overriding shared assumption among the diplomatic community was that the ICC’s judges could and should decide in a concrete case whether or not the alleged crime of aggression was indeed a manifest violation of the UN Charter. In so doing, they were asked to distinguish between crimes of aggression, on the one hand, and ‘illegal but legitimate’ uses of force, on the other: uses of force that may be illegal but are not (criminally) aggressive because even though they are a violation of the UN Charter, they are not a manifest violation of it. The distinction thus becomes not only one of legal/illegal but also one of whether – even if illegal – it is also legitimate, such as for humanitarian purposes for some or for protecting sovereignty for others, to name a few possible justifications.<sup>19</sup> The question of whether a use of force is thus not only an illegal use of force but also one that, by its character, gravity and scale, manifestly violates the UN Charter transposes disagreement on how the purposes of the UN Charter need to be interpreted and weighed against each other – and, thus, disagreement on the nature of world order – to the application of criminal law on the actions of individuals that allegedly commit aggressive war. For example, on the one hand, it can be stated that NATO’s 1999 bombings are a manifest violation of the UN Charter and, thus, aggression because it is the main purpose of the UN to prevent war and to protect individuals ‘from the scourge of war’.<sup>20</sup> To use war to make peace or to stop human rights abuses is still war and, thus, not in conformity with this reading of the UN Charter unless authorized by the UN Security Council or in self-defence. On the other hand, others argue the contrary, namely that NATO’s bombing of Belgrade was not a manifest violation, and, thus, not aggression, because, for instance, it is intended to protect civilians from harm and against human rights abuses, which is also one of the main goals of the UN and – according to proponents of that intervention – the better way to prevent (further) war.<sup>21</sup>

The same use of force can therefore be understood by one to be ‘aggression’, while another finds it humanitarian, just or necessary. These different approaches to assessing whether use of force is aggressive or not vary according to, for example,

<sup>19</sup> The Independent International Commission in Kosovo called the North Atlantic Treaty Organization’s bombing campaign on Serbia ‘illegal but legitimate’. Independent International Commission in Kosovo, Kosovo Report (2000); see also Ruys’s discussion of how the Court will have to decide on the ‘genuineness’ of a humanitarian intervention. Ruys, *supra* note 2.

<sup>20</sup> UN Charter, Preamble, Art. 1(1) and especially Art. 2(4). For more discussion on the disagreement of the international community on its values with regard to war, see also J. Castellino, *International Law and Self-Determination: The Interplay of the Politics of Territorial Possession with Formulations of Post-Colonial National Identity* (2000); Creegan, ‘Justified Uses of Force and the Crime of Aggression’, 10 *Journal of International Criminal Justice* (2012) 59.

<sup>21</sup> See UN Charter, Art. 1(3) and Preamble, *supra* note 2.

worldviews, power and interest positions, values and morality, subjective perceptions of reality and risk assessments. Because these different approaches rely on different assumptions that may contradict one another fundamentally, they lead to different understandings of what the role of the UN, states and individuals are as well as of what values to protect, to what extent interests may justify using force (and which interests may and may not justify force) and how a situation and the risk that it worsens is understood. Different understandings of such factors may lead to different understandings of what a 'manifest violation' of the UN Charter is and, thus, what constitutes a crime of aggression.<sup>22</sup>

The crime of aggression is therefore open to its very core; a use of force can be regarded as a violation of the highest norms or, instead, as protecting such highest norms, depending on how one approaches and uses the provision. This openness in the norm is created because the notion of aggression attempts to accomplish two goals simultaneously: (i) it seeks to protect states against the aggression of others and (ii) it seeks to maintain states' own freedom to use force when justified as being for 'the good'. However, the meaning of 'the good' – and, thus, what may be illegal but not manifestly contrary to the UN's goals – is essentially contested. Because of this, the crime of aggression can be used to argue mutually exclusive positions – to argue both A and non-A at the same time. The crime of aggression, therefore, cannot adequately distinguish 'aggressive' from 'non-aggressive' behaviour because it remains unclear what exactly aggression is, and it does not provide a meta-criterion on the basis of which different viewpoints, values, interests and fairness can be weighed in light of the particular circumstances at hand. Political contestation on the legitimacy of using force, and related questions such as what caused the war and who is responsible, is therefore not resolved by creating the crime-of-aggression norm. Instead, it transports this political contestation into a criminal court of law.

Because the ICC has not prosecuted anyone for the crime of aggression (yet), it is not possible to analyse it in practice. However, this discussion on the openness of the crime of aggression becomes more concrete by applying the 'manifest' criterion to a recent example of discussions on the legality and legitimacy of use of force: the 2014 Crimea crisis. In the 2014 Crimea crisis, contestation revolved particularly around the question whether the role of Russia in Crimea's separation from Ukraine was aggressive or, instead, in support of human rights and sovereignty, as Russia itself claimed.

## **2 An Example: Crimea, Russia's Protection of the Highest Norms and Russia's Violation of the Highest Norms**

If there is one element that all contemporary discussions on using force have in common, it is that they are discussed in terms of international law and that these conflicts are not only fought out on the battlefield but also in the arena of global public opinion,

<sup>22</sup> This is further explained in M. de Hoon, 'The Law and Politics of the Crime of Aggression' (2015) (PhD dissertation on file at the Vrije Universiteit Amsterdam).

with the legal language as the weapon of choice. The language of international law functions as a vocabulary and grammar to international politics. It provides the vocabulary by conditioning which words are and are not used in international politics. For instance, no state will say that it chose to act as the aggressor, as it will not only thereby admit to the illegality of its own acts but also politically damage its reputation. Instead, states say they 'defend', 'protect' or 'restore peace'. Moreover, international law provides a grammar to international politics by providing a structure through which arguments are constructed. Arguments are worded in legal vocabulary and follow the grammar of a legal logic that requires it to be buttressed by legal sources and that regulates what is and is not recognized as valid as well as persuasive. Words like 'defend', 'protect' or 'restore peace' are placed in structures that invoke a legal basis (whether in good or bad faith and convincing to all, most or no one). For example, 'defending' is connected to the right to self-defence or defence of others, 'protecting' is connected to the responsibility-to-protect doctrine and often invokes the Kosovo situation as precedent and 'restoring peace/stability' alludes to the UN Charter's nexus between using force and maintaining or restoring international peace and security in its Chapter VII.

Looking at the recent Crimea situation, for example, both Russia and Ukraine invoked legal argumentation to make their case. On 28 February 2014, Russian military troops were sent to Crimea in addition to those already stationed there, claimed by Russia as part of a military exercise and in accordance with the existing agreements between Ukraine and Russia for Russian military presence in Crimea. On 1 March, Russian President Vladimir Putin requested permission from the Russian parliament to send more troops to Crimea, using the reasoning that it was protecting the safety of ethnic Russians. On that same day, the Ukrainian parliament declared that it interpreted the increased Russian military presence in Crimea as a military invasion and the Russian decision to send additional troops as a declaration of war. On 4 March, Putin made a public statement in which he denied that Russia had annexed Crimea, that the Russian uniformed military troops that were surrounding key strategic locations in Crimea were not Russian troops but, rather, Ukrainian troops (suggesting that they wore Russian uniforms left over from when Ukraine was part of the Soviet Union), that Russia did not recognize the new Ukrainian government and that the Russian military presence was invited by the lawful government of Ukraine, led by President Viktor Yanukovich, who, however, had fled the capital and had been ousted by the Ukrainian parliament. By 12 March, Crimea was fully isolated from the rest of Ukraine through a closure of its main airfield (with the notable exception of flights to and from Moscow), which followed the occupation of the railway headquarters and roadblocks to close off all land routes and the blockade of Sevastopol harbour that prevented Ukrainian warships from leaving or entering the port. After a referendum in which the population of Crimea expressed its wish to become part of Russia, Crimea was formally included into Russia. By 24 March, the Ukrainian military withdrew from Crimea, after Kiev's last remaining military assets were stormed by the Russian military in the week before.



The Crimea crisis illustrates the openness of the normative framework surrounding use of force and, thus, the various ways in which international law can be invoked in an effort to strengthen a position with law's power. According to Russia, its role in Ukraine was merely to protect 'their compatriots' against violations of international law and, therefore, that it acted to protect the highest norms. To argue that it would be lawful to resort to force to protect the Crimeans, Putin adopted a 'responsibility-to-protect' type of argumentation by claiming that it was entitled to protect Crimeans against abuses of their rights by resorting to armed force (if necessary) on the basis of NATO's intervention in the Kosovo situation as a precedent. Furthermore, Putin claimed that the people of Crimea were exercising their right to self-determination, again in a similar manner as those of Kosovo did when they declared independence, and that Russia merely supported them in executing the independence they chose in their referendum, thus, fulfilling their human rights. Moreover, Putin raised a Hobbesian self-preservation/self-defence type of argument that Russia needed to act in Crimea because the 'westernization' of Ukraine – and, thus, of Crimea – caused existential threats to Russia's autonomy. In a number of speeches during 2014, Putin applied the rationale to justify its activities in Ukraine that if Russia would not have acted in Ukraine it would have lost an important part of its ability to protect its way of life and the survival of the Russian influence over states it regarded as part of its influence sphere, realm or empire.<sup>23</sup> Even though Putin did not provide a serious attempt to buttress this self-defence argument with legal sources, he did aim to provide legitimacy to the Russian cause and, thus, to undermine qualifications of committing a crime of aggression.

Conversely, Ukraine accused Russia of perpetrating aggression and thus violating the highest norms. The government of Ukraine invoked the 1974 UN General Assembly's definition of aggression and Article 8bis(2)(a) of the Rome Statute, which states that acts of aggression include annexation of the territory of another state by using force, which they argued was obvious given Russia's military presence in

<sup>23</sup> In his 4 December 2014 presidential address to the Federal Assembly, Putin submitted that Russia has an absolute need for sovereignty. He stated: 'If for some European countries national pride is a long-forgotten concept and sovereignty is too much of a luxury, true sovereignty for Russia is absolutely necessary for survival.' Speech by Russian President Vladimir Putin, delivered on 4 December 2014, available at <http://en.kremlin.ru/events/president/news/47173>. In his end of the year televised question-and-answer appearance on 18 December 2014, Putin explained this geopolitical strategy further by using a 'bear-in-the-forest' metaphor, referring to Russia's national symbol. 'Sometimes I think, maybe they'll let the bear eat berries and honey in the forest, maybe they will leave it in peace,' Putin contemplates. He then continues by saying: 'They will not. Because they will always try to put him on a chain, and as soon as they succeed in doing so they tear out his fangs and his claws. Once they have taken out his claws and his fangs, then the bear is no longer necessary. He will become a stuffed animal.' And then tying it back to Crimea, Putin says: 'The issue is not Crimea, the issue is that we are protecting our sovereignty and our right to exist.' He finished the metaphor by asking the Russian audience whether they would prefer the Russian bear to just become a stuffed animal. For English translated excerpts of the television interview of 18 December 2014, see, e.g., M. Dejevsky, 'Putin Speech: President Says Russian Bear "Won't Be Chained" by the West as He Warns of Tough Two Years Ahead', *Independent* (18 December 2014), available at [www.independent.co.uk/news/world/europe/putin-speech-president-says-russian-bear-wont-be-chained-by-the-west-as-he-warns-of-tough-two-years-ahead-9934532.html](http://www.independent.co.uk/news/world/europe/putin-speech-president-says-russian-bear-wont-be-chained-by-the-west-as-he-warns-of-tough-two-years-ahead-9934532.html).

Crimea and their statements that showed the willingness to use their military means to accomplish the separation of Crimea from Ukraine. Moreover, pointing to satellite images that show how Russian vessels blocked the port of Sevastopol for Ukrainian traffic but not for the Russian fleet, Ukraine argued that Russia also committed the act of aggression of the blockade of ports, as provided by Article 8bis(2)(c) of the Rome Statute. Although many states supported Ukraine and announced economic sanctions against Russia in response, very little happened otherwise, and Crimea is currently – at least de facto – part of Russia.

While not operative and, thus, impossible to prosecute under, the crime-of-aggression amendment was adopted prior to this situation, and Ukraine referred to the norm in its accusation of Russia. Therefore, let us examine how the ‘manifest violation’ criterion applies to this situation. Given the above types of arguments, the core of the contention lies in whether the (alleged) annexation of Crimea is ‘by its character’ a manifest violation of the UN Charter. Those that argue that it is (see Ukraine’s argumentation above) will say that it hence also clearly meets the ‘gravity’ and ‘scale’ components since it concerns, rather than ‘border skirmishes’, the annexation of a significant and strategically important territory. Yet, seen through the Russian rationale (whether in good or bad faith is irrelevant for understanding the openness of the crime-of-aggression provision), it is ‘by its character’ not a manifest violation of the UN Charter and, thus, inherently not too grave or problematic. Putin used almost word for word the legal argumentation that Western states used to recognize the independence of Kosovo and to justify NATO’s bombings. Dismissing the type of argument as invalid means similarly dismissing the argumentation for the Kosovo intervention. Consequently, those opposing Russia’s actions in Crimea, but supporting NATO’s actions concerning Kosovo, raise arguments such as that Kosovo was a *sui generis* case, that it did not provide precedent for other situations and, in any case, that the situation in Crimea did not compare because the human rights violations in Crimea were not as grave as they were in Kosovo.

The ‘manifest violation’ criterion would come down to deciding the scope, meaning and applicability of justifications for using force that are not manifest violations of the UN Charter, such as Putin’s invocation of the responsibility to protect. Similarly, when it concerns Putin’s self-preservation/self-defence argument, acting against threats to its influence sphere and therefore power position is, according to Russia and many other (powerful) states in the past (USA in Vietnam and Central America, China in Tibet, Western powers in Africa and other colonial regions), although perhaps illegal, not manifestly in violation of the UN Charter. The ICC would thus have to engage in discussions that are highly and fundamentally contested in global politics. Since the question of the crime of aggression goes beyond legal/illegal and asks judges to decide over which illegal uses of force are and are not legitimate (or at least not manifestly a violation of the highest norms), we are brought back to the discussion of which use of force is properly for ‘the good’ – protecting, defending or restoring stability legitimately, even if perhaps illegally – and which is not; we thus encounter problems surrounding what is ‘the good’, for whom and who gets to decide this. Which is precisely what is of the most intense contestation in the geopolitical pluriverse in which we all live.

### 3 Judging the Crime of Aggression

The obvious question that arises is how the ICC's judges are supposed to make such decisions. Adjudicating such an essentially contested and indeterminate notion in a criminal court of law raises various concerns for the traditional criminal law paradigm. For the task of adjudication, a predominant concern is the fact that a judge is forced to choose one conceptual framework over another, one conception of 'the good' over another or one understanding of what is necessary over another. This is not to say that a judge or panel of judges is not able to make a choice because obviously, in a concrete case, a judge can always say yes or no, right or wrong, red or blue, and even reason towards one or another decision, buttressing it with legal sources. Rather, the point is that placing such a question before a judge results in a level of unpredictability that raises tensions with criminal law's principle of legality and enables a structural indeterminacy in the institution beyond individual judges' decision-making. On the one hand, the judge is forced to make intrinsically political decisions between differing views of the world and the function of use of force in it. But the judge has to do so without much external guidance in the form of a meta-criterion that provides support in grasping what to prioritize. On the other hand, a judge is not allowed to appear (too) political either. If he or she exercises her discretion 'too far' and formulates views into rules that, in the words of Duncan Kennedy, seem to achieve 'extradiscursive political objectives', the judge will be criticized for being disloyal and politicizing the institution.<sup>24</sup> And it is exactly this conundrum that allows a defendant to turn his trial into spectacle and himself into a martyr, invoking the counter-narrative to demonstrate how political the trial is. The manifest criterion thus seems to rely on the assumptions (i) that there is a way in which to assess, with sufficient accuracy for a criminal norm, what use of force is and is not, 'by its character', legitimate and (ii) that this is what the ICC's judges should (ultimately) decide on if the question arises.

There is disagreement, however, on how substantial the judges should understand the question into the manifestness of the violation when put before them or whether they should dismiss as not manifest any situation that could be argued to be legitimate (that is, as therefore not a manifest violation of the UN Charter). For example, Harold Koh, on behalf of the US delegation, argued in Kampala that 'manifest' simply excludes all situations that can be argued to be lawful or legitimate:

If Article 8bis were to be adopted as a definition, understandings would need to make clear that those who undertake efforts to prevent war crimes, crimes against humanity or genocide – the very crimes that the Rome Statute is designed to deter – do not commit 'manifest' violations of the UN Charter within the meaning of Article 8bis. Regardless of how states may view the legality of such efforts, those who plan them are not committing the 'crime of aggression' and should not run the risk of prosecution. At the same time, in order for an investigation or prosecution to proceed it must be shown that it was manifest that the action was not undertaken in self-defense, without the consent of the state in question, and without any authorization provided by the Security Council.<sup>25</sup>

<sup>24</sup> D. Kennedy, *A Critique of Adjudication: Fin de Siècle* (1997), at 370.

<sup>25</sup> Statement made by US delegate Harold Koh in Kampala during the Rome Statute Review Conference in Kampala on 4 June 2010 (on file with author).

Moreover, Claus Kress asserts that because the definition excludes ‘seriously controversial cases ... in order not to decide major controversies about the content of primary international rules of conduct through the back door of international criminal justice’, the ‘manifest’ criterion ‘will make proceedings for a crime of aggression an exceptional event’.<sup>26</sup> It seems therefore that, according to Koh and Kress, since the ICC’s judges should not ‘decide major controversies about the content of primary international rules of conduct through the back door of international criminal justice’,<sup>27</sup> the Crimea situation would be dismissed from the scope of the crime of aggression. There is obvious major contention over whether it is a manifest violation or not, and Russia and its allies argue that it was undertaken to prevent further serious human rights violations and, thus, to protect the population of Crimea as well as a needed support to the exercise of the right to self-determination by the Crimeans. On the one hand, this may seem wise in any event, given the geopolitical power struggle the ICC would be brought into if it would engage in the matter – taking up the fight against a power like Russia, with its already severe challenges. On the other hand, however, it also raises the question what the crime of aggression is if it is not to provide for situations like these.

Following this reasoning means that since most use-of-force situations nowadays raise major and serious controversies (notwithstanding whether one agrees with whether they are actually legally controversial or not), the crime of aggression remains of very limited scope and meaning. Alternatively, if such situations are not dismissed for being controversial and thus outside of the scope of the crime of aggression, judges would have to decide not only on the (il)legality of force, with all of its difficulties in and of itself,<sup>28</sup> but also on the question of the (il)legitimacy of illegal force, where there is fundamental disagreement on what is just and necessary. And it is this that makes this crime so particularly usable for undermining the perception of the ICC’s independence and impartiality when a defendant is put in the dock, even more than in most other international criminal justice cases.

#### 4 The Kampala Sentiment: About a Train That Left the Station and Faith in Judges

Now that the crime-of-aggression amendment is activated and the ICC may exercise jurisdiction over it, it is important to consider what this means for potential cases at the ICC. To emphasize his point that the notion of aggression tries to simplify a question that is rarely that straightforward – what caused a war? – Judge Pieter Kooijmans introduced his separate opinion in the International Court of Justice’s *Armed Activities* case by quoting John P. Clark, who said the following about the Ugandan intervention in Congo:

<sup>26</sup> Kress, *supra* note 11, at 1142.

<sup>27</sup> *Ibid.*, at 1142.

<sup>28</sup> E.g., the legality of self-defence against non-state actors, the limits of anticipatory self-defence and the interpretation of United Nations Security Council authorizations.

[T]o explain the intervention of one State into the affairs of another is rarely simple or uncontroversial ... To maintain objectivity in the face of confusing and contradictory evidence is particularly difficult. ... Moreover the results are likely to be tentative, partial and complex, and therefore less than totally satisfying. One is more likely to end with a 'thick description' of a complex episode than a 'scientific' explanation of a discrete social event.<sup>29</sup>

The openness of the crime-of-aggression provision, particularly through its 'manifest violation' criterion, results in the fact that, as a consequence, the substantive contestation over the notion of aggression that cannot be resolved in the political system is transposed to the criminal courtroom – delegated to its judges to deal with. Adjudicating such an essentially contested and indeterminate notion in a criminal court of law raises various concerns for the traditional criminal law paradigm, most particularly with regard to criminal law's fundamental principle of legality. This provides that an individual must be able to know prior to its conduct whether its acts would constitute a crime.

The complexity behind the notion of aggression was not a consideration that went unnoticed to the negotiators in Kampala. Stephen Rapp of the USA, for instance, raised the concern that 'moving forward now on the crime of aggression *without* genuine consensus could undermine the Court'.<sup>30</sup> It was not unknown to be complex; it was just not felt as being crucially important. Any consideration or second thought about whether international criminal law was an appropriate place to deal with aggression was waived away under the mantra: 'that train has left the station' (meaning: let's not talk about that, this is an irreversible course).<sup>31</sup> We cannot now say we will not do it, can we? Not after the Nuremberg Tribunal called it the 'supreme international crime'. And, anyway, we already decided in Rome that we could not have an International Criminal Court without the crime of aggression. So the problem was passed on to the judges, justified by the platitude that we have to 'have faith in the judges'.

The sentiment in Kampala was that progress, ending impunity, saving succeeding generations from the 'scourge of war'<sup>32</sup> and the civilizing project of international relations would all come another step closer to realization. For many in Kampala, this meant having faith in the ability of judges to resolve these issues in the end. For example, when the debate between members of the Assembly of States Parties was confronted with publicly pronounced extreme positions that seemed unlikely to lead to a consensus, Ben Ferencz, who prosecuted Nazi leaders for aggression at Nuremberg, took the stage. He spoke to the statesmen and diplomats passionately about how the idea of creating a crime of aggression under the jurisdiction of the ICC would end the impunity of those who use aggressive force. On behalf of the 'conscience

<sup>29</sup> *Case Concerning Armed Activities on the Territory of the Congo (DRC v. Uganda)*, Judgment, 19 December 2005, ICJ Reports (2005) 168, para. 2, Separate Opinion of Judge Kooijmans, quoting Clark, 'Explaining Ugandan Intervention in Congo: Evidence and Interpretations', 39 *Journal of Modern African Studies* (2001) 262.

<sup>30</sup> Statement made by US delegate Stephen Rapp during the Rome Statute Review Conference in Kampala on 7 June 2010 (emphasis added; on file with author).

<sup>31</sup> I attended the Rome Statute Review Conference in Kampala as delegate of the Public International Law and Policy Group, which was an observing non-governmental organization.

<sup>32</sup> UN Charter, Preamble.

of humanity’, he said, there should be a court to try those responsible for this supreme international crime. He addressed the delegates about their differences on the various aspects of a crime of aggression. ‘Use your skepticism to work harder’, and don’t leave this ‘license to kill that we are here to stop’, Ferencz urged. And while pointing his finger as if to stress his argument, he called upon the delegates, the diplomats that were there on behalf of the states parties to the ICC, to leave the difficult issues that they could not agree upon to the judges. ‘Leave it to the judges to interpret, ... this is how we go to a more humane world’, and the crowd stood up and applauded.<sup>33</sup>

What Ferencz stated was that the lawmakers were in Kampala to agree on a text. They should not try too hard to overcome their differences if that would stand in the way of creating international criminal jurisdiction over those who use aggressive force against other states. The judges would be in a better position to resolve any remaining issues. One can wonder about this division of tasks between legislators and adjudicators. Of course, in most legal systems, it is within the purview of the judge to decide on hard cases, and, in that process, judges ‘make’ law. But the complexity of an aggression case is that it goes beyond a typical ‘hard case’ that requires adjudication on an under-determined notion, since there are no abstract legal rules available due to the indeterminacy of the notion of aggression; the disagreement is fundamental due to a reliance on different and contradicting underlying assumptions. This is not to say that there are no other hard cases in which fundamental contestation occurs and in which notions of ‘the good’ also play a crucial role. In such cases, judges also have fundamentally different views and are left to decide those cases nevertheless on the presumption of ‘applying and interpreting law’. In an aggression case, this problem shall likely occur almost invariably. In the absence of a meta-criterion to choose between fundamentally differing worldviews, between contradictory assumptions that underlie the current use of force concept and between what different people consider to be ‘the good’, how is a judge to adjudicate such matters? As noted above, no doubt a judge can make a choice in a concrete case. However, if the diplomatic field that is joined in the Assembly of States Parties to the ICC (or any other special committees, working groups or the International Law Commission) cannot come to agreement on how to distinguish between aggression and non-aggression, does this then ask from judges to decide on the basis of their own political ideas or ideals?

Moreover, by sidestepping the recognition of the essentially political core of the dispute and thus allowing a void rather than guidance on questions such as who to prosecute and when the UN Security Council should intervene, a structural indeterminacy is placed at the core of the international criminal justice system. Even though the crime of aggression gives the illusion of an international rule of law, the ingrained unresolved legitimacy issues are sidelined in this push for adjudication-based justice. Yet, by embracing the ‘train-has-left-the-station’ and ‘have-faith-in-the-judges’ mantras, the Kampala delegates chose to accept whatever challenges the adjudication of aggression would bring in the future, in the sheer optimism of a progress ideal for

<sup>33</sup> Excerpts of the speech delivered by Ben Ferencz during the plenary session on 8 June 2010, during the Rome Statute Review Conference in Kampala.

some and, for others, a pessimism that it was better than the alternatives, most predominantly the alternative of leaving it outside of the ICC's jurisdiction. The common belief was that adopting an abstract and open crime of aggression amendment was better than leaving it outside the realm of law in the policy domain – that the law's power would generate more beneficial effects than harmful effects. It is hard to research the validity of such claims, and the future will tell, but what can at least be foreseen is that inserting this contestation into the criminal courtroom by placing an alleged aggressor in the dock will likely turn the process into a spectacle that may further damage the ICC's legitimacy as an independent and impartial court of justice. And it is this point that the remainder of this article addresses.

## 5 The Show Trial Catch-22

Having been placed in the dock, what are the accused's options other than turning the trial into a spectacle and counter-accusing the system, and those representing that system, of staging a show trial? Usually, no warring state leader regards himself as an aggressor. War is unpopular, and brings with it such high costs and risks, that it is hardly undertaken for just kicks. If a state decides to resort to armed force, its leadership will usually be convinced that it needs to resort to force – for instance, for self-defence or preservation or to come to the aid of others – to uphold certain essential values or interests, to protect innocent civilians against human rights violations or to protect its geopolitical position. We saw the reasoning in Putin's Crimea argumentation. Another may not agree that the war effort is legal or legitimate and condemn it as aggression, and even roll out the whole apparatus of international criminal law, but that does not take away the reasons why the warring state felt urged to take the costly road of resort to force. The indeterminate nature of the notion of aggression and the likelihood that an individual accused of the crime of aggression will fundamentally disagree with the label of 'aggression' and likely regard himself as hero – as will his supporters – opens the trial on the crime of aggression up to a likelihood of being experienced as a spectacle and then also turned into one if the accused has the ability to do so.

This is not new to international criminal law nor to criminal law in domestic settings for that matter. In the trials of Slobodan Milošević, Vojislav Šešelj and Saddam Hussein, for example, defendants aimed at disrupting the trial rather than following the framework and aiming at acquittal or mitigation of sentence. Instead of questioning the facts and/or the applicable law and arguing that the position taken by the prosecution misunderstands, misinterprets or just belies the facts of law relating to the case, the fundamental contestation that underlies the notion of aggression creates an impetus for a 'strategy of rupture'. Such a strategy is aimed at contesting not only the facts and law at stake but also the framework of the trial as such.<sup>34</sup> The fact that

<sup>34</sup> Jacques Vergès provides an analysis of the distinction between judicial strategies of 'connivance' and 'rupture', the former aimed at contesting facts and law and the latter aimed, additionally, at disrupting the entire framework of the law application and trial. J. Vergès, *De La Stratégie Judiciaire* (1968).

there is a court of law that has jurisdiction over the case, that it is a case at all and that there is a way of appropriately construing the situation in legal terms is not only part of the trial but also put by the defence as the central and only relevant question that is at stake.<sup>35</sup>

For defendants preferring such a defence strategy, winning the trial does not mean the same as what we usually conceive to be a winning defence strategy in a criminal case: acquittal or mitigation of sentence. For this type of defendant, winning means being successful at making a point and being heard to make this point. The trial is about taking this last moment of attention – which is nowadays in the eyes and ears of the world through mass and social media – to explain why they are right and why their position holds the moral ground rather than that of the mistaken or guilty authorities that accuse them. It is an attack on the system that has wrongly placed the accused in the guilty box, and it attacks this experienced structural injustice through an attack on the Court, its judges, its prosecutor and all it represents. It is a battle on the fundamentals of what law and law application is.

The defence strategy that such a trial provokes is thus aimed at contesting the assumptions that the trial is built on, which go back to the understanding of the context in which the scrutinized conduct was undertaken. An aggression trial inherently concerns large political events and requires an interpretation of the context of such political events, which is precisely what is disputed between warring sides. For the accused, the fact that he is on trial, and that a trial is conducted at all, represents that one interpretation of the context is already assumed and that it is not in line with the reading of the accused. To accept the terms of the trial is to accept this rejected reading of the context and history and, thus, to accept the adversary's assumptions. This is what Jean-François Lyotard refers to as a *différend*: a situation in which the regulation of the conflict is done on the basis of the assumptions of one of the parties and in which those of the other are not recognized.<sup>36</sup> Moreover, this places the judges in a constrained environment; when a case is brought before them, judges are submitted to a situation of this *différend*, in which they have no choice but to accept the method or criterion of settlement, by which they have already accepted the position of one of the disputing sides that the situation at hand is evaluated in terms of aggression or non-aggression.

In such a situation, for an accused, submitting to the trial means submitting to defeat. Consequently, everything is at stake, and, as such, everything requires contestation – not only the facts and the application and interpretation of law but also the entire context, history, the trial in its entirety and even law as such. And no one can tell how far in the past the chain of political causation leads. Not only is the existence of *actus reus* rejected (the criminal act), for calling the conduct aggression is fundamentally disagreed with, but the idea of a *mens rea* (the criminal intent) is also deeply

<sup>35</sup> *Ibid.*

<sup>36</sup> Compare the argument of Lyotard on the '*différend*' in J.-F. Lyotard, *The Differend: Phrases in Dispute* (1988), at 9; cf. Koskeniemi, 'Between Impunity and Show Trials', 6 *Max Planck Yearbook for United Nations Law* (2002) 1, at 15.



contested. According to the accused, there was no intent to act criminally but, rather, an intent to pay a high price (resorting to force with military means, with all of the costs, risks and peril it requires) for an even more important struggle: for defensive or humanitarian purposes, seeking justice or out of necessity. Force then is about ideology, striving for the good life or saving the world from a present danger. Deterrence is irrelevant in these circumstances,<sup>37</sup> and the criminal law that is laid in the warrior's way is not only a hurdle on the way but also part of the evil that must be set aside. What else can an accused do than to accuse the trial of being political and to fight the legitimacy of the institutions, of the crime of aggression and of the idea of applying law against its war, if it is genuinely believed to be legitimate?

As was noted in the introduction, any trial is political to a certain extent, and this is not as such a problem. This does not mean that trials cannot be conducted impartially and independently or in full compliance with the rights of due process. However, what makes international criminal trials particularly political is that a court needs to take judicial notice of at least some background facts. Because what those facts are and how they should be understood forms part of the conflict that is being adjudicated in international criminal trials and in crime-of-aggression trials, the court cannot avoid but taking at least some political stance.<sup>38</sup> Rather than a space liberated from politics, international criminal trials are spaces in which politics occur and materialize. This is not because these trials would merely reflect political forces or lack legal foundation but, rather, because, as Gerry Simpson observes, concepts of the political are continually effectuated and endorsed in international criminal trials as well as contested *vis-à-vis* each other.<sup>39</sup> As such, the international criminal trial is a space of contested narratives. Procedural guidelines are intended to guarantee that both contested narratives receive consideration, and, in the trial's conclusion, the judicial opinion produces its own authoritative account, the ideal being that this is a product of all things considered. Yet, any engagement of the Court with these contested narratives, each claiming to represent the truth, in situations of wide-ranging international and moral significance, calls on the Court to engage with political antagonism.

In this context, the international criminal trial finds itself in a paradox. In order for a trial to be legitimate, the accused must be allowed to present its version of the truth and challenge that of the prosecution. In so doing, he may turn the trial into another attack on the victims and witnesses the trial in fact seeks to protect, allowing the accused to turn into a martyr and the trial into his podium. On this podium, he is allowed to use his speeches during trial to support revolution, countering and undermining the narrative that the powers on which the trial and the Court relies seeks to solidify. The accused may question every single aspect of this narrative for reaching the 'beyond-reasonable-doubt' standard. He may cast doubts on this reading and raise credibility for the counter-narrative that was already fought and beaten on the battlefield. If the trial is conducted

<sup>37</sup> See also Klabbers, 'Just Revenge? The Deterrence Argument in International Criminal Law', 12 *Finnish Yearbook of International Law* (2000) 249.

<sup>38</sup> For further discussion on this point, see Koskeniemi, *supra* note 36, at 29–30.

<sup>39</sup> G. Simpson, *Law, War and Crime* (2007), at 11.

in a manner that presumes the innocence of the accused and aims at providing equality of arms, the trial becomes the arena to continue the struggle even after being defeated militarily. Rather than acquittal or mitigation of sentence, success for the accused lies more likely in reaching his or her audience, undermining the adversary that exerts his or her power through the trial, taking use of the procedure to give credence to its own narrative and condemning the trial as a political show trial.

But the paradox is that if the trial would not allow for the right to speak and, thus, the right to turn the trial into a spectacle, and the right to present a counter-narrative, but only endorses the narrative of those that have initiated the trial, seeking to present to the public the accusation, evidence, judgment and punishment as an expressive educational and didactical medium, vindicating the wrongs that were committed, emphasizing where power lies and displaying what is right and wrong, the trial actually is a show trial.<sup>40</sup> Such a trial sacrifices the just process for the sake of using the international criminal justice apparatus to emphasize the moral apprehension of the behaviour, condemning the loser, who finds himself in the dock not only by the reality of being in the non-hegemonic position but also for the purpose of publicly renouncing him as an enemy of society – an enemy of humanity – from whom those holding power have relieved humanity. Where international criminal justice is used as an instrument of victors' justice, and where a trial becomes about demonstrating and educating about the wrongs of those that find themselves in the losing position, its structural underpinnings reproduce the hegemonic narrative that serves to justify the actions of those exerting power. This hegemonic, but usually deeply contested, narrative serves to tell a history. But it is the historical narrative of one and not the other. The international criminal trial aims to solidify the authoritativeness of the hegemonic narrative and to depreciate or annihilate the counter-narrative, but it lacks the legitimacy among those that were not on the hegemonic side to begin with to hold any persuasive power.

## 6 Conclusion

When the crime-of-aggression amendment was agreed on in 2010 in Kampala, Uganda, and the ICC's states parties decided, in 2017 in New York, that the ICC would be able to exercise jurisdiction over the crime of aggression from 17 July 2018 onwards, the international criminal justice community celebrated progress. With the crime of aggression, the world had come together to take a collective stand against those considering aggressive war and to pronounce that the ICC would become a partner in suppressing aggression and in fighting for peace and justice. Indeed, by enabling judges to adjudicate on bad faith arguments, there will be authoritative rulings for those that were subjected to aggression. It will allow international lawyers to figure out on a case-by-case basis what the rule should be and how it applies. And through that norm development, even if limited, there may even be a normative effect that has some restraining effect on actors.

<sup>40</sup> For a more elaborate account of this argument, see Koskeniemi, *supra* note 36, in which he analyses this paradox in the context of various trials, including the trials of Milošević, Barbie, Eichmann and Touvier.

However, whether the ICC may indeed play a positive role in these important ambitions and whether the benefits of norm development outweigh the possible problematic consequences of these trials depends greatly on the perceived legitimacy of the trials.<sup>41</sup> A trial that is experienced as a show trial, scapegoating a nation, group or individual, may constrain rather than foster any such hopes with which the trial is set out. Achieving any of international criminal justice's aspirations is conditioned by the legitimacy of the trial, the courts that hold them, the ICC and international criminal justice as such. But the legitimacy of the trial is likely to be challenged by fundamental disagreement on the 'aggression' norm, a norm that is contested in its core, because, for one or the other, the norm is applied against what is perceived to be quite the contrary of aggression. The structure that applies this norm is rejected, and the legitimacy of such structures dismissed.<sup>42</sup> The flimsiness of the distinction between the hero and the supreme criminal will not leave the legitimacy of the ICC unharmed if it is set to apply its crime-of-aggression norm against an accused of aggression who fundamentally disagrees with the label of aggression for its state's resort to force.

In a criminal court of law, where morality is on one side and the criminal on the other, the verticality of the relationship between the law enforcer who mobilizes the system on behalf of the society it represents, on the one hand, and the criminal against whom this mobilization occurs, on the other, stands central. A criminal case is about condemning 'the bad' to protect, maintain and emphasize 'the good'. It therefore presumes the ability to distinguish between what is bad and what is good. Putting the ICC up for adjudicating aggression asks criminal law to deal with the question of the legitimacy of use of force. It asks the ICC and its judges to address, or even overcome, the fundamentality of the disagreement, to resolve the age-old question of the justness of war and 'build' consensus and a 'common good'. It asks the ICC to preserve fair proceedings where it is stuck in a Catch-22 of being turned into a spectacle and condemned as show trial either way, whether it does or does not manage to take fair consideration of alternative narratives. It asks the Court to engage in the geopolitical arena under the motto of equality before the law and ending impunity when aggressive states that are shielded by a UN Security Council veto can escape the ICC's sword of justice, while others cannot, giving more credence to the argument that the ICC's universal justice reaches some but not those that wield the mightiest power. And it asks all this in a time when the Court's already frail legitimacy becomes an even wider embraced vassal in political and military frontlines, where a willingness to sacrifice the global justice project is closer to heart for those who find the ICC in their way than accepting its rule against oneself. In that light, the train may have left the station in Kampala and in New York, but should it arrive at the next?

<sup>41</sup> See also Danner and Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law', 93 *California Law Review* (2005) 75, at 93–94.

<sup>42</sup> See also Sean Murphy for pointing to the contestation of the core of the norm and its relation to the legitimacy of the Court. He also makes the argument that the legitimacy of the Court is challenged by the crime of aggression's lack of coherence, asserting that the crime of aggression brings an 'unequal or illusory application of standards', by excluding from the ambit of the crime of aggression conduct (threats to force, unconsummated but planned force, aggression on smaller scale) that is said to qualify as *ius cogens*, somehow determining that such *ius cogens* violations are not criminal in nature. Murphy, *supra* note 17.