SUMMARY

During the 2010 Review Conference in Kampala, delegations from the member states of the International Criminal Court (ICC) came to a consensus agreement to include the crime of aggression into the jurisdiction of the ICC. They decided that in the future, the ICC could become able to address situations of aggressive use of force by prosecuting state leaders for planning, preparing, initiating or executing aggressive resort to armed force against other states.

This dissertation discusses this new development for the notion of aggression by telling two stories. The first story is that of the regulation and criminalization of the notion of aggression. This narrative explores how the right of states to resort to force has changed over the past 100 years into a crime of aggression, and how this process saw several repeating dynamics of contestation, postponement, diplomatic maneuvering, proceduralization, and delegation of substantive decisions off the diplomats’ table. The second story tells of the different ways in which the relationship between law and politics materializes in these discussions on aggression. It describes how the regulation and criminalization of aggression can be read as a story about seeking law as a means to suspend the politics of decisions on use of force. This second story reframes the first, and draws attention to how the regulation and criminalization of aggression (the first story) shows how law and politics relate to and mutually (re)constitute one another.

The main research questions are therefore, first, how the Kampala crime of aggression amendment came into existence and came to be constructed as it is. And second, in what ways law and politics relate to one another and what kinds of law and politics are produced in the construction of the crime of aggression. Law and politics are not meant here as separate realms. Rather, the research is about how, in the regulation and criminalization of aggression, political contexts produce particular kinds of legal constructs and how these kinds of legal constructs generate particular kinds of politics. The research is therefore about the law generated by the politics of regulating aggression and about the politics that is generated through this legal construction, and thus about how law and politics co-constitute each other in the construction of the crime of aggression.

The main argument that is developed in this dissertation is that the discourse and argumentative practices on use of force and aggression demonstrate both the legalists’ and the realists’ arguments on the relationship between law and politics. On the one hand is the legalist idea that law is able to discipline politics, that it binds and restrains states in their actions, and that it produces a legal framework that consists of rules that discipline what is and what is not an accepted argument. On the other there is the realist idea of law as an empty veil of politics, or in other words, that law is inherently and entirely political and therefore not able to restrain the political. Discussions often present these two understandings of the relationship between law and politics as a
dichotomy, and both legalist and realist literatures tend to focus on disproving the other logic. However, this book shows how rather than a dichotomy, both of these conceptions of law/politics co-exist and are interdependent with one another.

The dissertation is based on discourse analysis of the use of force paradigm and the process of regulating and criminalizing the notion of aggression. Discourse and argumentative practices show that the law on aggressive use of force is inherently political. It cannot overcome this by suspending politics and replacing it with an objective rulebook providing what is and is not aggression. That issue is and remains deeply contested, and this fundamental disagreement cannot be resolved by using the language of law. Nevertheless, this does not mean that law becomes valueless, nor that law has no disciplining power. Use of force discourse also shows, for example, that discussions on use of force have become almost exclusively legalized. Arguments of morality or political interest have been replaced by arguments that invoke one or another legal source. With this adoption of the legal language comes the power of law that disciplines what is and is not recognized as following the legal logic and as legal argument. Consequently, some positions lose merit, others gain standing. And because of this performative dynamic, new interpretations and arguments constitute new realities, which invites new contestation, leading to new positioning, and so the dynamic goes on and on. Therefore, there appears to be a certain (discursive) disciplining power in law even if this does not overcome fundamental substantive disagreement.

Moreover, the interdependence of these two logics leads to the proceduralization of norms on which there is fundamental substantive disagreement. Throughout the regulatory history of the notion of aggression this phenomenon can be observed. As this dissertation discusses, repeatedly, substantive disagreement on what aggression is and thus on where to draw the line between aggression and non-aggression led to seeking agreement on procedures on how to deal with resolving such a dispute, but elsewhere than on the diplomats’ table. It led to finding consensus on how to deal with it, rather than dealing with it.

In addition, legalization of a fundamentally contested issue without reaching substantive agreement can also entrench such disagreement by enforcing contested positions with the power of law. Disagreement is no longer the holding of a different view but becomes an alleged ‘mistaken understanding’ of the law. In addition, the morality that comes from international criminal law’s presentation as addressing crimes that are inherently criminal and blameworthy, the mala in se crimes, and only the most serious of those, adds a further moral layer to this entrenched disagreement. Not only is the position of the other disagreed with and an alleged mistaken interpretation of the law, it also represents evil: it tries to justify a crime that belongs to the most serious crimes of concern to mankind, and a crime against all, erga omnes. This further entrenches contestation, which, for example, may make negotiated settlement or compromise even harder to find.
This book does not advocate a normative agenda for or against the crime of aggression or propose a (better) legal provision that would tackle the challenges it identifies and discusses. It rather aims to provide an analysis of the nature, abilities and limitations of the crime of aggression that might contribute to the development of the international criminal justice field. The international criminal justice field is currently in the process of exploring how best to deal with the new crime of aggression. This book aims to contribute to this development by offering an analysis of the notion of aggression to its conceptual core and by tracing its historical roots, beyond its mere jurisprudential application in a court of law. Only by understanding the law and politics of the notion of aggression can a sensible effort be undertaken to work with the crime of aggression in striving for the highly ambitious aims that it is associated with: such as contributing to the suppression of aggressive war, to maintaining peace and security, to ending impunity for those engaging in aggressive use of force, and to seeking justice for those that are affected by aggression. Striving after socio-political goals like these with a legal notion that regulates the most political decision a state has (resorting to force to protect its way of life, in narrower or broader interpretations thereof), requires a profound understanding of the interaction of law and politics and how their interaction has (re)constituted and (re)shaped the notion of aggression throughout history to arrive at the crime of aggression amendment that was adopted in Kampala.