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Abstract:

The regulation of war through the prohibition and criminalization of the act of aggression has provided a common legal language for denouncing an opponent for committing aggressive war that is used between warring sides and is understood globally. Nevertheless, due to the indeterminate nature of aggression, different actors may invoke different interpretations and conceptual frameworks related to the legality of war to accuse the other of aggression. This article asserts that the notion of aggression can be used as a weapon of lawfare because the laws of war can be interpreted differently by different actors. The article explores how this is done by analyzing the Nagorno Karabakh conflict as a case study. A deconstruction of both sides' arguments where they accuse each other of committing aggressive war shows that even though both sides speak the same 'language' of law, they rely on contradictory underlying assumptions, both in their internal argumentative structure as well as between both sides' legal argumentations. The article furthermore asserts that, strengthened by the criminalization of aggression, the indeterminacy of the notion of aggression provides conflicting parties with another weapon to battle with, and another battlefield to fight on. Despite its aim to monopolize and prevent war, the regulation of war and criminalization of aggression thereby provides new ways to continue a conflict, allows law to be used as a strategic tool of lawfare, and creates false presumptions of the ability of law to resolve fundamental disagreement.

Essay

**COLLATERAL DAMAGE FROM CRIMINALIZING AGGRESSION?
LAWFARE THROUGH AGGRESSION ACCUSATIONS IN THE
NAGORNO KARABAKH CONFLICT**

Marieke de Hoon*

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1. INTRODUCTION

On 11 June 2010, delegations from the member states of the International Criminal Court (ICC) came to a consensus agreement on the definition of the crime of aggression and a jurisdictional regime.¹ This outcome of the 2-week long Review Conference of the Rome Statute, taking place in Kampala, Uganda, was unexpected for most followers prior to the conference, and was celebrated widely as a historic achievement. The inclusion of the crime of aggression in the Rome Statute was seen as the capstone of a century-long process to prohibit and criminalize aggressive war. The reason for this celebratory atmosphere was that what had been worked towards but not yet fully achieved at Versailles, in the interwar period with bilateral and multilateral treaties, in San Francisco in 1945, in the special working groups in the 1950s, 1960s and 1970s, in the International Law Commission in the 1990s, or in Rome in 1998, was finally on the verge of culmination.² The crime of aggression would enter into force in 2017 or soon thereafter, and with the crime of aggression, the world not only renounced aggressive war as an instrument of national policy, but agreed that it is a crime, for which individuals can be prosecuted. Moreover, it provided the norm with a hierarchically superior status, because forming part of the jurisdiction of the ICC denounces it as one of ‘the most serious crimes of concern to the international community as a whole.’³ In short, this enthusiasm in Kampala celebrated progress. With the crime of aggression, the world had come together to climb the barricades and take a collective stand against those considering aggressive war.

Problematic with aggression is, however, that due to its indeterminate character, the notion of aggression can be applied as a useful weapon of lawfare. Its indeterminacy is caused by the fact that different actors can hold different conceptual frameworks on at least three levels that are associated with an actor’s perspective on the limiting power of international law for a particular use of force. Namely, related to i) fundamentally differing world views, ii) fundamentally differing perspectives on the function of the use of force, and iii) fundamentally differing views about the source and binding nature of international law. Since these differing conceptual frameworks are based on differing and often contradictory underlying assumptions, they may lead to fundamental disagreements on the aggressiveness of a particular use of force. Despite the recent consensus agreement in Kampala, the definition of the crime of aggression’s ‘manifest’ criterion, which provides that a prohibited use of force is only a crime of aggression if it is a ‘manifest’ violation of the UN Charter,⁴ does not overcome the fundamentality of this disagreement. It does not, nor does any other

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¹ The Crime of Aggression (adopted 11 June 2010) Resolution RC-Res.6.

² ‘On the verge’ because the Kampala amendment provides that the exercise of jurisdiction is pending a decision to be taken by a majority of the states parties after 1 January 2017 (Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) U.N. Doc. A/CONF.183/9 (Rome Statute), available at <http://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf>, art. 15bis(3) and 15ter(3)).

³ Rome Statute (n 2) Preamble.

⁴ Rome Statute(n 2) art 8bis(1).

part in the amendment on the crime of aggression, provide for a meta-criterion to choose between these fundamentally opposing conceptual frameworks.

Consequently, the legal concept of aggression is flexible enough to provide for different interpretations of aggression so that, in many situations, both sides in a conflict can accuse each other of aggression by both relying on legal argumentation. This method to accuse one's opponent of aggression has become increasingly powerful with the regulation of war, i.e. encapsulating the previously non-legal realm of war with legal norms, and particularly with its criminalization. As David Kennedy explained, with the development of law as vernacular of political judgment, and with the fading of distinctions of war from peace and of law from morality and politics, war has become 'the continuation of law by other means.'⁵ Kennedy asserts that Clausewitz was right in his assessment in his time that war is a continuation of politics with other means, but that the notion of law, and particularly its separation from politics, has changed fundamentally, as well as the separation of war from peace.⁶ Law has become a strategic tool for military and humanitarian actors to frame a situation to their advantage. It has become a way to communicate a message, to argue for the legitimacy of one's actions and to delegitimize the opponent's actions.⁷

Lawfare is understood by Charles Dunlap and Kennedy as a concept that helps understand how '[l]egal arrangements not only put limits on warfare, but also provide venues to legitimize the use of military force, to de-legitimize the enemy, and to supplement the use of force with less destructive – and less costly – means.'⁸ The idea that the regulation of war limits politics, is outdated. Rather than limiting power, the regulation of war, and particularly the criminalization of aggression, provides for a potential intensification of the battle, by enlarging the arsenal of warring sides with the weapon of lawfare. The effect of this regulation is the continuation of the struggle not only on the battlefield, but also in the arena of the law.

How the notion of aggression is usable as a weapon of lawfare becomes apparent when looking at particular conflicts to see how the arguments accusing an opponent of aggression are structured. This article analyzes the Nagorno Karabakh conflict as a case study to illustrate how the regulation of war can allow for this strategic use of law. To do this, the article deconstructs the argumentative structure of both sides in the conflict.

Nagorno Karabakh is a mountainous area in the South Caucasus, predominantly inhabited by a people of Armenian descent, but internationally recognized as part of neighboring Azerbaijan, yet *de facto* independent for over 20 years. When the Soviet Union was on the verge of collapsing, the smoldering conflict about the status of Nagorno Karabakh blazed into open warfare between Azerbaijan and Armenia between 1991 and 1994, and is to date an ongoing 'frozen conflict' with a fragile cease-fire. What began⁹ with a resolution adopted on 20 February 1988 by the local

⁵ David Kennedy, *Of War and Law* (Princeton University Press 2006) 46-47.

⁶ Kennedy (n 5).

⁷ Kennedy (n 5) 125-6.

⁸ Wouter G. Werner, 'The Curious Career of Lawfare' (2010) 43 *Case W. Res. J. Int'l L.* 61, 66.

⁹ The roots of the conflict date back much longer than 1988, and in the months before February 1988, there were other violent inter-communal incidents as well. However, according to Thomas de Waal, who wrote an authoritative, balanced and insightful account on the Nagorno Karabakh conflict, the

Soviet of the Nagorno Karabakh Autonomous region of Azerbaijan to leave the Azerbaijani Soviet and join the Armenian Soviet, led to open demonstrations in Nagorno Karabakh's Armenian-dominated capital Stepanakert, followed by counter-demonstrations in Azeri-dominated cities in the area, violent incidents in the following days, deportations of Azeris from Armenia and Armenians from Azerbaijan, further intensification of violence on both sides, and eventually the outbreak of war in 1991. The resolution to join the Armenian Soviet was denied by General Secretary Mikheil Gorbachev because he feared setting a precedent by making concessions in this dispute when there were at least nineteen other potential territorial disputes in the Soviet Union that were feared to erupt if he decided in favor of the resolution.¹⁰ Due to the collapse of the Soviet Union and international recognition of Azerbaijan and Armenia as independent states, the inter-communal conflict on the status of Nagorno Karabakh became an inter-state conflict between Armenia and Azerbaijan, and in the eyes of the Armenian-dominated Nagorno Karabakh that declared independence in 1991, between the proclaimed independent state of Nagorno Karabakh and Azerbaijan.¹¹ Accusations of unlawful violence thereby arose to the status of accusations of unlawful use of inter-state force; accusations of committing aggressive war.

Both sides in the Nagorno Karabakh conflict accuse each other of committing aggression. Both sides dress their positions in legal terminology to convince the world that *they* are law-abiding but that the other is the violator, the aggressor. By these accusations and by invoking law to convince the world of the wrongfulness of the other's behavior, legal argument is used not so much to convince the *opponent* of the rightness of one's claims, but rather for the purpose of winning in the forum of global public opinion, which has come to form the other battlefield, called international law.

This article aims to demonstrate how the notion of aggression is invoked and becomes usable for lawfare.¹² The main argument is that, due to its indeterminacy, the notion of aggression can be used as a weapon of lawfare, which becomes increasingly powerful with its criminalization due to an inherent morality attached to (international) criminal law. The regulation of the legality of war and particularly the criminalization of aggression increases the powerfulness of this means of lawfare by providing a common legal 'language' that is understood globally and that allows for a strong denunciation of the opponent as an aggressor, i.e. a criminal and enemy of mankind. As an illustration of how accusations of aggression can be used for lawfare, the arguments that both sides in the Nagorno Karabakh conflict use to accuse the other of aggression are deconstructed to analyze the assumptions upon which they are based. This analysis shows that even though they both speak the 'language' of law,¹³ they rely on differing and often contradictory underlying assumptions with regard to the notion of aggression that they employ when posing

beginnings of the armed conflict in the early 1990s is usually connected to the uprisings in February 1988 following the resolutions to join the Armenian Soviet, Thomas de Waal, *Black Garden. Armenia and Azerbaijan Through Peace and War* (New York University Press 2003) 18.

¹⁰ De Waal (n 9) 13.

¹¹ Even though Nagorno Karabakh has declared its independence in 1991 and has been de facto independent from Azerbaijan since, no state has recognized it as an independent state, not even Armenia.

¹² For this interpretation of lawfare, I rely particularly on the works of Charles J. Dunlap, Jr., 'Lawfare Today: A Perspective' (2008) 3 *Yale J. Int'l. Aff.* 146, Kennedy (n 5) and Werner (n 8).

¹³ See on the international laws about war as a common legal vocabulary for assessing the legitimacy of war, Kennedy (n 5).

their arguments against each other. Different conceptual frameworks are applied depending on the type of argument that is being rebutted. The result is that their arguments not only contradict when put opposite one another, but are also internally contradictory. This is a symptom of the indeterminacy of the notion of aggression. *Because* of its indeterminacy, the notion of aggression lends itself to being used as a weapon of lawfare in conflicts where the legality of the use of force is disagreed on.

The reasons to choose this particular conflict as an illustration of this argument for the purpose of this article include that by spending time in the area recently and having the opportunity to listen to discussions on the conflict and the accusations of aggression, I found this a particularly telling example of how aggression as a legal concept can be invoked by both sides to argue their case. However, in other conflicts, similar patterns to those described in this article can be seen. Even though the crime of aggression, as included in the ICC's Rome Statute, is not directly applicable to this conflict,¹⁴ the relevance of discussing the criminalization of aggression in light of the Nagorno Karabakh conflict lies not in the direct applicability of the legal norm for adjudication, but in the way that the process of regulating and criminalizing creates other, counterproductive effects in the usability of the legal norm for lawfare.

Where David Kennedy explores the interrelatedness of law and war in the context of the Charter of the United Nations and the collective security system, this article seeks to further develop this analysis of the regulation of war by exploring this in the context of the crime of aggression, the capstone of the regulation of war. Moreover, where Kennedy insightfully describes the fluidity and diversity of the legal context to assert that the laws of war allow for diverse interpretations, this article adds to this by demonstrating *how* this occurs. Furthermore, the article also aims to add to the discussions on the crime of aggression by applying the understandings of the lawfare discussion to the aggression debate and pointing to the potential collateral effect of criminalizing aggression by providing conflicting parties with another weapon to battle with, and another battlefield to fight on.

2. THE NOTION OF AGGRESSION AS WEAPON OF LAWFARE

The Nagorno Karabakh conflict finds itself militarily at a stalemate, even though this may be changing with the way Azerbaijan is currently building its military. For over 20 years, the Armenian Karabakhis, helped by Armenia, have been effectively controlling the area and have formed a *de facto* independent state.¹⁵ The 'international community' is not interested enough to intervene or actively push for a sustainable solution, partly because both sides need to be willing to compromise, which they are currently not. And Azerbaijan is militarily not powerful enough (yet) to invade and violently retake the area. Aside from the sniper fire in the border area, the current battle is therefore predominantly fought in the legal arena. Interestingly, both sides use the legal paradigm to add to their violent, military struggles on the ground, a legal fight on the battlefield of global public opinion and international law.

¹⁴ Neither Armenia nor Azerbaijan is a state party of the International Criminal Court, and there is no reason to assume that the Security Council would be interested in referring this situation as such, besides the fact that the crime of aggression is not operative, and won't be until at least 2017. And even then, there needs to be new aggression in order to meet the temporal requirement of Article 11 Rome Statute.

¹⁵ However, even though clearly independent from Azerbaijan, one can wonder to what extent it is independent from Armenian influence and control.

In this context, Charles Dunlap defined lawfare as the ‘strategy of using – or misusing – law as a substitute for traditional military means to achieve an operational objective.’¹⁶

The regulation of war has turned the idea that war is a right for states – to advance objectives and interests – into a prohibition and a crime. With the term ‘aggression’, international law refers to interstate use of force that is not authorized by the United Nations Security Council and is not in self-defense, following an ‘armed attack’. The allegedly illegal use of force may be considered as aggression if it is directed against the sovereignty, territorial integrity or political independence of another state, or in any other manner inconsistent with the Charter of the United Nations.¹⁷ This definition of aggression was adopted by the General Assembly in 1974. It also forms the basis of the definition of aggression for the purpose of the crime of aggression. In 2010, the Assembly of States Parties to the International Criminal Court (ICC) came to a consensus agreement during the Review Conference for the Statute of the ICC, to expand the jurisdiction of the ICC with the crime of aggression. For the purpose of the *crime* of aggression, the states parties added to the 1974 definition that an *individual* can be held criminally responsible for the crime of aggression if that person planned, prepared, initiated or executed an act of aggression, and was in a position effectively to exercise control over or direct the political or military action of a state, provided that this act of aggression constitutes a *manifest* violation of the UN Charter by its character, gravity and scale.¹⁸ However, even though it is called a ‘definition’ of aggression, neither the 1974 resolution nor the 2010 Kampala amendment provide definitive answers where fundamental disagreement exists on a particular use of force related to the indeterminacy of the notion of aggression.

The regulation of war and criminalization of the notion of aggression has provided a common legal language to denounce an opponent of committing aggressive war.¹⁹ This language is used between parties and understood globally.²⁰ However, despite the similarity of the language, the analysis in this article shows that even though parties to a conflict can speak the same ‘language’ of law, they rely on differing and often contradictory underlying assumptions. This is possible because the notion of aggression is indeterminate. The disagreement about whether a particular use of force constitutes aggression and which side is the actual aggressor is more than merely a disagreement on the scope of the legal provision that prohibits and criminalizes aggressive war. This disagreement stems from differing conceptual frameworks with regard to the nature of international relations, the function of the use of force, and the source and binding nature of international law.

For instance, with regard to the nature of international relations, a worldview that sees the world comprised of a system of states, each in a legitimate struggle to further national interests and policy objectives, may lead to a different perspective on the legality of the use of force than a view that sees the world as a society of states, based on cooperation and interdependence. And this is very different still from a perspective on international relations based on the idea that individuals and civil

¹⁶ Dunlap (n 12) 146.

¹⁷ Definition of Aggression, UNGA Res 3314 (XXIX) (14 December 1974) art 1.

¹⁸ Rome Statute (n 2) art 8bis.

¹⁹ Kennedy (n 5).

²⁰ See Kennedy (n 5) and Werner (n 8) 67.

society groups are relevant international actors.²¹ Who are the main victims of aggressive war? States, the stability of a region or world, a community or people, individuals, or humanity even? One of the above, some of the above, all of the above?

The function of the use of force is another aspect of the legality of the use of force that fundamentally disagreed upon. For instance, perspectives may differ on whether force can be used to protect human rights, or, instead, to protect territory, or to protect the interests of a state, or of a community, or when the survival of a state (or of a community or a people) is at stake, or whether force can be used in the interest of stability in a region, or for protecting a *status quo*, or whether there are no circumstances conceivable in which force can or should be resorted to outside the limited scope of self-defense or Security Council authorization. Different actors apply different reasons to determine the legitimacy of a particular use of force, and they often rely on differing or even contradictory assumptions related to the function of war. Where, for example, ideas derived from the just war tradition assume war to be an instrument of law enforcement,²² the 'war as institution of law'-concept is based on the idea of war as an instrument of furthering policy objectives.²³ The two are mutually exclusive, since the former relies on the presumption that war is legitimate to further a universal notion of justice, the latter assumes that war is legitimate if furthering particular interests.

²¹ These distinctions are drawn from the English School in international relations theory. For analysis on the structure and normatively progressivist understanding of contemporary international relations see, for instance, Barry Buzan, *From International to World Society. English School Theory and the Social Structure of Globalisation* (Cambridge University Press 2004) and Andrew Linklater, Hidemi Suganami, *The English School of International Relations. A Contemporary Reassessment* (Cambridge University Press 2006).

²² The just war tradition arose in the European Middle Ages as a combination of the ideas of Christian thinkers, who abandoned absolute pacifism, and natural law thinkers. St. Augustine was one of the founders of just war thinking and wrote that even though wars were in principle unfavorable, a wrong inflicted by an adversary required the waging of just wars (St. Augustine, *De Civitate Dei Contra Paganos*, Book XIX, para. VII (6 Loeb Classical ed., W.C. Greene transl. 1960) 150-151). St. Thomas Aquinas developed this idea further and focused particularly on the justice of the causes of war and the rightful intention of the war maker (St. Thomas Aquinas, *Summa Theologiae, Secunda Secundae, Quaestio 40, 1* (35 Blackfriars ed. 1972) 80-83). War was only just under certain circumstances and was a mechanism to punish wrongs. These criteria include that only a sovereign authority can wage a just war (*auctoritas*), that only certain categories of persons are allowed to engage in the use of force (*personae*), that the war has a well-defined objective (*res*), that the force has to be waged in pursuit of a valid legal claim (*justa causa*), and with the rightful intention (*animus*) (Stephen C. Neff, *War and the Law of Nations. A General History* (Cambridge University Press 2005) 49-68).

²³ See Neff (n 22) 177. The 'war as institution of law'-concept assumes that it belongs to the prerogative of states to decide on whether or not to go to war, since any other decision-making body is unable to make universally just or 'right' decisions on whether or not to engage in warfare. It regards resort to force as an accepted instrument of foreign policy and international business. War is seen as a rule-governed resort to armed force for the settlement of disputes. The war as institution of international law concept is to certain extent inspired by the writings of Thomas Hobbes. Hobbes argued that because the state of nature is a ruthlessly competitive world in which each individual and each state rightfully seeks to safeguard their own self-preservation, perpetual war is the natural condition between states (Thomas Hobbes, *Leviathan* (first published 1651, Penguin 1985)). According to Hobbes, peace can be created through the skillful drafting of treaties and agreements between states, but peace is not the state of nature between states. In pursuit of their own safety, two states can be in conflict with each other with each having right on its side. This idea broke decidedly with the just war tradition. According to Hobbes, opposing sides could both be lawfully entitled to use force since both were exercising their natural right to survival. Hobbes held that if necessary for self-preservation, states are allowed to break treaty obligations and resort to armed force lawfully (Thomas Hobbes, *De Cive* (first published 1642, Clarendon Press 1983)).

The third aspect on differing conceptual frameworks related to the question of legality of the use of force is on the source and binding nature of international law. Is the law derived from the will of the state or from nature? If derived from state will, why would any state be limited by law? If it changes its will, it will no longer be bound. But if the source of international law is nature, divinity, morality or another 'higher' source detached from state will or interests, you stumble upon the problem of sovereign equality due to the question of whose interpretation of the law is leading.²⁴

It is due to these fundamentally different perspectives related to the legality of war that the question of how to define aggression has been a source of disagreement amongst legal, political and philosophical scholars and practitioners ever since legal thinking about war started many centuries ago.²⁵ Each of these differing conceptual frameworks can rely on one out of a number of differing underlying assumptions. Any actor involved in a conflict or judging from the public opinion forum may hold any combination of the above assumptions or others on which it bases its assessment on the legality or legitimacy of a certain use of force. To make matters more complex, each actor may well apply different conceptual frameworks today than it did yesterday or will tomorrow. Moreover, it is different for a situation in one part of the world than in another, and different where other circumstances are involved. In other words, the dimensions of time, space and circumstance added to the differing underlying assumptions attached to worldviews, function of war, and source of international law, provide for an inherently complex net of conceptual frameworks that can be applied and differed upon fundamentally. Consequently, the underlying assumptions of the actors involved in or commenting on a particular conflict, and their approach to the legality of a particular resort to force, may very well differ.

It is this complexity of potential underlying assumptions and the corresponding complexity of conceptual frameworks regarding the use of force that complicates the application of law to the issue of aggression. The indeterminacy of the notion of aggression leads to fundamental disagreement on a determination of aggression in particular situations. What one actor may find lawful self-defense, another sees as aggressive war; what one may find a heroic intervention, or even a responsibility to protect, another sees as aggressive war; what one may find a rightful protection of a people's land, another sees as aggressive war; etcetera. Even though they speak the same 'language' of law, this language has a different meaning depending on the conceptual frame through which one looks at the law. They disagree and will continue to disagree because they hold different, and often contradicting, underlying assumptions.

However, despite the indeterminacy as a legal notion, the consequential difficulty of construing abstract legal rules to distinguish between legitimate war and aggression, and the accompanying reluctance of the Security Council or international tribunal to determine a situation as aggression, parties in a conflict are not shy to use the notion to accuse their opponent of committing aggression. With the increasing importance attached to the concept in international law (from

²⁴ This problem has been explained in much detail by Martti Koskenniemi in *From Apology to Utopia. The Structure of International Legal Argument* (Reissue with new Epilogue, Cambridge University Press 2005).

²⁵ See for an insightful account of the history of the legal argument on war Neff (n 22).

renunciation²⁶ to prohibition²⁷ to crime²⁸), the force of the accusation has also increased. To understand better how aggression can be used as a weapon of lawfare, the next sections analyze this dynamic in the context of the Nagorno Karabakh conflict. This conflict is particularly interesting because it demonstrates the indeterminacy of the notion of aggression so clearly, thereby raising questions about the limitations of law in the context of the legality of war.

3. LAWFARE IN THE NAGORNO KARABAKH CONFLICT

Upon visiting Nagorno Karabakh, the incongruity between the *de jure* and *de facto* situation of the status of this mountainous area is striking. When looking at a conventional map, one would presume that the area forms part of Azerbaijan, and is not even directly bordering Armenia. However, when actually visiting, the world of reality opens and one enters a *de facto* independent country,²⁹ that is only accessible from Armenia. It has a parliament, a government, a justice system that includes a court of first instance, a court of appeal, and a supreme court, democratic elections supervised by an electoral commission, schools, universities, civil society organizations, a television station and newspapers, and an airport waiting to be opened. And all this with a population of less than 150.000 citizens, in a state of war, and in a decidedly poor economic situation. It is a world of contradictions: in a state of war with Baku, the Armenian Karabakhis hold effective control over an area of at least 7.000 square km,³⁰ for over 20 years now, even though no state has recognized this independence, not even Armenia.

3.1 Lawfare Through Resolutions in the Build Up to War

When war broke out in 1991 shortly after the collapse of the Soviet Union and the independence of former soviet republics, Azerbaijan and Armenia were without strong military forces. This is one of the reasons that the war was fought through law at the same time as on the ground. Prior to the actual military operations, a form of lawfare on the status of Nagorno Karabakh was fought through resolutions by the local parliaments. Following the resolution of 20 February 1988 in which the local parliament of the Nagorno Karabakh Autonomous Region of Azerbaijan requested to leave Azerbaijan and join Armenia, the Armenian Supreme Soviet – the local parliament – adopted a resolution on 15 June 1988 in which it formally gave its approval to Nagorno Karabakh joining Armenia. Two days later, the Azerbaijani Supreme Soviet passed a counter-resolution to reaffirm that Nagorno Karabakh was

²⁶ General Treaty for Renunciation of War as an Instrument of National Policy, also known as the Kellogg-Briand Treaty or Pact of Paris (adopted 27 August 1928) 46 Stat. 2343, T.S. No. 796, 94 L.N.T.S. 57.

²⁷ Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, art 2(4).

²⁸ Charter of the International Military Tribunal (adopted 8 August 1945) Nuremberg Trial Proceedings Vol. I, art 6(a); Rome Statute (n 2) art 5 and 8bis.

²⁹ At least independent from Azerbaijan, but one can wonder about the independence with regard to the amount of influence that Yerevan (Armenia) has over Nagorno Karabakh.

³⁰ Encyclopaedia Britannica, available at <http://www.britannica.com/EBchecked/topic/401669/Nagorno-Karabakh> (last visited 18 June 2012). However, the Permanent Representation of Nagorno Karabakh in the United States estimates the area that is under the jurisdiction of the Nagorno Karabakh Republic at approximately 11.500 square km, in accordance with its Constitution of 2006, see http://www.nkrusa.org/country_profile/overview.shtml (last visited on 18 June 2012).

part of Azerbaijan.³¹ This so-called ‘war of laws’³² was furthered by another incendiary resolution by the local parliament of Nagorno Karabakh on 12 July to secede unilaterally from Azerbaijan and rename Nagorno Karabakh ‘the Artsakh Armenian Autonomous Region’.³³ On 18 July, this campaign of lawfare³⁴ was temporarily quelled when the full Soviet parliament reconfirmed that Nagorno Karabakh was staying with Azerbaijan.³⁵

When the Soviet Union collapsed, the conflict increased in intensity, not only through increasing inter-communal violence, and ethnic cleansings through deportations and persecutions on both sides, but also through further legal actions on both sides. With the independence of Armenia and Azerbaijan, formally, the borders of the former soviets were maintained and became international borders. Nagorno Karabakh was internationally recognized as part of Azerbaijan. Armenia was now in danger of international condemnation for violating Azerbaijan’s territorial integrity by laying claims on its territory. This was circumvented, or at least attempted, by Nagorno Karabakh’s declaration of independence on 2 September 1991, three days after Azerbaijan had declared independence. The declaration of independence allowed Armenia to say that it was only an interested observer to the conflict, not a party to it.³⁶ After some failed efforts at peace negotiations, not least because Azerbaijan accused Armenians of shooting down an Azerbaijani helicopter with 22 prominent individuals on board, Azerbaijan responded by revoking the autonomous status of Nagorno Karabakh and renaming its capital Khankendi. Nagorno Karabakh responded to that with a referendum overwhelmingly supporting the independence.

The Armenians were more successful in their military strategy and more powerful because they got hold of the left-behind Soviet weaponry and were the better fighters in Soviet times. Eventually, in 1994, the mass violence ended with a *de facto* independent Nagorno Karabakh and an impassable line of contact between Nagorno Karabakh and Azerbaijan, but the political dispute remained unresolved. No international force was deployed to monitor the frontline, or line of contact, which stretched approximately 180 kms,³⁷ and even though the May 1994 cease-fire agreement is still effective, a peace has never been achieved.

On the Armenian side, the area is claimed as either part of Armenia or as an independent state, historically and currently inhabited by the Karabakhis, ethnically and culturally related to the Armenian people. The Azeris, however, claim it as part of Azerbaijan, at least since Stalin made the region a part of the Azerbaijani Soviet in

³¹ De Waal (n 9) 61.

³² De Waal (n 9) 60-61.

³³ Artsakh is a name that nationalist Karabakhi also use to refer to Nagorno Karabakh.

³⁴ This strategy falls within the description of lawfare made by Qiao Liang and Wang Xiangsui where they state that the use of law can be one of many strategies where the dividing line between war and non-war becomes impossible to draw. Wouter Werner interprets their view as turning the relationship between war and politics upside down. ‘[W]ar is no longer the continuation of politics with the inclusion of other means; it is politics that has become the continuation – or even just one of the manifestations – of war. Werner (n 8) 65, citing Qiao Liang & Wang Xiangsui, *Unrestricted Warfare* (PLA Literature and Arts Publishing House 1999).

³⁵ De Waal (n 9) 61.

³⁶ De Waal (n 9) 161.

³⁷ International Crisis Group, *Tackling Azerbaijan’s IDP Burden*, Policy Briefing (27 February 2012) 1, available at [http://www.crisisgroup.org/~media/Files/europe/caucasus/azerbaijan/b067-tackling-azerbaijans-idp-burden.pdf](http://www.crisisgroup.org/~/media/Files/europe/caucasus/azerbaijan/b067-tackling-azerbaijans-idp-burden.pdf).

1921. Furthermore, the Azeris claim that its historical ties with the region are stronger, and that, in any event, the declaration of independence of Nagorno Karabakh and claimed secession from Azerbaijan were illegal because it was enforced militarily and achieved through illegal use of armed force.³⁸

3.2 Accusations of Aggression in the Nagorno Karabakh Conflict

Both sides accuse each other of committing aggression. Even though the notion of aggression has arisen to the status of an ‘international crime’, importantly for the notion of aggression is that each side is usually convinced of the correctness of its own assertion. The accused party usually believes that its use of force is legitimate, if not lawful.³⁹ As David Kennedy explained, ‘[i]t is hard to think of a use of force that could not be legitimated in the Charter’s terms. It is a rare statesman who launches a war simply to be aggressive. There is almost always something else to be said – the province is actually ours, our rights have been violated, our enemy is not, in fact, a state, we were invited to help, they were about to attack us, we are promoting the purposes and principles of the United Nations. Something.’⁴⁰

But what does it say if both sides can provide a *prima facie* sound legal argument to accuse the other side of aggression? The simple answer to this is that one side must be plainly wrong. And this type of approach is usually chosen. However, in this article, I would like to take the analysis beyond this stalemate and consider the implications of mutual accusation of aggressive use of force by deconstructing both sides’ arguments regarding the other’s aggression. This deconstruction demonstrates that the concept of aggression is indeterminate. The consequence of that conclusion is that the application of law, and particularly of criminal law through the crime of aggression and jurisdiction over this crime by the ICC, is highly problematic. But before turning to implications, it is interesting to explore *how* the notion of aggression is used to accuse the other of committing aggression.

The Nagorno Karabakh conflict provides an interesting case study for the notion of aggression. But before analyzing the argumentative structures of both sides, it is important to justify which actors I use for this analysis. On the one hand is the Azerbaijan side. On the other, I discuss the arguments of Armenia and Nagorno Karabakh together, mainly because, even though their interests and (foreign) policy objectives may differ on several issues, with regard to the arguments regarding the use of force, they do not differ significantly. It therefore seems appropriate to discuss the aggression arguments in terms of the Azeri arguments that accuse the Armenians of aggression and the Armenian and Karabakhi Armenian arguments accusing Azerbaijan of aggression. The dominant understanding of the concept of

³⁸ My account of the positions and arguments of the Armenians and Azeris are drawn mainly from De Waal (n 9) conversations with individuals from both sides, and news articles from local and international media.

³⁹ There are many examples in which force is claimed to be lawfully resorted to even though the legal basis was deemed absent by many others. See for instance the discussions on the scope of self-defense, particularly anticipatory self-defense, for instance regarding the current situation with Iran’s nuclear build-up. Also, the discussions on Security Council authorizations. For instance the argument that the US/UK invasion in Iraq was lawful on the basis of Resolution 678 (1990), brought forward by, amongst others, Yoram Dinstein, *War, Aggression and Self-Defence* (4th ed., Cambridge University Press 2005) 294-304. A third example are the arguments put forward to claim that humanitarian intervention without Security Council authorization is legal.

⁴⁰ Kennedy (n 5) 80.

aggression is that it applies only to the use of force between states,⁴¹ even though an argument can be made that the concept of aggression should also apply to *de facto* independent states.⁴² Since Nagorno Karabakh is not recognized as a sovereign state by any other state, one could criticize the exercise in this article on the basis of the argument that Nagorno Karabakh may therefore not be regarded as a potential perpetrator nor victim of aggression. However, since the purpose of this article is not to examine the legal application of aggression to this conflict, and therefore not to draw conclusions about whether or not Azerbaijan, Nagorno Karabakh and/or Armenia could be considered aggressors, but instead to study the structure of the arguments, I find it irrelevant to include the question of the status as state or quasi-state with regard to aggression into this analysis. This would only make matters more complex, without providing analytical benefits.

Regarding the method of selecting the arguments, I want to stress that this analysis is aimed to be explorative in order to illustrate a logic, rather than empirical. I do not understand Armenian, Azeri nor Russian and am therefore unable to study primary sources. The analysis is based on the many discussions over the past few years with those involved in the conflict and descriptions of experts. I have presented and discussed this analysis to regional experts and in Nagorno Karabakh. Therefore, even though the sections below may come across as rather hypothetical due to the lack of primary sources, I believe that the logic and argumentative dynamic described is a helpful illustration of this article's argument that the notion of aggression is fluid enough to be interpreted in what seem like mutually exclusive ways.

This analysis is not aimed to criticize or discuss the substance of the arguments, of either side. Instead, the focus turns to the structure of the arguments, and particularly, the structure of the legal arguments regarding aggressive use of force. There are two levels of contradictions between the underlying assumptions of the legal arguments that are used by both sides when accusing the other of aggression. First, there are contradictions between the different assumptions *within* each side's argumentative structure, and second, there are contradictions between the assumptions on the function of the use of force *between* the two sides to this conflict. In asserting that the argumentative structure of the legal argument is contradictory, I do not mean to criticize either side in the way they choose to formulate their arguments. This can be highly effective for, for instance, political purposes. Rather, it is a critique on the ability of law to deal with situations like these, or, put differently, a study of the limitation of international law when it is applied to the issue of war.

Arguments regarding aggression are directed towards the alleged unlawfulness of the use of force. For the Nagorno Karabakh conflict, one would look at the grounds on which the use of force started in 1991. The arguments that are used can be subdivided in arguments i) based on territory and ii) based on human rights discourse. Arguments that connect the lawfulness of the use of force to territorial claims are either based on (a) the idea that territory belongs to a community or a

⁴¹ See UN Charter (n 27) art 2(4); UNGA Resolution 3314 (n 17); Rome Statute (n 2) art 8bis; Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UNGA Res 2625 (XXV) (24 October 1970).

⁴² See for this argument Alexander G. Wills, 'The Crime of Aggression and the Resort to Force against Entities in Statu Nascendi' (2012) 10 Journal of International Criminal Justice 83.

people, or (b) that it belongs to a state. The human rights-type arguments to legitimate the use of force either rely on (a) the individual's rights or on (b) the right to self-determination and self-preservation attached to a community.

3.3 Territorial Arguments

Both Azeri and Armenian Karabakhis claim historical ties to the area. The Armenian argument comes down to the claim that the Armenian Karabakhis have the strongest historical ties because they have lived there since before the time when the mountains formed part of the great Armenian kingdom. They buttress this, amongst others, by pointing to Armenian inscriptions and Armenian religious buildings that were built in various historical periods and are found throughout the territory. The Azerbaijani argument, on the other hand, claims that the territory belonged to Azeris and point to sources that state that the people claiming to be Armenian Karabakhis are actually 19th century settlers from Persia, or even Albanian descendants, making them in fact Azeris. Both these arguments are based on assumptions that connect a people to territory, that a territory belongs to a community of people or a nation. I will therefore refer to these as community-based territorial arguments.

These arguments that refer to historical claims are often taken into, what I call, state-based arguments, asserting that, because of stronger historical ties, the territory belongs to a *state*: either to Armenia or to an independent Nagorno Karabakh, or to Azerbaijan. The Armenian argument puts forward that the area belonged to the great Armenian kingdom and should therefore naturally belong to the current Armenian state, or, alternatively, be an independent Karabakhi state, Nagorno Karabakh. They buttress their state-based claim by asserting that Stalin's reassignment of Nagorno Karabakh from Armenia to the Azerbaijani Soviet in 1921 was unjustified and illegal, merely an appeasement towards Turkey. International law cannot accept this illegality and injustice, and the use of force to protect Nagorno Karabakh from illegal annexation is therefore justified. The Azerbaijani state-based argument is that Nagorno Karabakh was part of the Azerbaijani Soviet before the collapse of the Soviet Union, and, pointing to the *uti possidetis* principle, that therefore the contested area belongs to the state Azerbaijan. Any use of force against this territory is therefore a violation of Article 2(4) of the UN Charter, which protects the territorial integrity of (*de jure*) states.⁴³

3.4 Human Rights Arguments

However, because neither of these community-based and state-based arguments that are grounded on the legality of using force for territoriality provide a legal solution to the dispute and do not convince the opponent of revoking its claims, they are supplemented by human rights arguments – usually individual-based arguments. The Armenian argument is that force is to be used because the human rights of the individuals from Armenian descent are violated by Azeris through persecution, and these rights can be vindicated and protected by using force. The individual-based counterargument of the Azeri side is that it is they, not the Armenians, that are

⁴³ Even if a state has become a 'failed state', international law is still widely believed to regard the entity as a state under international law, as long as it at one point met the Montevideo criteria of statehood and was recognized as an independent state by other states (which and how many suffices remains unclear and part of the political domain, as was reiterated by the Kosovo situation).

entitled to use force, in order to protect the human rights of Azeri individuals, who are persecuted and ethnically cleansed by Armenians. They point to the now almost entirely Armenian population of Nagorno Karabakh as evidence, since during the Soviet period Azeris made up approximately a quarter of the population.

In addition, there are two other human rights based arguments from the Armenian side, but they are community-based arguments. First is an argument based on self-preservation. The argument is that their resort to force is lawful because the Armenian Karabakhis as a 'people', as opposed to individuals, are under threat of extermination. They argue that living under Azerbaijani rule will cause (further) persecution. For self-preservation, the community is entitled to defend itself, and therefore can lawfully resort to force. And another state, Armenia, is entitled to assist a people that would otherwise be in danger of extinction. This resembles a Hobbesian approach. Hobbes wrote that for self-preservation, there would always be the right to resort to all means. Hobbes derived the idea of self-defense of a state from the right to self-preservation of any individual. Therefore, a community that fights to protect itself from extermination would in the opinion of Hobbes and many thinkers in the 'war as institution of law'-concept of the use of force, be a resort to force in accordance with the law.⁴⁴ Hobbes therefore held that if necessary for self-preservation, states are allowed to break treaty obligations and resort to armed force lawfully.⁴⁵

A second community-based human rights argument that the Armenian side invokes is a self-determination argument. Namely, that resort to force by Armenia is justified to assist secession because the internal right to self-determination is denied to the Karabakh people, due to violence against the Karabakhis and the lack of ability to pursue political, economic, social and cultural development. They argue that they should be granted independence by asserting that they are 'subject to alien subjugation, domination or exploitation outside a colonial context', which is declared a violation of the right to self-determination in the Declaration on Friendly Relations⁴⁶ and which was recognized as grounds for external self-determination by the Canadian Supreme Court in the *Quebec* case.⁴⁷ In addition, and particularly since the independence of Kosovo, they argue that the abrogation of Nagorno Karabakh as an autonomous region by Azerbaijan in 1991 and the violation of fundamental human rights, block the meaningful exercise of their self-determination, leaving no other means than secession. The Armenian use of force to ward off violators of this right and enable the exercise of self-determination is therefore justified, according to the Armenians. Particularly since Kosovo was recognized as an independent state by some states, especially Western states,⁴⁸ because the secession of the Kosovar Albanians was deemed lawful in their opinion due to human rights abuses by Serbia,⁴⁹ the argument that such a 'remedial right' to independence exists in international law has been invoked increasingly.

⁴⁴ See Neff (n 22) 177 and further.

⁴⁵ Hobbes, *De Cive* (n 23). See also Hobbes, *Leviathan* (n 23).

⁴⁶ Friendly Relations Declaration (n 41).

⁴⁷ Reference re Secession of Quebec [1998] 2 S.C.R. 217, para 133.

⁴⁸ Kosovo is recognized by 91 states, most of which are Western states (including 22 EU member states), but also including few from Africa, Latin-America and Asia. See for an overview of recognitions of Kosovo: <http://www.kosovothanksyou.com/> (last visited on 18 June 2012).

⁴⁹ See for instance the letter from the government of the Netherlands, recognizing the independence of Kosovo, Brief van de Minister van Buitenlandse Zaken (4 March 2008) Tweede Kamer, vergaderjaar 2007-2008, 29478, nr. 8.

4. CONTRADICTORY ASSUMPTIONS WITHIN AND BETWEEN ARGUMENTATIVE STRUCTURES

Neither of these bases for arguments (state-based, community-based or individual-based) have led to a resolution of the conflict. They have been incapable of convincing the other side. But besides being unconvincing for the opponent, if they are analyzed as *legal* arguments, relying on underlying assumptions regarding the nature and function of law, they are also contradictory. For example, the arguments described above hold contradictory assumptions i) within both sides' argumentative structure on territoriality, namely between the state-based and community-based arguments, ii) between the territorial and human rights arguments within each side's argumentative structure, and iii) between the Azerbaijani and Armenian arguments with regard to worldviews or nature of international relations.

First, applying a state-based approach to argue that use of force is legitimate because the territory belongs to this or that state, such as set out above, assumes that the world is comprised of states that have claimed parts of territory and have agreed amongst each other on a certain division thereof, and that, consequently, a certain territory belongs to a certain state. However, the community-based arguments assume the contrary, namely that it is communities, nations or peoples that have a claim over a territory, not states. In this view, statehood is derived from nationhood, not from territorial acquisition and division amongst organizational structures called states. They often go together, but not necessarily, as numerous conflicts in the world demonstrate. Conceptually, to argue on the basis that a territory belongs to a state in the way of the state-based argument is to discredit the argument that the territory belongs to a people of the community-based argument: a territorial claim is either derived from the idea of sovereign states' rights over territory or from the idea of peoples' rights over territory, but not a combination of the two. The state- and community-based arguments are therefore mutually exclusive.

Second, the human rights-type arguments also contradict the state-based arguments. For example, to invoke an individual-based argument that armed force can be resorted to in order to protect individuals assumes that there are universal values that are applicable to any individual that belongs to humanity, that the state is a mere production of these individual rights, and that international law is to be understood as based on objective assessments of universal truths and values. This contradicts with a state-based approach, which assumes that the world consists (exclusively) of states, particular (as opposed to universal) interests, and that international law is derived from state will instead of a natural or universal law and cosmopolitan values.

Third, in addition to these internal contradictions within each side's argumentative structures, both sides also argue with each other from different and inconsistent conceptual frameworks regarding the nature of international relations. The argumentative strategy often chosen is to oppose the other's state-based argument by putting forward a community- or individuals-based argument or vice-versa. For example, against the Azerbaijani state-based reference to the UN Charter and claim that the Armenians violate Azerbaijan's territorial integrity, Armenians put forward the argument that the territory actually belongs to Armenian Karabakhi people and/or that their right to self-determination and/or individual human rights are violated. Switching between these argumentative bases is a strategy to provide for a

(politically) more convincing and compelling position than the other side, and presents the conflict as a legal conflict between conflicting norms. It adds to the persuasive power of the arguments, which, in ‘the court of world public opinion’ is often more important than its validity.⁵⁰ As asserted by Kennedy, ‘[w]hether a norm is or is not legal is a function not of its origin or pedigree, but of its effects. Law has an effect – is law – when it persuades an audience with political clout that something someone else did, or plans to do, is or is not legitimate. The point is no longer the validity of distinctions, but the persuasiveness of arguments.’⁵¹ However, in a similar way as described above for the internal contradictions, this search for persuasiveness merely places these contradictory assumptions opposite each other.

Both sides are convinced of the legitimacy of their own resort to force and claim the other’s use of force as aggressive. Interestingly enough, however, both sides use conceptual frameworks that are legal frameworks, i.e. a limitation of unbridled power. For example, if the argument for Azerbaijan is that they are entitled to use force because their territorial integrity is violated, that they are merely defending against aggression, the argument applied to argue the Nagorno Karabakh side is that they are entitled to use force because they are denied their self-determination, and are in the course of a legitimate struggle for freedom from alien subjugation. They may invoke the Kosovo Advisory Opinion of the ICJ that stated that territorial integrity is a principle that only applies in interstate relations and cannot be invoked against a self-determination movement.⁵² For Armenia, the argument goes that they are entitled to use force to protect Karabakhi individuals from human rights abuses – a responsibility to protect-type argument. A state-based argument is responded to with a community-based and an individual-based argument, all sides also applying conceptual frameworks that rest on contradictory underlying assumptions with regard to the nature of international relations, the function of the use of force, and the source and binding nature of international law.

The legal dispute is only resolved by making a choice between one or another concept of the use of force. In the examples above, I have purposely simplified the positions of the parties to this conflict to show the contradictions between their perspectives. This does not alter the dynamic of the argumentative process. When one side jumps to another use of force concept and conceptual framework to argue their position, the opponent counters this by switching as well, in order to provide a counterargument, maintaining the contradiction.⁵³

In the arguments exchange between Armenia and Nagorno Karabakh on one side and Azerbaijan on the other, where each side accuses the other of aggression, state-based, individual-based and community-based arguments, each with their own underlying assumptions, are used at the same time, with the purpose to reinforce the other arguments. However, at the same time, they create conceptual contradictions; within each argumentative structure and between the two opposing positions. Neither of these bases for arguments have in itself led to a resolution of the conflict. They have shown incapable of convincing the other side. But besides unconvincing for the opponent, if they are analyzed as *legal* arguments, relying on underlying

⁵⁰ Kennedy (n 5) 96.

⁵¹ Kennedy (n 5) 96.

⁵² Accordance with international law of the unilateral declaration of independence in respect of Kosovo (Advisory Opinion) 2010, available at <http://www.icj-cij.org/docket/files/141/15987.pdf>, para 80.

⁵³ See for a profound analysis of the structure of the legal argument Koskeniemi (n 24).

assumptions regarding the nature and function of law, they may also be contradictory.

5. THE CRIME OF AGGRESSION: INDETERMINACY MEETS MORAL REPUDIATION

This analysis demonstrates what Kennedy described as ‘the *fluidity* and *diversity* of the legal context,’ in which ‘[o]ften more than one law might apply, or one law might be thought to apply in quite different ways.’⁵⁴ He continues, ‘[a]lthough any of us might well disagree with one or another interpretation, we must recognize that the legal materials are elastic enough to enable diverse interpretations. Harnessing law as a strategic asset to strengthen or restrain the military requires the creative use of *legal pluralism* – and a careful assessment of the power those with different interpretations may have to influence the context for operations. The astonishing thing is that these are differences in *perspective* on a quite similar set of legal doctrines and political considerations.’⁵⁵ The notion of aggression is a particularly elastic legal concept that is therefore ever so useful for creative argumentation.

The indeterminacy of the notion of aggression allows parties to invoke differing interpretations and switch between differing underlying conceptual frameworks, while speaking the same ‘language’ of law, making it an instrument that is flexible enough to be a felicitous weapon in the struggle for global public opinion. Besides *well-suited* for lawfare, it has moreover become an increasingly *powerful* tool for lawfare because the regulation of war and the criminalization of aggression has provided the accusation an opponent of committing aggressive war with the connotation of it being a *jus cogens* violator and a criminal, guilty of committing an international crime, which is according to the Rome Statute of the ICC one of ‘the most serious crimes of concern to the international community as a whole.’⁵⁶ It has thereby added a layer of moral repudiation to the concept. Parallel to the development of law as inseparable from politics, and the development of war as inseparable from peace, this moral condemnation has made the *jus ad bellum* a strategic partner for both sides in a conflict.⁵⁷

It is difficult to assess this development as being ‘good’ or ‘bad’ as such. Providing instruments in terms of law rather than military means seems a less harmful manner of fighting a war: who will die or lose a limb from that? But changing the battlefield to the arena of law, does not solve the conflict. The positions and objectives of the parties to a conflict remain opposed. As Paul Williams noted, ‘[t]hey may switch their guns for their pens, but they are still engaged in a very aggressive action to accomplish those same political objectives that led them to the battlefield. Most often, when agreeing to a peace process, the parties have not changed their positions but have simply changed the venue of the battle.’⁵⁸ This is highly visible in the Nagorno Karabakh example. Economic circumstances and (geo-)political considerations may have brought parties to verbalize their positions in legal terms rather than only through military power, but a solution to the deep-rooted conflict is

⁵⁴ Kennedy (n 5) 38 (emphasis in original text).

⁵⁵ Kennedy (n 5) 39 (emphasis in original text).

⁵⁶ Rome Statute (n 2) Preamble.

⁵⁷ See Kennedy (n 5) 41.

⁵⁸ Paul R. Williams, ‘Lawfare: A War Worth Fighting’ (2010) 43 Case W. Res. J. Int’l L. 145, 147.

ever so far away, and ready to burst out again beyond the current near-weekly casualties.

Despite the presumption that the prohibition to use force in the UN Charter provides legal mechanisms to monopolize war and ‘to save succeeding generations from the scourge of war,’⁵⁹ it has in fact created a constitutional regime of legitimate justifications for warfare.⁶⁰ The Nagorno Karabakh example provides some insight, but not nearly an exhaustive one, into the wide variety of possible justifications for the presumed *jus cogens* norm.⁶¹ By providing the vocabulary not only for restricting the occurrence of war but also for legitimizing the decision to go to war, the prohibition of the use of force has not banned war, and certainly not prevented war as several post-WWII examples have shown. Rather, it has provided a new strategic tool for the continuation of the conflict. As Kennedy put it, ‘this bold new vocabulary beats ploughshares into swords as often as the reverse.’⁶²

Furthermore, the integrity of law, and in particular of the notion of aggression, may well be at stake. This was noted by Wouter Werner, who raised the question ‘What is left of the integrity of law and the responsibility of lawyers if legal provisions are turned into strategic tools to fight an enemy?’⁶³ Werner thereby refers to Kennedy, who pointed out that an increasingly strategic use of the modern law in war would eventually undermine the normative force of law.⁶⁴ One can raise concerns, as Kennedy does, regarding the responsibility of lawyers, both in the military and in the humanitarian professions. By presenting law as a mechanism through which all relevant factors are taken into account and justice is its only outcome, lawyers create an image of law that it cannot deliver.

This is not necessarily or solely due to parties’ and their lawyers’ use of the notion of aggression (because if the law allows for it, why shouldn’t they?), but due to the indeterminacy of aggression and the limitation of law in providing answers to every question. Regulation, and especially criminalization, raises the presumption that law can prevent war or resolve its underlying conflict, and that it can always provide the answer to which side is good and which is bad, which party has the law on its side (if any), and which does not. Understanding the law in this way, as a means to give ‘right’ answers and solutions to any conflict that arises, may well be an overstatement of the law’s capabilities. Such an interpretation of the ability and function of international law falsely provides the idea of the legal language as necessarily encapsulating truths. But it is precisely this perception that allows an indeterminate notion as aggression to be used as weapon of warfare.

5. CONCLUSION

While wars of aggression are believed to be one of ‘the most serious crimes of concern to the international community as a whole’,⁶⁵ at the same time, the meaning of aggression is stretched and molded to mean almost anything one wants it to mean

⁵⁹ UN Charter (n 27) Preamble.

⁶⁰ Kennedy (n 5) 79.

⁶¹ Presumed, because one may wonder whether it is not a *contradictio in terminis* to have justifications for breaking a *jus cogens* norm.

⁶² Kennedy (n 5) 167.

⁶³ Werner (n 8) 67.

⁶⁴ Kennedy (n 5) 135; Werner (n 8) 67.

⁶⁵ Rome Statute (n 2) Preamble.

because the indeterminacy and variety of frames through which it can be interpreted allow it so. In Kennedy's words, '[w]here it is clear, the law in war will have winners and losers. Where the law is open and plural, it will be pulled and pushed in different directions, articulated in conflicting ways, by those with different strategic objectives.'⁶⁶ War is the topic *par excellence* where the law is open and plural, and where a state will reject law to trump politics, but rather uses law to support its politics.

The Nagorno Karabakh conflict shows how the notion of aggression can be used as a weapon of lawfare, to fight the disagreements in the arena of law as well as on the ground. It also demonstrates the limits of the law's ability to provide universal truths and solutions to deep-rooted conflicts. Ultimately, even though parties can agree to speak 'law' to one another, different underlying assumptions lead to different interpretations of that law that may well contradict each other. To think that the law can provide for answers where disagreement stems from fundamental disagreement on which conceptual frame to look through with regard to world views, the function of war, and the source and binding nature of international law, is an overestimation of the law's capabilities. By presenting law as a solution-bringing instrument, and by attaching to aggression the label of 'international crime' despite its indeterminacy, what is in fact put at stake is the *integrity* of the law, and particularly of the notion of aggression. It creates the illusion that law can deliver solutions where it cannot. It adds a layer of moral repudiation to the already heated mix of disagreements in existing conflicts. And it provides warring parties with yet another weapon to fight with, and yet another battlefield to fight on. As with the incongruity between the *de jure* and *de facto* situation in Nagorno Karabakh, the misfit between the presumed and the actual capabilities of the crime of aggression is conspicuous.

⁶⁶ Kennedy (n 5) 127.