

# Julius Stone, Aggression, and the Future of the International Criminal Court

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## Abstract

The article is concerned with the crime of aggression, the long and contested history behind its regulation, the final incorporation in the Rome Statute, and the implication of the regulation for the standing of the international criminal court. In order to explain and understand the struggle over aggression, the article recovers the writings of Julius Stone. It is contended that his writings can not only help us in understanding the key elements that have made aggression a highly controversial topic in international criminal law but also in comprehending the underlying features of the current regulation. Drawing on Stone's account of justice, the article further suggests that, in light of the position in which the court finds itself, it should approach the crime of aggression with modesty and self-restraint.

The International Criminal Court (icc)<sup>1</sup> is finding itself in a challenging situation.<sup>2</sup> Some have sustained that the practices of the court have fallen short

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<sup>2</sup> I will use the terms 'icc' and 'court' synonymously.

<sup>3</sup> See e.g. Mark J. Osiel, 'The Demise of International Criminal Law', *Humanity Journal Blog*, 14 June 2014, <http://humanityjournal.org/blog/the-demise-of-international-criminal-law/>, accessed on 14 November 2017.

of the self-proclaimed standards the court has adhered to.<sup>3</sup> Others have contended that the understanding of justice underpinning the court is inadequate and even counterproductive for the dealings with systemic crimes like genocide or war crimes.<sup>4</sup> Last but not least, the ICC has been criticized to suffer a bias against Africa by having disproportionately focused its operations on the continent. This has led some African countries to become increasingly disaffected with the court.<sup>5</sup>

Following the agreement reached at the 16th Assembly of State Parties (ASP), the court will start to have jurisdiction over the crime of aggression from 17 July 2018, the 20th anniversary of the Rome Statute and eight years after the Kampala Review Conference.<sup>6</sup> In some quarters the effective inclusion and regulation of the 'supreme international crime',<sup>7</sup> as it is sometimes treated, has been heralded a 'milestone'.<sup>8</sup> At the same time, the possibility of the ICC handling aggression has raised concerns.<sup>9</sup> In contrast to other offences like war crimes the question of aggression is concerned not with an action itself but with the reasons behind that action, in this case the initial use of force by states. Accordingly, it becomes unavoidable to question the political reasons that drove the state to perform such an action. In other words, the court needs

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4 See, e.g., Sara Kendall and Sarah Nouwen, 'Representational Practices at the International Criminal Court: The Gap between Juridified and Abstract Victimhood', 76 *Law & Contemporary Problems* (2014) 235–262; Carsten Stahn, 'Justice Delivered or Justice Denied? The Legacy of the Katanga Judgment', 12 *Journal of International Criminal Justice* (2014) 809–834.

5 Sarah Nouwen and Wouter G. Werner, 'Monopolizing Global Justice. International Criminal Law as Challenge to Human Diversity', 13 *Journal of International Criminal Justice* (2015) 157–176; Mark A. Drumbl, *Atrocity, Punishment, and International Law* (Cambridge, Cambridge University Press, 2007); Obiora C. Okafor and Uchechukwu Ngwaba, 'The International Criminal Court as a 'Transitional Justice' Mechanism in Africa: Some Critical Reflections', 9 *International Journal of Transitional Justice* (2014) 90–108.

6 Edwin Bikundo, 'The International Criminal Court and Africa: Exemplary Justice', 23 *Law and Critique* (2012) 21–41; Kamari M. Clarke, Abel S. Knottnerus and Eefje de Volder (eds.), *Africa and the ICC: Perceptions of Justice* (Cambridge, Cambridge University Press, 2016).

7 See Draft resolution proposed by the Vice-Presidents of the Assembly Activation of the jurisdiction of the Court over the crime of aggression (ICC-ASP/16/L.10).

8 *Trial of the Major War Crimes before the International Military Tribunal* (Nuremberg, International Military Tribunals, 1947), p. 186.

9 Claus Kreß and Leoni Von Holtendorff, 'The Kampala Compromise on the Crime of Aggression', 8 *Journal of International Criminal Justice* (2010) 1179–1217, p. 1217.

10 See Marieke de Hoon, 'The Crime of Aggression's Show Trial Catch-22', *European Journal of International Law* (forthcoming).

to, even more explicitly, grapple with what it means to engage in the politics of international law.<sup>10</sup>

The challenging aspects of aggression would not have surprised Julius Stone. Already in 1958, he noticed that behind aggression lay ‘a rich vein of problems and ideas of fundamental juristic and political importance’, which necessarily embroiled ‘the inquirer in problems of ultimate values’.<sup>11</sup> Born in 1907 in Leeds, United Kingdom (UK), to Lithuanian Jewish refugees, Stone had a very peripatetic life. He pursued his legal education in the UK and the US, after which he taught in the US, New Zealand, India, Israel, and Australia. He spent the bulk of his career at the University of Sydney, where he was the holder of the Challis Professorship of Jurisprudence and of International Law between 1942 and 1972. He would die in Sydney in 1985.

Despite Stone’s prominence in international law during his academic career,<sup>12</sup> his writings have slowly fallen out of focus since his death.<sup>13</sup> If at all, he tends to be mostly remembered for his debate with Sir Hersch Lauterpacht on *non liquet* in international law.<sup>14</sup> In this article, I attempt to revive Stone’s writings and to highlight their fruitfulness in dealing with some of the challenges the ICC faces at present, in particular that of aggression.<sup>15</sup>

The article is structured as follows. The first section sketches the basic categories of Stone’s writings – communication, sociological jurisprudence, realism – and thereby allows for a contextualization of his writings on aggression.

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11 Gerry J. Simpson, *Law, War and Crime: War Crimes, Trials and the Reinvention of International Law* (Polity, London, 2007), p. 11.

12 Julius Stone, *Aggression and World Order: A Critique of United Nations Theories of Aggression* (The Lawbook Exchange, Ltd., Clark, NJ, 2011 [1958]), p. vii.

13 For instance, his 1954 book *Legal Controls of International Conflict* was awarded the American Society of International Law’s Certificate of Merit in 1956.

14 A quick look at Google Ngram, for example, shows that there has been a constant decline of books citing him since his death, see at <https://tinyurl.com/y7qolpow>, accessed on 14 November 2017.

15 See in chronological terms Hersch Lauterpacht, *The Function of Law in the International Community* (Clarendon, Oxford, 1933); Julius Stone, *Legal Controls of International Conflict: A Treatise on the Dynamics of Disputes and War Law* (Rinehart & Company Inc., New York, 1954); Hersch Lauterpacht, ‘Some Observations on the Prohibition of “Non Liqueur” and the Completeness of the Law’, in F.M. van Asbeck (ed.), *Symbolae Verzijl: présentées au professeur J.H.W. Verzijl, à l’occasion de son LXXième anniversaire* (Martinus Nijhoff, The Hague, 1958), pp. 196–221; Julius Stone, ‘Non Liqueur and the Function of Law in the International Community’, 35 *byil* (1959) 124–161.

16 As Benjamin B. Ferencz remarks, Stone’s analysis of aggression has been ‘nearly prophetic’, see Benjamin B. Ferencz, ‘Paradoxes of a Sharp Legal Mind: Professor Julius Stone and International Aggression’, in Stone, *supra* note 11, pp. iii–xxvii, p. xvi.

The article continues by presenting Stone's analysis of aggression. For Stone, the struggles behind aggression reflect deep political, sociological, and ethical issues of international law. The following section describes the negotiations concerning aggression for the purposes of the Rome Statute. It will become clear that the debate regarding the regulation of the crime closely reflects the issues identified by Stone. I will then contend that the effective inclusion of aggression in the Rome Statute merely constitutes a transfer of the problems identified by Stone to the ICC. Lastly, I will argue that Stone's writings on justice give important clues for how to move forward.<sup>16</sup> We shall see that his understanding of what justice requires pinpoints to the need for a more self-reflexive ICC, as some of the recent critical literature has suggested.<sup>17</sup>

## 1 The Core Elements of Julius Stone's Theory

Stone's account can be separated analytically into three distinctive elements: communication, sociological jurisprudence, and realism.

### 1.1 Communication

Stone takes the notion of communication from the German existential philosopher Karl Jaspers. For Jaspers, human beings are relational beings whose life and existence depends on communication.<sup>18</sup> Through communication, which comprises 'acting, speaking, and keeping silence together',<sup>19</sup> we can overcome who we are as human beings, our limitations and antinomies and reach the '*unity of mankind*'.<sup>20</sup> By engaging incessantly with others, what Jaspers describes as 'shared participation in dialogue',<sup>21</sup> we can elevate our consciousness and overcome our prejudices and fixed attitudes, thereby reaching

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17 Julius Stone, *Human Law and Human Justice* (Stevens, London, 1965).

18 See e.g., Nouwen and Werner, *supra* note 4; or Sara Kendall and Sarah Nouwen, 'Speaking of Legacy: Toward an Ethos of Modesty at the International Criminal Tribunal for Rwanda', 110 *AJIL* (2016) 212–232.

19 Karl Jaspers, *Way to Wisdom: An Introduction to Philosophy* (Yale University Press, New Haven, 1954 [1950]), p. 91; Karl Jaspers, *Reason and Existenz* (Noonday Press, New York, 1957 [1935]), p. 79.

20 Jaspers, *Way to Wisdom, ibid.*, p. 122.

21 *Ibid.*, p. 106.

22 Chris Thornhill, 'Karl Jaspers', in Edward N. Zalta (ed.), *Stanford Encyclopedia of Philosophy* (2011), available at <https://plato.stanford.edu/cgi-bin/encyclopedia/archinfo.cgi?entry=jaspers>, accessed on 15 November 2017.

'mutual understanding'<sup>22</sup> and truth.<sup>23</sup> Vice versa, if communication fails, then there is no possibility of community or loyalty.<sup>24</sup>

Stone follows Jaspers in that he treats communication 'as a basic component of individual and social life'.<sup>25</sup> Accordingly, it is through communication that individuals engage with each other<sup>26</sup> and through which they can impart, seek, or discuss 'what is known or felt, what is to be known or felt, whether as facts or as asocial or individual values'.<sup>27</sup> Communication thus allows individuals to mature and to develop inter-personal bonds.<sup>28</sup> As a result of this maturation, individuals begin to grasp reality and their 'own identity as an individual'.<sup>29</sup>

Communication, according to Stone, has a physical and a mental component. The physical element simply refers to the overcoming of the obstacle of space so as to engage in communication. The mental one focuses on the 'more or less' accurate transmission of thought between persons.<sup>30</sup> Following Stone, a mental act of communication is composed of three elements which are necessary for the success of the act: (1) the symbol or physical event by which thoughts are transmitted; (2) the thought that is intended to be transmitted; and (3) the subject matter which the thought concerns'.<sup>31</sup> Stone remarks that, even if all three elements are present, communication can still fail due to 'man's unwillingness to be found in error', which 'inhibits the perseverance of the search for truth'.<sup>32</sup>

Concerning international law, Stone maintains that communication is as crucial at the international level as it is in domestic society<sup>33</sup> and that the existence of common norms at the international level necessitates a 'high degree of efficient human communication'. At the same time, he warns that because of the absence of a stable community, i.e., the lack of a widespread historical culture and way of life, the level of communication existent at the international

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23 Jaspers, *Way to Wisdom*, *supra* note 18, p. 122.

24 *Ibid.*, p. 26.

25 *Ibid.*, p. 25.

26 Julius Stone, *Visions of World Order: Between State Power and Human Justice* (Johns Hopkins University Press, Baltimore, 1984), at 4; Stone, *supra* note 14, p. 321.

27 *Ibid.*, *Legal Controls*, *supra* note 14, p. xxxix.

28 *Ibid.*, p. 121.

29 *Ibid.*

30 Julius Stone, 'Problems Confronting Sociological Enquiries Concerning International Law', 89 *Collected Courses of the Hague Academy of International Law* (1956) 61–180, p. 94.

31 *Ibid.*, p. 95.

32 *Ibid.*, p. 96; Stone, *supra* note 25, p. 4.

33 Stone, *supra* note 14, p. 121.

34 Stone, *supra* note 29, p. 95.

level is less developed in comparison to that at the domestic level.<sup>34</sup> In other words, he has concerns about the presence of a shared community at the international level,<sup>35</sup> making communication a much more complex task.<sup>36</sup> Despite these limitations, because of international law's 'world-wide recognition', he sees international law as having the potential to foster world-wide communication, which, for him, makes its nurturing worthwhile.<sup>37</sup>

## 1.2 *Sociological Jurisprudence*

Following his mentor Roscoe Pound, Stone holds the view that law essentially aims to deal 'with the *de facto* interests or demands made by people within particular societies'. Sociological jurisprudence of (international) law refers to the thought of analysing law in terms of 'its practical functioning, with a view to making and administering law as means of adjusting those demands so as to minimise conflict between them and maximise their realisation'.<sup>38</sup> It follows that the study of international law cannot be reduced to a mere doctrinal analysis of the norms, principles and rules governing inter-state relations, but needs to include the exploration of their actual impact in a broader social context and the analysis of how the various 'interests' are secured.<sup>39</sup>

This requires, Stone writes, understanding the sociological substratum – the 'extralegal data knowledge' – underpinning international law. By knowing the 'material' of which international law is made, we can manipulate and elaborate it. Otherwise, our knowledge of international law becomes ossified and the law renders itself 'increasingly estranged from the problems which it seeks to regulate'.<sup>40</sup> What belongs to the substratum, according to Stone, is quite extensive. It includes geographical, technological, physical, biological, psychological, and cultural elements, among others.<sup>41</sup> He acknowledges that the factors interact in complex and irregular ways and that there is no a priori hierarchy between the different influences on international law.<sup>42</sup> Instead he sustains that all factors are potentially important and that their actual relevance 'will

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34 *Ibid.*, p. 105.

35 *Ibid.*, p. 128.

36 Stone, *supra* note 25, p. 5.

37 Stone, *supra* note 14, p. xlv.

38 Nicholas Aroney, 'Julius Stone and the End of Sociological Jurisprudence: Articulating the Reasons for Decision in Political Communication Cases', 31 *University of South Wales Law Journal* (2008) 107–135, p. 120.

39 Stone, *supra* note 25, p. xi.

40 Stone, *supra* note 14, pp. 39–40; *supra* note 25, p. 1; *supra* note 29, p. 66.

41 *Ibid.*, *supra* note 29, p. 76; *supra* note 25, p. i.

42 *Ibid.*, *supra* note 29, p. 78; *supra* note 25, p. 2.

depend mainly on the momentary state of the development of technological power and on the range and intensity of human demands'.<sup>43</sup>

### 1.3 **Realism**

Stone portrays himself as a 'realist' and thereby aims to distance himself from the majority of international lawyers, who he treats as 'idealists'.<sup>44</sup> His realism can be classified as 'classical', the notion of which 'denotes a certain hard-headed, unromantic, uncompromising attitude towards the world, which manifests itself in a brutal honesty and candour in the assessment of human motives and the portrayal of human affairs'.<sup>45</sup> At the same time, Stone's realism should not be understood as representing a cynical or pessimist understanding of the world under which any attempt to change the world is seen as pointless or illusory.<sup>46</sup> When he presents himself as sceptical, he does not refer to 'despair and inaction' but rather to 'true scepticism' in a world of constant movement. More precisely, his is a scepticism predicated against 'tedium, hardships and agony or an unknown journey, rather than a warrant for refusal to undertake it'.<sup>47</sup> For him, the international lawyer needs to accept that the

path of human survival is the path of untidy, protracted processes of compromise and adjustment; that history offers no ground for believing that sudden revealed salvations can do other than aggravate the evil they seek to remedy.<sup>48</sup>

## 2 **Stone's Views on Aggression**

By and large, Stone is sceptical of the idea of constructing an effective *legal* definition of aggression that is capable of regulating actions between states.<sup>49</sup>

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43 *Ibid.*, *supra* note 25, p. 1.

44 Stone, *supra* note 14, p. xxxiiiiff.

45 Brian Leiter, 'Classical Realism', 11 *Philosophical Issues* (2001) 244–267, p. 245.

46 Albert O. Hirschman, *The Rhetoric of Reaction* (Harvard University Press, Cambridge, 1991), Ch. 3.

47 Stone, *supra* note 29, p. 174.

48 Stone, *supra* note 14, p. xli.

49 Stone, *supra* note 11, p. 78. An astute reader might observe that during Stone's time there was in fact an agreement on aggression – General Assembly, *Definition of Aggression* (Resolution 3314 (xxix)), 14 December 1974. This would seemingly make in turn redundant some of Stone's criticism. However, Stone rightly notices that many of the elements and problems behind aggression persisted and that the consensus behind the definition was

He is conscious that aggression as an everyday concept has a 'reasonably well-settled (if imprecise) meaning', which carries a negative connotation in moral terms.<sup>50</sup> Nevertheless, Stone warns that, even if this everyday meaning provides a starting point for international lawyers, a legal definition of aggression requires considerably more than a mere clarification of its usage in common parlance. Determining aggression entails the fine balancing between the branding and punishing of states for committing 'the greatest crime against mankind', and leaving states 'sufficient freedom of action to allow them to survive at a tolerable level of security and opportunity'.<sup>51</sup>

Stone contends that no legal definition of aggression can fulfil such requirement in a satisfactory way. Parts of his criticisms are concerned with the conceptual aspects of aggression. To start with, Stone asserts that the concept of aggression is indeterminate.<sup>52</sup> While we might have a vague idea of what aggression is, there are no clear-cut criteria describing the concept. As Stone writes, "[t]he notion asks us, rather than tells us, what these criteria are".<sup>53</sup> Evidently, the task of selecting conditions that describe aggression is daunting because the kind of actions normally falling under aggression are "numerous, complex, wide-ranging and unpredictable".<sup>54</sup>

Besides this first-order problem, Stone points to the issue that to describe aggression, one needs to resort to other concepts and criteria, which will be in need of further of those, and so on.<sup>55</sup> Each of the concepts ultimately brings with itself another layer of uncertainty and complexity of interpretation.<sup>56</sup> For instance, suppose the definition of aggression includes 'economic pressure'. In this case we would first need to determine what kind of activity can be considered economic pressure in order to then decide whether an act of aggression

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more apparent than certain, see Julius Stone, 'Hopes and Loopholes in the 1974 Definition of Aggression', 71 *American Journal of International Law* (1977) 224–246; Kirsten Sellars, *Crimes against Peace and International Law* (Cambridge University Press, Cambridge, 2013), Ch. 9.

50 Stone, *supra* note 11, p. 15.

51 *Ibid.*

52 *Ibid.*, p. 11.

53 *Ibid.*, p. 17.

54 Julius Stone, *Conflict through Consensus: United Nations Approaches to Aggression* (Johns Hopkins University Press, Baltimore, 1977), p. 109.

55 *Idem*, *supra* note 11, p. 82.

56 *Ibid.*, p. 85.

took place.<sup>57</sup> In conclusion, Stone rejects the possibility of fixing a 'mechanical' definition that could establish beforehand all future situations and actions that would amount to aggression.<sup>58</sup>

While the conceptual problems are significant, Stone acknowledges that there is nothing in the logical structure of the concept that necessarily impedes elaborating a successful definition.<sup>59</sup> For him, the actual problems behind the intractability of aggression are first and foremost ethical, political, and sociological.<sup>60</sup>

The sociological problem arises from the diversity of the international community.<sup>61</sup> Stone points to the fact that aggression is a 'strongly emotive symbol' with clear underlying moral intonations. To label an act as an 'aggression' suggests that something morally reproachable has been done and that others need to react and censure that action.<sup>62</sup> However, in order to understand whether a reaction is indeed apposite, criteria are needed and states vehemently disagree on what those criteria are.<sup>63</sup> This is an issue because, while each of us might have an intuition of what constitutes aggression, the intuition will only be effective as long as it converges with that of others.<sup>64</sup> Accordingly, even if our intuitions 'seem compulsive to us', they 'may go quite unfelt by our fellows'.<sup>65</sup>

The political element centres on the future-oriented character of any definition of aggression.<sup>66</sup> Aggression is an extreme case of what Stone calls a 'fact-value complex'; a type of concept whose applicability not only requires ascertaining the facts of a situation but also an 'overall moral judgement' of that situation.<sup>67</sup> While many concepts involve a certain entanglement between facts and values, aggression, for Stone, is an extreme instance: it touches upon facts of a very wide range in space and time, e.g., the historical relationship between states, as well as upon challenging value elements. The intricate blend

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57 *Ibid.*, p. 82.

58 *Ibid.*, p. 10.

59 *Ibid.*, pp. 90–91.

60 *Ibid.*, p. 106; Stone, *supra* note 54, p. 15.

61 Julius Stone, 'Approaches to the Notion of International Justice', in Richard A. Falk and Cyril E. Black (eds.), *The Future of the International Legal Order*, Vol. 1 (Princeton University Press, Princeton, nj, 1969), pp. 372–463.

62 *Ibid.*, *supra* note 54, p. 14.

63 *Ibid.*, *supra* note 11, p. 11.

64 *Ibid.*, p. 12.

65 *Ibid.*

66 *Ibid.*, *supra* note 54, p. 15; *supra* note 11, p. 17.

67 Julius Stone, 'Review of *International Law and the Use of Force by States* by Ian Brownlie', 59 *American Journal of International Law* (1965) 396–403, p. 401.

of facts and normative considerations creates severe difficulties in determining in advance what constitutes an aggression, especially when unforeseen circumstances might appear.<sup>68</sup> In light of this, states are extremely sceptical of submitting 'their major concerns (sometimes even their survival)' to any definition that relies on simple criteria.<sup>69</sup> The main worry is that a fixed definition could stigmatise 'an action which the State may in some yet unforeseen but not unforeseeable circumstances feel justified and even compelled to take'.<sup>70</sup>

The ethical dimension of the problem, as described by Stone, is closely linked to the lack of reliable collective processes for minimal demands of justice at the international level.<sup>71</sup> To make his argument, Stone compares the structural differences between domestic and international law. He notices that domestic legal orders

have a fairly adequate range of detailed rules for solving disputes of all kinds, in which the community's prevailing value-judgments about most aspects of men's lives have already been concretised. They have reliable collective processes for enforcing general observance of their rules, and for legislative adjustment of the social, legal and political arrangements to the minimal demands of justice and stability in the changing matrix of social life. The *effective* prescriptions of such a system are thus great in number and ambit.<sup>72</sup>

Given such structural features of national law, a domestic criminal court can convict a defendant 'without embarking on a judgment of justice in the full context of the relations *inter partes*'. International law has no comparable conditions; there is a lack of 'collective redress of the gravest wrongs ... much less of collective adjustment of law to minimum standards of justice'.<sup>73</sup> According to Stone, due to the structural deficiencies of international law, the regulation of aggression is being proposed as a substitute.<sup>74</sup> Indeed, he argues that 'the imperatives of justice remain necessarily embedded in the very notion of "aggression"'.<sup>75</sup> Elaborating this point, Stone highlights that definitions

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68 *Ibid.*, *supra* note 54, p. 107; *supra* note 11, p. 123.

69 *Ibid.*, *supra* note 11, p. 108.

70 *Ibid.*, p. 106.

71 *Ibid.*, p. 120.

72 Stone, *supra* note 54, p. 107.

73 Stone, *supra* note 11, p. 130.

74 Stone, *supra* note 54, p. 107.

75 Stone, *supra* note 11, p. 18.

of aggression are aimed at protecting the *status quo* – if to differing degrees. Whether or not a definition of aggression is acceptable to states will therefore depend ‘on whether the *status quo* is itself within the limits of tolerable justice, or will simultaneously be brought, by the criterion, within these limits’.<sup>76</sup> Since there are intractable disagreements among states on what is ‘just’, consensus on a definition of aggression becomes impossible. Thus, by using aggression not only as means of punishing certain actions as criminal but also as means of settling ‘*once and for all* the just distribution of goods of life’ among states, too much is being asked from the concept.<sup>77</sup>

Taken together, these concerns highlight that a profound engagement with aggression is not a matter of merely fine-tuning a definition until the right wording is achieved. Aggression is a multifaceted concept that touches upon the foundational structures of the international legal order. In light of this, Stone comes to the conclusion that even if aggression is regulated by international law, the notion might inadvertently remain ineffective.<sup>78</sup>

### 3 The Struggle over Regulating Aggression

In light of Stone’s incisive criticisms, it is unsurprising that he views the possibility of establishing a world criminal court with jurisdiction over aggression as highly unlikely.<sup>79</sup> Instead, he proposes to establish a more ‘modest’ version of a world criminal court; one that would exclude aggression from its purview. Stone thought that by taking out the crime of aggression, the chances of creating a court would increase. His hope was that, once the court was operating, ‘its functioning may well come to transcend the original consensus’.<sup>80</sup> With the benefit of hindsight, it is tempting to view Stone’s assessment of the possibility of regulating aggression and his proposal for a modest court as unduly pessimistic. Not only is there an international criminal court nowadays but one that has proper jurisdiction over aggression. Nevertheless, a closer look at the negotiations leading up to the adoption of the articles concerning aggression into the Rome Statute reveals a much more complex picture, where the fault lines identified by Stone reappear both implicitly and explicitly.

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76 *Ibid.*, p. 110.

77 *Ibid.*, p. 120.

78 *Ibid.*, p. 147, pp. 149–150.

79 Stone, *supra* note 54, p. 162.

80 Julius Stone, ‘Introduction’, in Julius Stone and Robert K. Woetzel (eds.), *Toward a Feasible International Criminal Court* (World Peace through Law Center, Geneva, 1970), p. xii.

Although the protracted history of criminalizing aggression is a long one, for the purposes of this article, we can start in 1993 when the International Law Commission (ILC) released the *Draft Statute for an International Criminal Court*, which complemented the 1991 *Draft Code of Offenses Against the Peace and Security of Mankind* and recommended the General Assembly (GA) to organize a diplomatic conference with the purpose of establishing an international criminal court. Following the recommendation of the ILC, the GA convened in 1995 an Ad Hoc Committee on the Establishment of an International Criminal Court (Ad Hoc Committee), which in 1996 was taken over by the Preparatory Committee on the Establishment of an International Criminal Court (PrepComm). The PrepComm finished its work in 1998 when it submitted a 'consolidated text' of the draft establishing the ICC.<sup>81</sup>

As it happens with any ambitious endeavour, there were many points of contention among the states on how to proceed with what would become the ICC. Unsurprisingly, aggression quickly emerged as one of the most important areas of disagreement. Some states proposed the complete exclusion of aggression from the jurisdiction of the potential court on the basis of different arguments, for instance, the idea that any act of aggression would already be covered by war crimes due to the logical relationship between them. States especially emphasised the issue of aggression's justiciability; the fact that aggression refers to an eminently political decision and that, as a result, it was outside the competencies of the court. At the end of the day, aggression would not be removed from the draft. However, no details of what aggression entails were specified, leaving all disputes in place for the diplomatic conference in Rome.<sup>82</sup>

It is useful to take a closer look at the main points of disagreements. The first one centred on the definition of aggression.<sup>83</sup> The key question was whether it was sufficient to determine a general, relatively abstract definition of aggression, or whether the definition had to be supplemented with a list of acts that

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81 Fanny Benedetti and John L. Washburn, 'Drafting the International Criminal Court Treaty: Two Years to Rome and an Afterword on the Rome Diplomatic Conference', 5 *Global Governance* (1999) 1–37, p. 3; Mahmoud Cherif Bassiouni, 'Negotiating the Treaty of Rome on the Establishment of an International Criminal Court', 32 *Cornell International Law Journal* (1999) 443–469, p. 4.

82 Roger E. Clark, 'Negotiations on the Rome Statute, 1995–98', in Claus Kreß and Stefan Bariga (eds.), *The Crime of Aggression: A Commentary* (Cambridge University Press, Cambridge, 2017) pp. 244–270, pp. 247–251.

83 *Ibid.*, p. 252, Jennifer Trahan, 'Defining "Aggression": Why the Preparatory Commission for the International Criminal Court Has Faced Such a Conundrum', 24 *Loyola LA International & Comparative Law Review* (2002) 439–474, p. 445.

might be characterized as aggression, and whether to make reference to the 1974 GA Resolution 3314 (xxix) on aggression. The other major disagreement concerned the scope of aggression. States like Germany wanted a narrow and strict definition of the notion, criminalizing all but the gravest acts, whereas other states leaned towards a broader definition of the crime.<sup>84</sup>

A further point of contention revolved around the precise relationship between the UNITED NATIONS Security Council (SC) and the ICC. Some states, including the five permanent members (P-5) of the SC, argued in favour of conditioning the court's ability to deal with the crime on the SC determining beforehand that a particular event constituted aggression. The argument for giving priority to the SC was based on the SC's role as the organ with the primary responsibility for the maintenance of international peace and security. It was further contended that, because determining whether or not an act of aggression had occurred required establishing the responsibility of the respective state and, therefore, qualifying a political act, the role of the SC was unavoidable. On the opposite side, several states opposed an active involvement of the SC, arguing that the SC's track record concerning aggression was rather irregular and that involving the SC would create a risk of politicizing the court. They warned that such dependency would result in the court being viewed as an operating tool of the SC and that this would undermine the court's authority.<sup>85</sup>

Both issues would remain unresolved during the diplomatic conference in Rome, becoming so contentious that they almost derailed the entire negotiations.<sup>86</sup> At a certain point the disagreements between states were so deep that in one of the circulated versions of the Rome Statute aggression would be left out entirely.<sup>87</sup> With no solution near, but with the majority of states supporting the inclusion of the crime, it was agreed to nominally keep aggression in the Rome Statute and to postpone the discussion to a review conference at a later date.<sup>88</sup>

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84 Clark, *supra* note 82, pp. 251–260; Dan Zhu, 'China, the Crime of Aggression, and the International Criminal Court', 5 *Asian Journal of International Law* (2015) 94–122, p. 107; Carrie McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court* (Cambridge University Press, Cambridge, 2013), p. 7.

85 Zhu, *supra* note 84, p. 97; Mannoush H. Arsanjani, 'The Rome Statute of the International Criminal Court', 93 *American Journal of International Law* (1999) 22–43, p. 29.

86 Allegra C. Carpenter, 'The International Criminal Court and the Crime of Aggression', 64 *Nordic Journal of International Law* (1995) 223–242, p. 223.

87 Oscar Solera, *Defining the Crime of Aggression* (Cameron May, London, 2007), pp. 356–373; McDougall, *supra* note 84, pp. 10–11.

88 Solera, *supra* note 87, p. 366; Clark, *supra* note 82, pp. 262–264.

In the years 1999 to 2009 several working groups convened regularly with the aim to move the debate on how to regulate aggression forward. Despite extensive deliberations, the discussion in those years kept revolving around the points of contention that almost unsettled the Rome Conference.<sup>89</sup> It was not surprising, then, that the negotiations over aggression during the review conference in Kampala would in many respects be the continuation of the debate that took place during the Rome Conference.<sup>90</sup> Nevertheless, in contrast to the Rome Conference, states did agree on a regulation of aggression in the end, even if the agreement was reached only at the very last minute and not without severe antagonisms.<sup>91</sup>

The final results of the conference, the so-called Kampala amendments, can be summarized as follows. The definition of aggression is 'mixed', following Stone's typology. It incorporates a general, abstract definition, alongside a list of concrete 'acts of aggression.'<sup>92</sup> Under the general definition, aggression is determined as 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.

Not all acts of aggression fall under the jurisdiction of the ICC, only the most egregious ones – hence the inclusion of the 'manifest' qualifier on the general definition.<sup>93</sup> Furthermore, according to the above definition, aggression is a 'leadership crime', meaning that the court can only prosecute those individuals effectively exercising power, e.g., presidents, prime ministers, and top military leaders such as ministers of defence and commanding generals. To clarify what an 'act of aggression' might be, the article makes reference to GA Resolution 3314 (XXIX) and the acts of aggression classified therein. The definition is further accompanied by a series of 'understandings'. These aim to qualify

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89 See e.g., Mario Politi and Giuseppe Nesi (eds.), *The International Criminal Court and the Crime of Aggression* (Ashgate, Burlington, 2004); McDougall, *supra* note 84, pp. 12–24.

90 David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* (Oxford University Press, New York, 2013), p. 164.

91 *Ibid.*, pp. 164–166; Kreß and von Holtendorff, *supra* note 8, p. 1216; McDougall, *supra* note 84, pp. 50–51.

92 Stone, *supra* note 11, p. 80.

93 Beth Van Schaack, 'Negotiating at the Interface of Power & Law: The Crime of Aggression', 49 *Columbia Journal of Transnational Law* (2011) 505–601.

the content and interpretation of the offence. For instance, it is established that, for determining whether an act of aggression constitutes a manifest violation of the UN Charter, the character, gravity, and scale of an action need to be simultaneously assessed.<sup>94</sup> Next, the amendment establishes a *sui generis* procedural hurdle for the ICC to exercise jurisdiction over the crime. While the SC did not receive an exclusive prerogative in determining whether an act of aggression took place, it has the possibility to delay any investigation opened by the prosecutor for six months. If in the six months the SC did not come to a determination, the prosecutor then needs the authorization of the Pre-Trial Division for commencing the investigation.<sup>95</sup> Lastly, the ICC can neither prosecute those states that are not part of the Rome Statute nor those that have not accepted the amendments. Despite some states arguing that in the absence of an unequivocal 'opting-out' declaration all state parties to the Rome Statute would be subject to the jurisdiction of the court as long as either the aggressor or a state victim had ratified the amendments, the last ASP clarified that no state will be under the jurisdiction of the court unless the amendments have been explicitly accepted.<sup>96</sup>

#### 4 Limitations of the Current Regulation

Carrie McDougall vividly recounts the frenzy and uncertainty behind the negotiations over aggression at Kampala. She recalls how once it became clear that there would be an agreement on the crime, everyone started cheering and

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94 See *Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression* (ICC Doc. RC/10/Add. 1).

95 Concerning the involvement of the ICC see e.g., Leoni von Braun and Annelen Micus, 'Judicial Independence at Risk: Critical Issues Regarding the Crime of Aggression Raised by Selected Human Rights Organizations', 10 *Journal of International Criminal Justice* (2012) 111–132.

96 *Draft resolution proposed by the Vice-Presidents of the Assembly Activation of the jurisdiction of the Court over the crime of aggression* (ICC-ASP/16/l.10), para. 2. There is further discussion of para. 3, where it is reaffirmed the independence of the court and its competence to authoritatively decide on its judicial functions, whether this allows the court to disregard paragraph 2. However, as Kevin Jon Heller aptly notices the text of the resolution and its drafting history are quite unambiguous. Furthermore, if the court would rule against it, it would be politically catastrophic as those arguing for the opt-out regime are countries like the UK, France, or Japan, see Kevin Jon Heller, 'The Draft's Resolution's Curious Paragraph 3', *Opinio Juris*, 15 December 2017, available at <http://opiniojuris.org/2017/12/15/the-curious-paragraph-3/>, accessed on 15 December 2017.

applauding.<sup>97</sup> This reaction is quite understandable. The regulation of aggression within the Rome Statute represents the culmination of a long-standing desire among international lawyers for criminalising war.<sup>98</sup> Nevertheless, a closer look at the reach and substance of the amendments reveals a more sober story; one that is closer to what Stone's analysis predicted.

#### 4.1 *Restricted Reach*

Looking at the ICC SOLELY BY THE NUMBER OF STATES THAT ARE PARTIES to the Rome Statute, it suggests a successful story. 121 (63%) of the 193 UN member states, including prominent states such as the UK, France, and Japan, are parties to the Rome Statute. However, the remaining 72 states include important countries like the US, Russia, China, or India, and as such not only represent 67% of the world population but also 73% of the global armed forces.<sup>99</sup> While these figures do not automatically debase the ICC, they certainly contextualise the environment in which the court operates and qualify the so-called 'revolution' of regulating aggression.

The reasons provided by the states for refusing to join the ICC were manifold and sometimes put them on opposite sides of the discussion, e.g., when it came to the relationship between the SC and the ICC. At any rate, for many states the role of aggression loomed large behind the refusal to join the Rome Statute. A recurring concern against the inclusion of aggression was centred on the political and controversial nature of the crime. China, for instance, insisted that the '[c]rime of aggression is a state act' and therefore fell into the political realm. Only when the SC determined that an act of aggression took place, the court could proceed.<sup>100</sup> A similar argument was put forward by states like the US,<sup>101</sup> RUSSIA,<sup>102</sup> ISRAEL,<sup>103</sup> and Pakistan.<sup>104</sup> Especially the US fought hard during

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97 McDougall, *supra* note 84, p. 1.

98 See Simpson, *supra* note 10, p. 133; N. Weisbord, 'Civil Society', in Kreß and Barriga (eds.), *supra* note 82, pp. 1310–1356, p. 1311.

99 Bosco *supra* note 90.

100 Zhu, *supra* note 84, p. 98.

101 See, e.g., the 2010 speech of Harold H. Koh, 'The Obama administration and international law', Legal Advisor at the time of the US Department of State, available at <https://2009-2017.state.gov/s/l/releases/remarks/139119.htm>, accessed on 14 November 2017.

102 Gennady Kuzmin and Igor Panin, 'Russia', in Kreß and Barriga (eds.), *supra* note 82, pp. 1264–1270.

103 Roy S. Schöndorf and Daniel Geron, 'Israel', in Kreß and Barriga (eds.), *ibid.*, pp. 1198–1216.

104 Edwin Bikundo, *International Criminal Law: Using or Abusing Legality* (Routledge Abingdon, 2016), p. 157.

The Kampala conference to be 'unbound and unaffected'<sup>105</sup> by the icc, which in the end was accomplished with the explicit exclusion of aggression from the jurisdiction of the icc in cases where the act was committed by a non-signatory member of the Rome Statute. While it might be easy to dismiss the arguments of China and the US AS SELF-SERVING, OTHER ACTORS WITH LESS CLEAR MOTIVES voiced similar doubts.<sup>106</sup>

The fierce opposition against the inclusion of aggression serves as a reminder that much of the traditional power structures of international law have remained intact. In fact, when discussing the prospects of a world criminal court with jurisdiction over aggression, Stone explicitly raised scepticism towards the possibility of the us and the Soviet Union granting jurisdiction to the potential court. For him, the belief that the US WOULD JOIN SUCH AN INSTITUTION AMOUNTED TO WISHFUL THINKING AND REQUIRED THE BLIND ASSUMPTION THAT 'SOMEHOW THE SUPERPOWERS WOULD HAVE BEEN TRANSFORMED IN THEIR TRADITIONAL POWER STRUCTURES OR IDEOLOGICAL COMMITMENTS AND BEING REPLACED WITH A NEW PLANETARY order'.<sup>107</sup> Although one might view Stone's claim as being specific to the times of the Cold War, there is a more interesting and deeper interpretation of his argument. For this purpose, we need to go back to *Aggression and World Order*. Therein, Stone maintains that in order to elaborate an adequate definition of aggression, it has to be underpinned by a broader theory of social forces. According to him, it is crucial to accept that force is present in every society and that a key problem in any 'civilisation' is how to equilibrate the different forces within so as to avoid the internal destruction of the society. In other words, it is necessary not only to understand the factors affecting a particular situation but also the 'techniques of equilibration' at play, with their 'ethos, power, and flexibility'.<sup>108</sup>

It follows that, besides the immediate historical transformations that are underway, we need to be sensitive towards the structural and institutional settings in which we find ourselves. While the end of the Cold War opened up the space for important transformations, many of the deeper structural and institutional elements remained intact, which is, for instance, manifested in

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105 Hector Olasolo and Lucia Carcano, 'The icc Preventive Function with Respect to the Crime of Aggression and International Politics', 58 *Harvard International Law Journal Online Edition* (2017) 66–70, p. 69.

106 See Bosco *supra* note 90, p. 165; von Braun and Micus, *supra* note 95; Van Schaack, *supra* note 93.

107 Stone, *supra* note 54, p. 164.

108 Stone, *supra* note 11, p. 85.

the veto power of the P-5 in the sc.109 Thus, it is little surprising that in the case of aggression a state like the us would not agree to be beholden by a court.

The irreducibility of politics in regulating aggression is further indicated in Stone's acknowledgement that social forces are equilibrated by power, understood as interpersonal reactions resulting in a predominance of influence. Politics represents the extension of interpersonal reactions at a larger scale. Within that understanding, politics is 'deeply involved with the making of choices between competing values' and law simply represents an 'instrument' through which some values take precedence over others.<sup>110</sup> For Stone politics is thus part and parcel of how society evolves that cannot be supplanted by law. It is then unsurprising that he finds the belief that politics can be tamed or abolished by international law illusory. Accordingly, he urges to 'resist the fashion... of assuming that the operations of power for good or ill can be abolished by drafting the constitution of a world security organisation'.<sup>111</sup> Presuming that aggression involves 'questions of ultimate values', it is consequently impossible to establish a firewall capable of distinguishing the legal and political sides of aggression. The role of politics is further related to the different ways in which we can confront aggression in the international legal order. As Gerry Simpson notices, the evolution of international criminal law is linked to a particular understanding of the international legal order as being capable of securing convictions of international criminals. This has pushed aside a conception of the international legal order centred, for instance, on diplomatic engagement.<sup>112</sup>

In sum, despite the agreement reached in Kampala, many of the disagreements that had deterred the universal acceptance of particular regulation of aggression are still present. As we shall see, the problems do not stop there.

#### **4.2 The Fault Lines of the Regulation**

One might regard attitudes over aggression by countries like China as representative of an antiquated understanding of international law. However, even if focusing directly on the substance of the Kampala amendments, thereby ignoring the issue of participation, the situation does not look much brighter. Similar to the consensus reached in GA Resolution 3314 (xxix), one could argue that the agreement culminating in the Kampala amendments is a 'Pyrrhic

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109 See, e.g., Bosco *supra* note 90, pp. 52–60; Bing B. Jia, 'China and the International Criminal Court: The Current Situation', 10 *Singapore Year book of International Law* (2006) 1–10.

110 Julius Stone, *Social Dimensions of Law and Justice* (Stanford University Press, Stanford, 1966), pp. 595–596, though see generally Ch. 13.

111 Stone, *supra* note 11, p. 105.

112 Simpson, *supra* note 10, p. 137.

achievement’, as Stone calls the former.<sup>113</sup> Although the amendments include a semblance of a definition as well as procedural rules detailing the jurisdiction of the court and the relationship between the court and the SC, the core problems that come to light when aggression is discussed – ‘to close all loopholes against aggressors, identify aggression, and foster the true spirit of *détente*’<sup>114</sup> – have not been overcome. The fact that the amendments are far from perfect is widely acknowledged. Joanna Harrington, academic and advisor to the Canadian delegation, writes of them as not being ‘elegantly drafted’,<sup>115</sup> Beth Van Schaack predicts them to ‘spawn uncertainty and controversy’,<sup>116</sup> and Koskenniemi, drawing from Stone, explicitly characterizes them as representing *conflict through consensus*: everyone keeps their ‘essential positions’, leaving everything undecided.<sup>117</sup>

A quick look at the amendments shows that the specification of aggression therein, far from determining beforehand with precision and clarity what aggression is, remains indeterminate.<sup>118</sup> For instance, recall that, according to the agreed definition, an act can be considered as an aggression only if it constitutes a ‘manifest’ violation of the UN Charter. The inclusion of the qualifier *rep-* represents the compromise reached between those who argued for an expansive interpretation of the crime and those who desired a higher threshold for the court to become active. However, the qualifier itself is hardly informative.<sup>119</sup> As Andreas Paulus argues, the way ‘manifest’ is understood can be clear to one and ‘completely obscure to the other’.<sup>120</sup>

While the indeterminacy of aggression raises pressing issues of legality, what is relevant for the purposes of this paper is that the ‘ambiguities, concealed

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113 Stone, *supra* note 54, p. 152.

114 *Ibid.*

115 Joanna Harrington, ‘An End to War Through Court of Law? Perhaps – and in Time’, *ejiil: Talk! Blog of the European Journal of International Law*, 30 June 2010, <https://www.ejiltalk.org/an-end-to-war-through-a-court-of-law-perhaps-and-in-time/>, accessed on 15 November 2017.

116 Van Schaack, *supra* note 93, p. 600.

117 Martti Koskenniemi, ‘A Trap of the Innocence...’, in Kreß and Barriga (eds.), *supra* note 82, pp. 1359–1385, p. 1370.

118 *Ibid.*, Marko Milanovic, ‘Aggression and Legality Custom in Kampala’, 10 *Journal of International Criminal Justice* (2012) 165–187; Michael J. Glennon, ‘The Blank-Prose Crime of Aggression’, 35 *Yale Journal of International Law* (2009) 71–114; Andreas Paulus, ‘Second Thoughts on the Crime of Aggression’, 20 *European Journal of International Law* (2009) 1117–1128, p. 1121.

119 Van Schaack, *supra* note 93, p. 522.

120 Paulus, *supra* note 118, p. 1121.

conflicts, confusions and frustrations'<sup>121</sup> behind the definition simply expose once more the underlying sociological, political, and ethical considerations that any discussion of aggression will open up. To begin with, the definition reveals the profound cultural, social, and moral divergences at the international level – the lack of a uniform international community. Stone in fact argues that, due to the indeterminate character of aggression, there is the implicit im- position of our own intuitions onto the concept and concurrently onto others. In other words, even if it seems that we are talking about similar concepts, we might in fact be referring to very different things.<sup>122</sup> This point still resonates strongly. Martti Koskenniemi, for instance, maintains that one of the various difficulties of the ICC in adjudicating aggression comes from the fact that the court is not operating against the backdrop of a 'thick' social context with a relatively homogenous outlook of the members and a 'large agreement on basic values'.<sup>123</sup> Similarly, Michael J. Glennon remarks that, when it comes to defining aggression, the differences between states are indicative of the existing political and cultural differences. In particular, he writes that the '[h]istorical differences among states and disparities in military and economic power have generated profound disagreement over when force may appropriately be used'. Accordingly, those states with major capabilities push for a narrower and stricter definition of what constitutes aggression, whereas those that are less capable of projecting power or that see themselves as victims argue for a broader understanding of aggression.<sup>124</sup> By implication, once a possible case of aggression arises, there is a foreseeable clash between the different understandings of how to apply the threshold that triggers the various intuitions prescribed by the definition.

Secondly, the indeterminate character of the definition is closely related to the uncertainty surrounding future encounters, which creates the need of leaving the definition sufficiently broad. This desire appears explicitly in one of the Understandings complementing the amendments, which establishes that any determination of an act of aggression necessitates 'consideration of all the circumstances of each particular case'. Although the understanding was supposed to address actions such as humanitarian intervention, the issue raised is much larger than that. The underlying problem with any clear and precise definition of aggression is that it would, in Stone's words, 'constitute a violent

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121 Stone, *supra* note 54, p. 164.

122 Stone, *supra* note 11, p. 12.

123 Koskenniemi, *supra* note 117, pp. 1375–1376.

124 Glennon, *supra* note 118, p. 111.

abstraction' from the full context of any crisis.<sup>125</sup> Any crisis involving aggression is a 'political-military event',<sup>126</sup> meaning that the variables related to aggression are 'numerous, complex, wide-ranging and unpredictable'.<sup>127</sup> This entails that states might 'find themselves forbidden, by terms to which they now commit themselves, to respond to such rapacity or treachery by what may turn out to be the only effective way of protecting themselves'.<sup>128</sup>

Taken together, Stone's arguments make it hardly surprising that no clear-cut definition came out from the Kampala conference. The various structural elements conforming to international relations and international law already determined to a large extent the range of possible solutions, including the open-ended texture of the definition.

## 5 The Future of the ICC

It has been argued that, in light of the jurisdictional hurdles introduced in Kampala, there are doubts as to whether the court will ever be confronted with a case of aggression.<sup>129</sup> Moreover, even if a case is brought to court, several new obstacles must be faced.<sup>130</sup>

The first problem the court will have to deal with is how to treat the definition, which, similarly to GA Resolution 3314 (xxix), is 'susceptible on so many important matters to diametrically opposed interpretations', leaving 'so much to the independent choice of the judges as to a particular crisis'.<sup>131</sup> In principle, this is not an unsurmountable task. Judges confront complex and vague concepts on a daily basis. Through adjudication the court might in fact be able to develop a relatively consistent jurisprudence on aggression that irons out the issues afflicting the definition.<sup>132</sup> However, this argument underplays the context in which the ICC operates. As noticed above, the agreement on shared

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<sup>125</sup> Stone, *supra* note 11, p. 156.

<sup>126</sup> Koskenniemi, *supra* note 117, p. 1361. Stone has a similar reading when he argues that aggression brings the most acute issues between states, see Stone, *supra* note 11, p. 156.

<sup>127</sup> Stone, *supra* note 54, p. 109.

<sup>128</sup> Stone, *supra* note 54, p. 12.

<sup>129</sup> As Davis Brown has observed 70% of the acts of aggression, as defined by the Rome Statute, committed between 1946 and 2001, which totalled 1738, were undertaken by non-parties, see Davis Brown, 'Why the Crime of Aggression Will Not Reduce the Practice of Aggression', 51 *International Politics* (2014) 648–670, p. 662.

<sup>130</sup> See e.g. de Hoon, *supra* note 9.

<sup>131</sup> Stone, *supra* note 54, p. 162.

<sup>132</sup> *Ibid.*

values and commitments is much thinner at the international level than in domestic societies. In domestic trials, the matter of the crime is 'relatively uncontested;' it is enough to ask whether the accused did it. That is so because 'there is normally little doubt about how to understand [within the respective domestic society] the relevant acts in their historical context'.<sup>133</sup> However, the ICC does not have such luxury and therefore needs to deal with the concealed struggles that lie beneath the definition.<sup>134</sup>

The second problem concerns the structural problems of the ICC when dealing with systemic crimes. As many have remarked, international criminal law focuses on issues of individual and legal responsibility. However, by going against single individuals the court simplifies the complex and collective responsibilities that exist in modern life<sup>135</sup> and obfuscates the profound political and historical situations in which aggression evolves.<sup>136</sup> Furthermore, the way in which international criminal law operates can make us forget that a great deal of the problems afflicting many conflicts cannot be addressed properly through law. Accordingly, an intervention of the ICC might further worsen an already difficult situation, especially if the conflict is ongoing while the court addresses the event.<sup>137</sup> Taking into consideration these complications, how to proceed then? A hint might be found in Stone's understanding of justice and his metaphor of 'enclaves of justice'.

For Stone, the concept of justice is surrounded by paradoxes. We crave absolute clarity and guidance from justice, but our understanding of the concept is historically conditioned.<sup>138</sup> In other words, justice does not float above the reality of our actual societies, but is interrelated with those very same facts.<sup>139</sup> This creates a dynamic between the real and the ideal whereby man wrestles continuously in making the ideal reality, even in the face of past failures. Furthermore, given that justice is an ideal, it can never be fully reached and is ever changing in light of new circumstances. As Stone remarks, '[e]very substantial change in man and his environment calls for re-examination of existing values in the application to new situations'.<sup>140</sup> This continuous struggle for bridging

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133 Martti Koskenniemi, 'Between Impunity and Show Trials', 6 *Max Planck Yearbook of International Law* (2002) 1–32, p. 12.

134 See also de Hoon, *supra* note 9.

135 Drumbl, *supra* note 4, p. 35.

136 Gerry J. Simpson, "Stop Calling it Aggression": War as Crime', 61 *Current Legal Problems* (2008) 191–228.

137 See *e.g.*, references to note 5.

138 Aroney, *supra* note 38, p. 118; Stone, *supra* note 110, p. 546.

139 Stone, *supra* note 110, p. 793.

140 Stone, *supra* note 61, p. 375, p. 379.

the unbridgeable represents for Stone one of 'the more glorious and eternal marks of the human condition'.<sup>141</sup>

The dichotomy between the ever-recurring clamour for justice in human history and the fact that calls for justice are made in concrete spatio-temporal circumstances<sup>142</sup> makes Stone doubtful of the possibility of any generalizable formulae. On the contrary, he sustains that we need to be conscious of justice's plurality and the meaning we ascribe to it in a particular context. By recognizing the various meanings of justice that we have inherited, we can better understand ourselves and also begin to understand 'the situations of others, in that same spirit and context.'<sup>143</sup>

Stone further introduces the metaphor of enclaves of justice, understood as 'empirically-given complexes ... all held in a certain stability within tolerable tensions'.<sup>144</sup> More precisely, an enclave is a space occupied by a group wherein one can observe 'a complex of attitudes and roles and expectations, and attendant values', which are 'progressively accepted' and which are 'concrete segments of the group's arrangement and activities.'<sup>145</sup> While one might read Stone's definition of enclaves of justice as a requirement for a near homogeneous understanding of what justice is, that does not have to be the case. Even 'within the more or less homogeneous and integrated constituency of a single municipal society' there can be various competing or antagonistic understandings of justice at play at any moment.<sup>146</sup> These different accounts of justice might indeed operate as means of explaining, justifying, extending, retracting, or modifying the ambit of the enclaves.<sup>147</sup> Furthermore, the pass of time and social change have the potential of eroding enclaves that might have seemed settled and stable previously.<sup>148</sup> According to Stone, the inherent fragility of enclaves and the fact that they can backslide at any moment should not be seen as reasons for despair but as a reminder that we need to 'struggle more firmly and effectively to arrest and reverse them wherever we can, and as best we can'.<sup>149</sup>

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141 *Ibid.*, p. 375.

142 *Ibid.*, p. 378.

143 Stone, *supra* note 16, pp. 352–353.

144 *Ibid.*, p. 349.

145 Stone, *supra* note 61, p. 426.

146 *Ibid.*, p. 375.

147 *Ibid.*, p. 426.

148 Anthony R. Blackshield, 'The Enclaves of Justice: The Meaning of a Jurisprudential Metaphor', 19 *Maine Law Review* (1967) 131–180, p. 156.

149 Stone, *supra* note 16, p. 352.

When discussing the possibility of enclaves of justice at the international level, Stone becomes sceptical. He argues that there is a lack of sufficient overlap of conceptions of justice between the various societies,<sup>150</sup> however, he does not reject the possibility of the emergence of an international enclave outright. He maintains that, even with the existence of deep disagreements between the different societies, it is possible to identify a minimal consensus at least on some aspects of justice.<sup>151</sup> The general point that Stone wants to convey is that we should be sceptical whenever claims of justice are framed as a universally shared understanding of humanity. Due to the sheer diversity of human beings with their different cultures and experiences, claims of justice ‘which seem to be thoroughly warranted in the enclaves held by some people, have little warrant and much incongruity for other people’.<sup>152</sup>

The purpose of the metaphor of enclaves of justice can be viewed as two-fold. First, it highlights the ‘historical struggle’ of societies and individuals in ‘gaining and holding such enclaves’. Secondly, it emphasizes the forces, both inside and outside particular societies, ‘which threaten what is held, or may help to defend it against such threats’.<sup>153</sup>

In my opinion, the metaphor can be fruitfully deployed for a deeper understanding of the ICC and the thorny question of aggression. The court, to begin with, should be conceived as part of a larger enclave of justice, that of international criminal law, which incorporates not only international or trans-national criminal courts but also domestic courts or other institutional ways in which justice can be performed. Thinking in terms of an enclave reminds us that justice is plural and not univocal; there is no single template of what justice demands. Instead the various understandings of justice co-exist in tension and competition.<sup>154</sup> As a result, any homogeneous imposition of justice not only pushes aside other valid understandings but, more importantly, puts at risk the very foundations of the enclave. Because no single account is capable of delivering justice on its own, dissatisfaction will arise and potentially damage the already fragile status of enclaves.

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150 Stone, *supra* note 61, p. 376, p. 402.

151 *Ibid.*, p. 429.

152 *Ibid.*, p. 431.

153 Stone, *supra* note 16, p. 349.

154 See e.g., David S. Koller, ‘The Global as Local: The Limits and Possibilities of Integrating International and Transitional Justice’, in Christian de Vos, Sara Kendall and Carsten Stahn (eds.), *Contested Justice – the Politics and Practice of International Criminal Court Interventions* (Cambridge University Press, Cambridge, 2015), pp. 85–105.

A clear illustration of the pitfalls of such tension can be seen in the ICC intervention in Uganda when the court decided to press forward with the proceedings even though the parties at conflict had reached a peace agreement which could have potentially stopped the conflict that had lasted for more than two decades. The intervention of the ICC not only derailed the possibility of achieving peace, but it also entailed a move from 'justice as reconciliation' to 'justice as retribution', with severe negative effects for the Ugandan population and the ICC itself.<sup>155</sup> One comes to the conclusion that pursuing a monolithic conception of justice at any price is rather dangerous, as it 'may mean war and human immolation in the short run'.<sup>156</sup>

The inherent fragility of the enclave suggests that the court needs to operate with self-restraint, as Nouwen and Werner have remarked, even more so when aggression is concerned.<sup>157</sup> Due to institutional reasons, prestige, and so forth, the court might be tempted to readily take on possible cases of aggression. However, in view of the described characteristics of the crime, it is not clear that the court is always the appropriate venue to deal with the conflict. In that respect, it is of utmost importance for the court to be self-reflexive about the different understandings of justice and their interaction when a particular case of aggression has occurred. The court needs to be conscious of 'what justice means (for whom) and what it implies (what should be done)'.<sup>158</sup>

To some, this suggestion might sound normatively undesirable. By asking for restraint, there is the real possibility of letting individuals off the hook who, in light of their actions, deserve to be punished. As Larry May argues in his defence of trials for aggression, for him 'there is a sense in which individuals who participate in wrongdoing should have their comeuppance'.<sup>159</sup> Nonetheless, the urge to intervene needs to be counterbalanced with the unintended consequences that might arise. It might be preferable to let a situation unfold in its political and societal environment and to accept that other understandings of justice might provide a better space for resolution.

Self-restraint does not entail a complete disengagement from aggression. There might be circumstances in which the court is indeed the appropriate

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155 Stephen Oola, 'In the Shadow of Kwoyelo's Trial: The ICC and Complementarity in Uganda' in *ibid.*, pp. 147–170.

156 Julius Stone, *Of Law and Nations: Between Power Politics and Human Hopes* (William S. Hein & Co, Getzville, 1974), p. 410.

157 Nouwen and Wouter, *supra* note 4.

158 Nikolas Rajkovic, 'On 'Bad Law' and 'Good Politics': The Politics of the ICJ Genocide Case and Its Interpretation', 21 *Leiden Journal of International Law* (2008) 885–910, p. 910.

159 Larry May, *Aggression and Crimes against Peace* (Cambridge University Press, Cambridge, 2008), p. 325; Simpson, *supra* note 136.

venue. Despite the problems and shortcomings of the ICC, the institution has played a relevant role in the establishment of an 'enclave of justice' at the international level and its continuing survival. Indeed, it has been both a solution and a problem for dealing with justice. But because of this duality and the inherent fragility of the 'enclave', it is of great importance that the court deals with modesty in the event that a realistic possibility of dealing with aggression emerges.<sup>160</sup> This necessitates an adept sense of how politics, law, and justice intermingle. Likewise, the court needs to be mindful about its position with respect to the involved actors,<sup>161</sup> remembering that it does not operate in a 'social hierarchy'<sup>162</sup> but as one institutional actor among others. Further, it needs to be conscious that any trial of aggression will be part of the strategic use of the law by some actors against other ones.<sup>163</sup> Furthermore, even if on a particular case of aggression a final judgement can be reached, this will in all likelihood not amount to the end of the dispute but will be part of the larger politics of the dispute.<sup>164</sup> All these caveats demand from the ICC a shrewd self-understanding and the acknowledgement that 'the practice of law and 'justice' does not come in a one-size-fits-all package'.<sup>165</sup>

One might characterize these comments as asking for 'bad law', precisely because it does not pursue 'justice' at all costs.<sup>166</sup> Putting aside the issue of what kind of justice we mean, by ignoring the context and presuming that only the law matters we would only intensify the problems surrounding the court, especially when it comes to aggression. If the court decides to act expansively with aggression, that is, to adjudicate on the overall 'character of international conflicts', it would further invite savvy actors to use the ICC as a site for its own de-legitimation.<sup>167</sup> In sum, what the court needs to avoid is falling into false dichotomies whereby either the court takes a case of aggression or justice will not be done.

As Stone writes, it is important to remain calm and prudent in order to properly face the events as they come to us. In particular, we need to avoid

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<sup>160</sup> Kendall and Nouwen, *supra* note 3.

<sup>161</sup> On the political see Sarah Nouwen and Wouter G. Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan', 21 *European Journal of International Law* (2010) 941–965.

<sup>162</sup> Koskenniemi, *supra* note 117, p. 1379.

<sup>163</sup> *Ibid.*

<sup>164</sup> Rajkovic, *supra* note 158.

<sup>165</sup> *Ibid.*, p. 905.

<sup>166</sup> *Ibid.*

<sup>167</sup> *Ibid.*, pp. 887–888.

the tendency to interpret our situation in terms of impossible choices, whether between Expediency and Morality, Power and Justice, of Perfection and Perfection, State Sovereignty and World Government. To leave men only with such alternatives may bring comfort and a sense of confident righteousness to individual hearts, and even individual peoples, but only to each according to their respective interpretations of these concepts. But it is also to undermine moderation, understanding, and tolerance and to cause human communication to become increasingly clipped, and perverted.<sup>168</sup>

## 6 Conclusion

The purpose of the present article is to suggest that Stone's writings provide interesting resources through which we can analyse our current condition in international law, in particular the regulation of aggression. At the same time, I hope that the article conveyed that Stone's writings are not only useful in understanding better some aspects of the current events in international law but also provide a deeper framework from which we can comprehend the role of international law in international society. Admittedly, at times his writings are inconsistent, ambiguous, and sometimes outdated. Likewise, he does not provide ready-made answers on how to confront the thorny relationship between law and politics. Nevertheless, his writings provide a powerful alternative view on how to think about international law. It is a view cognizant of the inherent limits of international law, the inescapability of politics, and some of the weaknesses of humanity. It is also a view that recognizes our craving for justice and our ability to overcome the dangers in front of ourselves. Hopefully, this article will spur further interest in him.

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<sup>168</sup> Stone, *supra* note 11, pp. 182–183.