## CARRIE McDougall

CAMBRIDGE STUDIES IN INTERNATIONAL AND COMPARATIVE LAW The Crime of Aggression under the Rome Statute of the International Criminal Court

SECOND EDITION



สำนักหอสมุด มหาวิทยาลัยเชียงใหม่

61658703 •
012538826
122569029

## The Crime of Aggression under the Rome Statute of the International Criminal Court

Carrie McDougall
The University of Melbourne





## Contents

Foreword		page xi
Preface to the Second Edition		xiii
Pref	ace to the First Edition	xvii
	Crime of Aggression Amendments	xix
	of Abbreviations	xxvii
1	The Crime of Aggression under the Rome Statute	
	of the International Criminal Court: an Introduction	. 1
	A Crime of Aggression at Last	1
	The Early History of the Crime of Aggression	2
	The Lead-Up to Rome	6
	The Rome Conference	9
	The Special Working Group on the Crime	
	of Aggression	13
	The Review Conference of the Rome Statute	24
	The Activation of the ICC's Jurisdiction over the Crime	
	of Aggression	32
	The Approach of This Book	40
2	Criminalising Aggression	43
	Misplaced Misgivings	43
	A Prohibition of at Least Certain Forms of Inter-State	
	Armed Violence	43
	Desirability versus Possibility	49
	Beyond an End to Impunity: the Significance	
	of the Crime	69
	International Politics and the Crime of Aggression	69
	The Crime of Aggression and the jus ad bellum	75
	Conflict over Aggression?	77

	A Chilling Effect	81
	Conclusion	83
3	An Act of Aggression: by Any Other Name	85
	The Distinction between Acts and Crimes	85
	Resolution 3314: a Poor Precedent	85
	New Nomenclature: Inter-State Armed Violence	
	under the UN Charter	86
	The 3314 Definition: a Compromised Text	94
	Acts of Aggression and the jus ad bellum	106
	Security Council Practice	106
	General Assembly Practice	111
	Decisions of the International Court of Justice	113
	Conclusion: the Definition of an Act of Aggression for	
	the Purposes of the jus ad bellum	119
	Article 8bis (2)	121
	Picking and Choosing	122
	Open or Closed	128
	In and Out	131
	Non-State Actors	131
	Cyber Operations and Emerging Weapons	
	Technologies	138
	Understanding the Understandings	142
	The Status of the Understandings	142
	Understanding an 'Act of Aggression'	149
	Conclusion: Act of Aggression under Article 8bis (2)	152
1	The Elevation of Acts of Aggression to the State Act	
	Element of the Crime of Aggression	154
	An Act of Aggression that by its Character,	
	Gravity and Scale Constitutes a Manifest Violation	
	of the Charter of the United Nations	154
	Nullum crimen sine lege and the Prohibition	
	of Analogy	160
	The Most Serious Crimes of Concern to the	
	International Community as a Whole	163
	Inconsistency with Customary International Law	168
	Making the ICC an Arbiter of the Grey Areas in the	
	ius ad hellum	200

	Article 31: Grounds for Excluding Criminal	
	Responsibility	210
	Conclusion	211
5	The Individual Conduct Elements of the Crime Effectively Exercising Control Over or Directing the	213
	Political or Military Action of a State	214
	The 'Leadership' Requirement	214
	The Relevance of Article 28	233
	The Perpetrator's Contribution	234
	The Mental Elements	239
	Article 32: Mistake of Fact or Mistake of Law	246
	The Relevance of Article 33	248
	Modes of Participation	249
	Third State Officials	250
	Can You Attempt to Commit a Crime of Aggression?	252
	Conclusion	256
6	The Court's Jurisdiction Over the Crime of	
	Aggression	258
	A Regime Consistent with International Law Does the UN Charter Give the Security Council	259
	a Prerogative to Identify Acts of Aggression? The Council's Pre-emptive Right to Identify Acts of	262
	Aggression The Council's Right to Identify Acts of Aggression is	263
	a Primary One	266
	Omitting a Role for the Council Would Raise a Conflict under Article 103	267
	The Council's Prerogative Does Not Extend to	
	International Criminal Law	268
	Other Entities Have the Ability to Identify Acts of Aggression	273
	Article 103 is No Barrier to Independent ICC	
	Identification of Acts of Aggression	283
	Policy Arguments Against a Role for the Council in	
	State Referrals or proprio motu Investigations	283
	Conclusion	287
	The Jurisdictional Regime of the ICC	288
	Entry into Force: the Slow Burn Issue	291
	The Dilemma: Article 121(4) or Article 121(5)?	291
	The Second Sentence of Article 121(5)	297
	The Negative Interpretation and Non-States Parties	301

	The Exclusions under Article 15bis	302
	The Article 5(2) Reference	305
	The Article 12 Reference	306
	The Rationale of the Opt-Out Declaration	307
	A Comparison with Article 15bis (5)	310
	The Absence of an Understanding	311
	A Comparison with the Assembly's Approach to	
	Article 121(5) in the Context of Other Amendments	312
	Article 15bis: an Interpretation	313
	The Effect of the Activation Resolution	323
	The Applicability of Article 12(3)	335
	The When and What of Art. 15bis (4) Declarations	337
	Security Council Determinations	339
	What Amounts to a Security Council Determination?	340
	Does a 'Negative Determination' Have Any Effect?	342
	The Pre-Trial Division Filter	343
	What is the Relationship between Article 15bis and	
	Article 15?	345
	Article 16	347
	Security Council Referrals	348
	Conclusion	351
7	Prosecuting Crimes of Aggression	353
•	Prosecuting a Crime of Aggression before the ICC	353
	Judicial Elections and Staffing the Court	354
	Victims of Crimes of Aggression	357
	Cooperation in the Investigation and Prosecution of	007
	Crimes of Aggression	369
	Domestic Prosecutions	374
	Domestic Prosecutions under the Aggression	0, ,
	Amendments	374
	Bases of Domestic Jurisdiction	378
	Immunities	385
	Other Potential Barriers to Domestic Prosecutions of	
	Crimes of Aggression	389
	Conclusion	392
	Review of the Amendments	393
	Conclusion: a Crime in Name Only?	398
ת - י	· · · · · · · · · · · · · · · · · · ·	400
_ =	rences	403
Ina	lex	453