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978-1-107-01109-0 - The Crime of Aggression under the Rome Statute of the International Criminal Court

Carrie McDougall

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

This guide to the crime of aggression provisions under the Rome Statute of the International Criminal Court (ICC) offers an exhaustive and sophisticated legal analysis of the crime's definition as well as the provisions governing the ICC's exercise of jurisdiction over the crime. A range of practical issues likely to arise in prosecutions of the crime of aggression before the ICC are canvassed, as is the issue of the domestic prosecution of the crime. It also offers an insight into the geo-political significance of the crime of aggression and the activation of the ICC's ability to exercise its jurisdiction over the crime. The author's intimate involvement in the crime's negotiations combined with extensive scholarly reflection on the criminalisation of inter-State uses of armed force makes this highly relevant to all academics and practitioners interested in the crime of aggression.

CARRIE McDOUGALL is a legal specialist in the International Law Section of the Australian Department of Foreign Affairs and Trade, where she advises on various topics including international criminal law and the use of force.

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## Foreword

The striking of the President of the Assembly of States Parties' ... gavel at 12:17am on 12 June 2010, signalling the adoption by the Review Conference of a resolution annexing provisions on the crime of aggression, unleashed a wave of emotion in the Speke Ball Room at Munyonyo Commonwealth Resort in Kampala, Uganda.

By these words, Dr Carrie McDougall accurately captures the prevailing mood at the moment when the States Parties of the Statute of the International Criminal Court reached consensus on the definition of the crime of aggression and on the conditions for the Court's exercise of jurisdiction over it. The 'wave of emotion' reflected a widespread sense of the historic importance of the decision just taken after almost a century of debate over the project to criminalise the contribution of State leaders to the commission of the most serious forms of use of force in violation of the Charter of the United Nations. Dr McDougall has accompanied the negotiation process leading to the Kampala breakthrough by weighty scholarly contributions, including a thorough and innovative piece on Nuremberg's legacy, and she has participated in a significant part of the negotiations as an advisor to the delegation of Australia, which in turn played an important part in reaching the final compromise. Based on this previous scholarly reflection about the crime and the intimate knowledge of the multilateral negotiations, Dr McDougall was ideally equipped to present and analyse the new legal regime in a comprehensive fashion and this is what she has done. Her book is, to the best of my knowledge, the first monograph on the crime of aggression after Kampala. Herein, Dr McDougall deals with each element of the crime's definition, with its complex jurisdictional regime and with the legal questions pertaining to the ultimate activation of the compromise package. She also covers the most important

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legal issues surrounding the new legal landscape including, for example, procedural and institutional challenges for the Court and the question of domestic criminal proceedings. Finally, she contributes to the legal policy debate about the subject and in doing so she does not shy away from tackling the hard questions that this subject raises. Throughout the elegantly and lively written book, Dr McDougall formulates powerful arguments and conclusions, each time based on thorough research and rigorous reasoning. In addition, the positions taken reflect excellent judgment. All this taken together will make the book an extremely useful piece of reference for scholars, State representatives and legal practitioners at the International Criminal Court for many years to come. Throughout her analysis, Dr McDougall does not spare any criticism of the final outcome of the negotiations. Yet, in her overall assessment in law and legal policy she concludes that the aggression amendments are ‘both important and remarkable’. I think the same of Dr McDougall’s book.

Prof. Dr Claus Kress LL.M. (Cambridge)  
Director of the Institute for International  
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Cologne University

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## Preface

This book grew out of my PhD and thus is the result of some seven years of endeavour. In that context I wish to express great thanks to my PhD supervisors, Professors Tim McCormack, Stuart Kaye and Gerry Simpson. Tim convinced me to stay in Melbourne and work with him when fancy scholarships overseas beckoned. Had I not remained in Australia it is unlikely that I would have become a member of Australia's delegation to the SWGCA, which was one of the most wonderful things that has ever happened to me. Stuart first exposed me to international law as an undergraduate student at the University of Tasmania, so working with him was a special thing. Gerry is, or at least was, a naysayer when it comes to the crime of aggression: this book is all the better for having had someone of his fierce intellect constantly challenging my arguments.

Warm thanks also to my wonderful former Asia Pacific Centre for Military Law colleagues, particularly Cathy Hutton, Alison Duxbury, Helen Durham, David Blumenthal, Kevin Heller, and the amazing and inspiring Bruce 'Oz' Oswald. Thanks also to my Melbourne Law School teaching and research colleagues, Ian Malkin, Martin Vranken, Maureen Tehan, Jenny Morgan and Carolyn Evans. Special thanks to PhD colleagues and sounding boards, Dominique Allen, Michelle Lesh, Sarah Finnen, Sasha Radin, Anita Foerester, and Kym Sheehan.

The Australian Department of Foreign Affairs and Trade enabled my participation in successive Australian Delegations to the SWGCA. I am thankful for the support of the other members of those Delegations, particularly Andrew Rose, alongside whom I now have the pleasure of working in Canberra. I am also grateful to all my other DFAT colleagues, particularly Greg French and Richard Rowe, who have been incredibly supportive as I have finished this book on my weekends.

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xxii      PREFACE

An enormous debt of gratitude is owed to Don Ferencz and the Planethood Foundation. The Foundation's financial support was of great assistance in making trips to SWGCA meetings in New York; Don's personal support was, moreover, overwhelming. Special thanks too to the delightful Ben Ferencz, whose lifelong commitment to the criminalisation of State acts of aggression has been an enormous inspiration. Ben – it is a privilege and an honour to have worked alongside you. A very warm thank you also to all my colleagues in the SWGCA and the Review Conference for their willingness to discuss issues 'in the corridors' with me. Special thanks to Claus Kress (who not only wrote a fabulous foreword to this book but was also one of my PhD examiners), Stefan Barriga, Pål Wrange, Astrid Reisinger Coracini, Bill Pace, Robbie Manson, Jutta Bertram Nothnagel, Jennifer Trahan, Noah Weisbord, Osvaldo Zavala and Elizabeth Lees.

Finally, an extra special thanks is reserved for my family, particularly my parents, Cam and Linda McDougall. This book is dedicated to them. No one could ask for more loving or supportive parents. There is literally no way that either my PhD or this book could have been written without them. Thank you too to Nelson who provided devoted company throughout the writing of both my PhD and this book and who somehow always seemed to know when cartwheels were in order.

This book was written in my personal capacity and should not be taken to reflect the views of the Australian Government or any other organisation or entity.

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## The Crime of Aggression Amendments

### Resolution RC/Res.6

*The crime of aggression*

*The Review Conference,*

*Recalling* paragraph 1 of article 12 of the Rome Statute,

*Recalling* paragraph 2 of article 5 of the Rome Statute,

*Recalling* also paragraph 7 of resolution F, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998,

*Recalling* further resolution ICC-ASP/1/Res.1 on the continuity of work in respect of the crime of aggression, and *expressing its appreciation* to the Special Working Group on the Crime of Aggression for having elaborated proposals on a provision on the crime of aggression,

*Taking note* of resolution ICC-ASP/8/Res.6, by which the Assembly of States Parties forwarded proposals on a provision on the crime of aggression to the Review Conference for its consideration,

*Resolved* to activate the Court's jurisdiction over the crime of aggression as early as possible,

1. *Decides* to adopt, in accordance with article 5, paragraph 2, of the Rome Statute of the International Criminal Court (hereinafter: "the Statute") the amendments to the Statute contained in annex I of the present resolution, which are subject to ratification or acceptance and shall enter into force in accordance with article 121, paragraph 5; and *notes* that any State Party may lodge a declaration referred to in article 15 *bis* prior to ratification or acceptance;
2. *Also decides* to adopt the amendments to the Elements of Crimes contained in annex II of the present resolution;

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3. *Also decides* to adopt the understandings regarding the interpretation of the abovementioned amendments contained in annex III of the present resolution;
4. *Further decides* to review the amendments on the crime of aggression seven years after the beginning of the Court's exercise of jurisdiction;
5. *Calls upon* all States Parties to ratify or accept the amendments contained in annex I.

## ANNEX I

### **Amendments to the Rome Statute of the International Criminal Court on the crime of aggression**

1. *Article 5, paragraph 2, of the Statute is deleted.*
2. *The following text is inserted after article 8 of the Statute:*

#### *Article 8 bis*

#### Crime of aggression

1. For the purpose of this Statute, "crime of aggression" means 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.
2. For the purpose of paragraph 1, "act of aggression" means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:
  - (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
  - (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
  - (c) The blockade of the ports or coasts of a State by the armed forces of another State;
  - (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;



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- (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
- (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
- (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

3. *The following text is inserted after article 15 of the Statute:*

#### *Article 15 bis*

#### Exercise of jurisdiction over the crime of aggression

(State referral, *proprio motu*)

1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraphs (a) and (c), subject to the provisions of this article.
2. The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.
3. The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.
4. The Court may, in accordance with article 12, exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party, unless that State Party has previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar. The withdrawal of such a declaration may be effected at any time and shall be considered by the State Party within three years.
5. In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory.
6. Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. The Prosecutor shall notify the Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents.

7. Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression.
8. Where no such determination is made within six months after the date of notification, the Prosecutor may proceed with the investigation in respect of a crime of aggression, provided that the Pre-Trial Division has authorised the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in article 15, and the Security Council has not decided otherwise in accordance with article 16.
9. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.
10. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.

4. *The following text is inserted after article 15 bis of the Statute:*

*Article 15 ter*

Exercise of jurisdiction over the crime of aggression  
 (Security Council referral)

1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraph (b), subject to the provisions of this article.
2. The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.
3. The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.
4. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.
5. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.

5. *The following text is inserted after article 25, paragraph 3, of the Statute:*

3 *bis*. In respect of the crime of aggression, the provisions of this article shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State.

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6. *The first sentence of article 9, paragraph 1, of the Statute is replaced by the following sentence:*

1. Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7, 8 and 8 *bis*.

7. *The chapeau of article 20, paragraph 3, of the Statute is replaced by the following paragraph; the rest of the paragraph remains unchanged:*

3. No person who has been tried by another court for conduct also proscribed under article 6, 7, 8 or 8 *bis* shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

## ANNEX II

### **Amendments to the Elements of Crimes**

#### *Article 8 bis*

#### Crime of aggression

##### Introduction

1. It is understood that any of the acts referred to in article 8 *bis*, paragraph 2, qualify as an act of aggression.
2. There is no requirement to prove that the perpetrator has made a legal evaluation as to whether the use of armed force was inconsistent with the Charter of the United Nations.
3. The term “manifest” is an objective qualification.
4. There is no requirement to prove that the perpetrator has made a legal evaluation as to the “manifest” nature of the violation of the Charter of the United Nations.

#### *Elements*

1. The perpetrator planned, prepared, initiated or executed an act of aggression.
2. The perpetrator was a person<sup>1</sup> in a position effectively to exercise control over or to direct the political or military action of the State which committed the act of aggression.
3. The act of aggression – the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations – was committed.

<sup>1</sup> With respect to an act of aggression, more than one person may be in a position that meets these criteria.

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4. The perpetrator was aware of the factual circumstances that established that such a use of armed force was inconsistent with the Charter of the United Nations.
5. The act of aggression, by its character, gravity and scale, constituted a manifest violation of the Charter of the United Nations.
6. The perpetrator was aware of the factual circumstances that established such a manifest violation of the Charter of the United Nations.

ANNEX III

**Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the crime of aggression**

*Referrals by the Security Council*

1. It is understood that the Court may exercise jurisdiction on the basis of a Security Council referral in accordance with article 13, paragraph (b), of the Statute only with respect to crimes of aggression committed after a decision in accordance with article 15 *ter*, paragraph 3, is taken, and one year after the ratification or acceptance of the amendments by thirty States Parties, whichever is later.
2. It is understood that the Court shall exercise jurisdiction over the crime of aggression on the basis of a Security Council referral in accordance with article 13, paragraph (b), of the Statute irrespective of whether the State concerned has accepted the Court's jurisdiction in this regard.

*Jurisdiction ratione temporis*

3. It is understood that in case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction only with respect to crimes of aggression committed after a decision in accordance with article 15 *bis*, paragraph 3, is taken, and one year after the ratification or acceptance of the amendments by thirty States Parties, whichever is later.

*Domestic jurisdiction over the crime of aggression*

4. It is understood that the amendments that address the definition of the act of aggression and the crime of aggression do so for the purpose of this Statute only. The amendments shall, in accordance with article 10 of the Rome Statute, not be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.
5. It is understood that the amendments shall not be interpreted as creating the right or obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another State.

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*Other understandings*

6. It is understood that aggression is the most serious and dangerous form of the illegal use of force; and that a determination whether an act of aggression has been committed requires consideration of all the circumstances of each particular case, including the gravity of the acts concerned and their consequences, in accordance with the Charter of the United Nations.
7. It is understood that in establishing whether an act of aggression constitutes a manifest violation of the Charter of the United Nations, the three components of character, gravity and scale must be sufficient to justify a “manifest” determination. No one component can be significant enough to satisfy the manifest standard by itself.

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# Abbreviations

3314	Definition of Aggression annexed to General Assembly
Definition	Resolution 3314 (XXIX)
ASP	Assembly of States Parties
AU	African Union
CICC	Coalition for the International Criminal Court
Court, the	International Criminal Court
Draft Code	Draft Code of Offences Against the Peace and Security of Mankind
FRY	Federal Republic of Yugoslavia
GA	General Assembly
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
ILC	International Law Commission
IMT	International Military Tribunal
IMT Charter	Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and the Charter of the International Military Tribunal
IMTFE	International Military Tribunal for the Far East
OP	Operational paragraph
OTP	Office of the Prosecutor
P3	US, UK and France

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P5	Permanent five members of the United Nations Security Council
PP	Preambulatory paragraph
Preparatory Committee	Preparatory Committee on the Establishment of an International Criminal Court
Review Conference	First Review Conference of the Rome Statute
Rome Conference	United Nations Conference of Plenipotentiaries on the Establishment of the International Criminal Court
Rome Statute	Rome Statute of the International Criminal Court
SWGCA	Special Working Group on the Crime of Aggression
UNCIO	United Nations Conference on International Organisation
VCLT	Vienna Convention on the Law of Treaties
WGCA	Working Group on the Crime of Aggression