

International Non-Aggression and Lawful Use of Force Bill

Member's Bill

Explanatory note

General policy statement

The purpose of this bill is to achieve two related objectives:

1. To ensure that the use of armed force by New Zealand is always in conformity with international law and in particular the UN Charter; and
2. To protect New Zealand leaders from external pressure to commit the New Zealand Defence Force to any illegal action overseas.

To that end, this bill:

- (a) requires that New Zealand observe its binding obligation under the UN Charter not to commit an act of aggression;
- (b) makes it a criminal offence in New Zealand law for any New Zealand leader to commit an act of aggression;
- (c) requires a New Zealand leader to obtain the written advice of the Attorney-General before deciding to commit the armed forces of New Zealand to action involving the use of force;
- (d) anticipates the inclusion at some future time of "aggression" within the jurisdiction of the International Criminal Court as one of the most serious crimes of concern to the international community and a punishable offence under international criminal law as envisioned in the Statute of Rome 1998, and

- expects this Act to be compatible with that Statute if it is amended to include aggression within the Court's jurisdiction:
- (e) recognises that New Zealand may engage in the use of armed force, under the UN Charter, in exercise of the inherent right of individual or collective self-defence or in any other manner properly authorised by the Security Council of the United Nations.

Legal considerations

(a) Non-aggression as a State responsibility

The UN Charter forbids any country to use force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the Charter (Art. 2.4). It is the responsibility of the Security Council to determine whether an act of aggression has been committed by a State (Art. 39). If the Council determines that a State has committed an act of aggression, it can authorise an enforcement action in response (Art. 42). Under the Charter, however, non-aggression is a State responsibility only, not an individual criminal offence.

(b) Aggression as a criminal offence

Over the past half-century, the international community has moved purposefully to make aggression an individual crime in international law. The UN Charter requires the General Assembly to make recommendations for encouraging the progressive development of international law (Art. 13). In 1946 the Assembly affirmed as an international crime the planning, preparation, initiation or waging of a war of aggression (UNGA res. 95 (I)). Since then, aggression has been accepted by States as a crime in customary international law.

Building upon that foundation, the international community has moved, in the post-Cold War world, to legislate against aggression in treaty law. The Rome Statute 1998, establishing the International Criminal Court (the ICC), identifies aggression as one of the four "most serious crimes of concern to the international community as a whole". Under the Statute, "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international

crimes”. Effective prosecution must be ensured “by taking measures at the national level and by enhancing international cooperation”.

In the specific case of aggression, however, this crime will not be justiciable in the ICC until agreement is reached among States Parties on two matters: a binding definition, and the conditions under which the Court is to exercise jurisdiction. A Special Working Group of the Assembly of States Parties is working on these issues. It may, however, take some time before agreement is reached among all 108 States Parties for aggression to become justiciable within the ICC.

Concerning the definition, considerable progress has been made—a majority of States Parties generally favouring the adoption of that provided by the UN General Assembly in 1974.

Regarding the jurisdictional conditions, the question concerns the relationship between the political responsibilities of the UN Security Council for determining aggression and the judicial responsibilities of the ICC for prosecuting aggression as a crime. In the case of domestic legislation, however, national courts are free to proceed on the basis of their own jurisprudential tenets, unencumbered by the Security Council.

In any event, the ICC is to act as a complementary court of secondary instance, domestic courts retaining primary responsibility.

There has never been any impediment to individual States proceeding on their own accord to legislate nationally—to make an act of aggression by one’s leaders (and perhaps other leaders) a crime in domestic law. Nor does the international work underway within the ICC constitute such an impediment—the only challenge being that a State Party to the Rome Statute 1998 would need to ensure that its legislation always remains consistent with any new obligations under the Statute.

The crime of aggression has been implemented into domestic law in some 25 national criminal codes, including three NATO countries and Russia. The method of implementation differs, depending upon a country’s juridical system. Some have simply implemented the crime as provided for in customary international law. Others have crafted national legislation with a view to protecting specific domestic legal values. In all cases, aggression is treated as exclusively a “leadership crime”; it cannot be committed by ordinary members of a country’s armed forces—only by its most senior political leaders.

This bill is submitted on the premise that the reasons for New Zealand following suit are strong, and sufficient (see section below: Political considerations).

Actions not circumscribed by the bill

The bill does not curtail New Zealand's freedom, under the UN Charter, to use armed force in self-defence of itself or others, or to use armed force in any other manner consistent with the Charter—such as an enforcement action authorised by the Security Council.

Jurisdictional limits of the bill

Unlike some cases of domestic legislation, the bill does not extend universal jurisdiction to New Zealand in the prosecution of aggression. The bill thus differs from the International Crimes and ICC Act 2000, which establishes universal jurisdiction for New Zealand over genocide, war crimes and crimes against humanity. Thus, nothing in the bill authorises New Zealand courts to prosecute non-New Zealand leaders outside New Zealand for any act of aggression. The bill focuses solely on New Zealand leaders, for acts committed by the New Zealand Defence Forces.

Political considerations

The political reasons for making aggression a crime in New Zealand domestic law are compelling. It is in the interest of every State to strengthen the fabric of international law. An effective law-based system of international peace and security is a more enduring guarantor of national security than reliance on a balance of power through military strength. In the words of Justice Robert Jackson, representing the United States at Nuremburg:

[T]he ultimate step in avoiding periodic wars, which are inevitable in a system of international lawlessness, is to make statesmen responsible to law. And let me make it clear that while this law is first applied against German aggressors, the law includes, and if it is to serve a useful purpose it must condemn, aggression by any other nation, including those which sit here now in judgement.

That observation applies equally to New Zealand, which provided a judge to adjudicate at the Tokyo war crimes trials.

A sovereign State can legislate only for itself, not for others. Through binding ourselves to the standards of non-aggression which we, as part of the international community, set over half a century ago we signal our resolve in this respect. And in so doing, we earn global credentials for legitimate criticism of any aggression committed by others.

Most importantly, this bill extends protection to New Zealand leaders by requiring them to observe a duty of non-aggression in domestic law. Small States often use armed force as part of a larger coalition; in such situations their freedom to make independent, objective judgment on the legality of a proposed action is constrained. This Act will relieve our leaders of much of that burden. The people of New Zealand and their leaders deserve the protection of law in those circumstances.

Clause by clause analysis

Clause 1 is the Title clause.

Clause 2 is the commencement clause and provides that the bill comes into force on the day after the date on which it receives the Royal assent.

Clause 3 is the interpretation clause.

Clause 4 sets out the purpose of the bill.

Clause 5 makes it unlawful (ie, a crime in domestic law) for any New Zealand leader to plan, prepare, initiate or execute an act of aggression and provides for a penalty for committing a crime of aggression.

Clause 6 defines an act of aggression.

Clause 7 sets out when armed force is lawful.

Clause 8 provides that allegations of a crime of aggression may be brought in a New Zealand court whether the act of aggression is alleged to have occurred in New Zealand or elsewhere, and whether the accused person was within New Zealand territory or elsewhere at the time of the alleged act.

Clause 9 provides that any New Zealand leader, when considering deploying New Zealand armed forces, must obtain written advice from the Attorney-General on whether such action is consistent with New Zealand's obligations under the Charter of the United Nations, and that this advice must be presented to the House of Representatives for consideration.

Clause 10 establishes the position of a Special Prosecutor to investigate allegations of crimes of aggression.

Clause 11 provides for immunity to any member of the New Zealand Defence Force in the exercise of their military duties, thereby making the crime of aggression a leadership crime.

Clause 12 makes a consequential amendment to the Remuneration Act 1977.

Kennedy Graham

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The Parliament of New Zealand enacts as follows:

- 1 Title**
This Act is the International Non-Aggression and Lawful Use of Force Act **2009**.

- 2 Commencement**
This Act comes into force on the day after the date on which it receives the Royal assent.
- 3 Interpretation**
In this Act, unless the context otherwise requires,— 5
act of aggression has the meaning given to it by **section 6**
manifest violation of the Charter of the United Nations means any action which, *prima facie*, contravenes the provisions of the Charter of the United Nations in a significant manner 10
New Zealand leader means a New Zealand citizen or a permanent resident of New Zealand, who is in a position in New Zealand or elsewhere, effectively to exercise control over, or to direct, political or military action by the State of New Zealand
political independence means the sovereign equality of any State 15
purposes of the United Nations means the purposes of the United Nations Organization as specified in Article 1 of the Charter of the United Nations
sovereignty means the legitimate and exclusive jurisdiction exercised by a government of a State on behalf of the citizens of that State 20
territorial integrity means the inviolability of a State’s existing territorial boundaries.
- 4 Purpose** 25
The purpose of this Act is to implement New Zealand’s obligation under the Charter of the United Nations to refrain from the use of armed force in any manner inconsistent with the purposes of the United Nations, by making an act of aggression a crime in New Zealand law. 30
- 5 Aggression by any New Zealand leader criminal offence**
(1) It is unlawful for a New Zealand leader to plan, prepare, initiate or execute an act of aggression which by its character, gravity and scale, constitutes a manifest violation of the Charter of

the United Nations, in the event that such an act of aggression is committed.

- (2) Every person who breaches **subsection (1)** commits the crime of aggression, and is liable on conviction on indictment to a maximum sentence of 10 years' imprisonment. 5

6 Definition of act of aggression

- (1) An act of aggression means the use of armed force by the State of New Zealand against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the purposes of the Charter of the United Nations. 10

- (2) For the purpose of **subsection (1)**, any of the following acts, regardless of any declaration of war, will, in accordance with General Assembly Resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression: 15

(a) the invasion or attack by the armed forces of New Zealand on 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: 20

(b) bombardment by the armed forces of New Zealand against the territory of another State or the use of any weapons by New Zealand against the territory of another State:

(c) the blockade of the ports or coasts of a State by the armed forces of New Zealand: 25

(d) an attack by the armed forces of New Zealand on the land, sea or air forces, or marine and air fleets of another State:

(e) the use of armed forces of New Zealand 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: 30 35

(f) the action of New Zealand 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, New Zealand 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. 5

7 Lawful use of armed force

- (1) Nothing in this Act prevents the lawful use of armed force by the State of New Zealand under Chapter VII of the Charter of the United Nations, namely the exercise of the inherent right of individual or collective self-defence of any Member of the United Nations or the use of armed force authorised by the United Nations Security Council. 10
- (2) No person who directs political or military action by New Zealand in accordance with Chapter VII of the Charter of the United Nations is liable for the crime of aggression. 15

8 Implementation in New Zealand of non-aggression obligation

- (1) Proceedings for an offence against **section 5** may be brought if the act constituting the offence charged is alleged to have occurred on or after the commencement of this section, regardless of— 20
 - (a) whether or not any act forming part of the offence occurred in New Zealand; or 25
 - (b) whether or not the person accused was in New Zealand at the time that the act constituting the offence occurred or at the time the decision was made to charge the person with an offence.
- (2) Proceedings for an offence against **section 5** may only be brought in a New Zealand court by the Special Prosecutor appointed under **section 10**. 30

9 Legal advice to New Zealand leader

- (1) A New Zealand leader must, before deciding to commit the armed forces of New Zealand to action involving the use of force, obtain written advice from the Attorney-General to de- 35

termine whether such action is consistent with the obligations of New Zealand under the Charter of the United Nations.

- (2) The written advice obtained under **subsection (1)** must, except in exceptional circumstances involving the immediate use of armed force in the exercise of the inherent right of individual or collective self-defence under the Charter of the United Nations, be presented to the House of Representatives for consideration at least 7 days before any decision referred to in **subsection (1)** is made. 5

10 Special Prosecutor 10

- (1) A Special Prosecutor will be appointed by the Governor-General on the advice of the Attorney-General.
- (2) The Special Prosecutor holds office for 5 years from the date of appointment at the pleasure of the Governor-General and cannot be re-appointed. 15
- (3) Any person who is a New Zealand citizen or who is a resident of New Zealand may bring to the attention of the Special Prosecutor any information regarding an alleged crime of aggression or any other action regarding the possible contravention of this Act by a New Zealand leader. 20
- (4) The Special Prosecutor may commence an investigation, on the basis of information received, or on his or her initiative, to assess evidence of an act of aggression by a New Zealand leader, and to consider whether to proceed with any trial according to that evidence. 25
- (5) The Special Prosecutor has the powers and duties of a prosecutor under Part 5 of the Rome Statute of the International Criminal Court (as incorporated in the Schedule to the International Crimes and International Criminal Court Act 2000) that are necessary for the purposes of **subsection (4)**. 30
- (6) In the event that the Rome Statute of the International Criminal Court, through amendment or additional protocol, includes aggression as a justiciable offence under the jurisdiction of the International Criminal Court, the Special Prosecutor will first consider undertaking prosecution of any person under this section before deciding whether to refer the situation to the International Criminal Court, according to the relevant provisions 35

of the International Crimes and International Criminal Court Act 2000.

- (7) If a Special Prosecutor commences an investigation under **subsection (4)**, the Special Prosecutor will be paid, without further appropriation than this section,— 5
- (a) remuneration at a rate and of a kind determined by the Remuneration Authority in accordance with the Remuneration Authority Act 1977; and
- (b) the costs of that investigation.
- (8) The Special Prosecutor may be removed or suspended from office by the Governor-General, upon an address by the House of Representatives, for disability affecting performance, or for misconduct. 10

11 Immunities

Nothing in this Act will be interpreted as limiting in any way the existing immunities enjoyed by any member of the New Zealand Defence Force regarding the execution of their military duties. 15

12 Consequential amendment to Remuneration Act 1977

Schedule 4 of the Remuneration Act 1977 is amended by inserting in the appropriate alphabetical order: 20
“Special Prosecutor for the Crime of Aggression”.
