

International Non-Aggression and the Lawful Use of Force (Implementation of Amendment to the Statute of Rome) Bill

Member's Bill

Explanatory Note

The purpose of this bill is to implement the Amendment to the Statute of Rome 1998, pertaining to the crime of aggression, as adopted in Resolution 6 of the Review Conference of the States Parties in Kampala, 11 June 2010.

Implementation by New Zealand is to be achieved through this Act in the following ways:

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 to protect New Zealand leaders from external pressure to commit the New Zealand Defence Force to any illegal action overseas.
2. To ensure that no leader of another State uses armed force against New Zealand with impunity.

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 a crime of aggression;
- (c) Requires a New Zealand leader to obtain the written advice of the Attorney-General before deciding to engage the armed forces of New Zealand in action involving the use of force;
- (d) Makes it a criminal offence in New Zealand law for any leader of any other State to commit aggression against New Zealand;
- (e) Recognises that New Zealand or any other State 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 (Article 2.4). As part of its responsibility for international peace and security, the Security Council may 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). The Charter, however, imposes only state responsibility, not individual criminal liability.

(b) Aggression as a criminal offence

For more than half a century, the international community has been moving 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 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, the crime is not to be justiciable in the ICC until agreement is reached among States Parties on two matters: a legally-binding definition and the conditions under which the Court is to exercise jurisdiction (particularly in relation to the responsibilities of the UN Security Council).

At the Kampala Review Conference of June 2010, agreement was reached among States Parties, with the concurrence and implied endorsement of major non-parties (including the US). Resolution 6 contains the amendment to the Rome Statute that will enable the Court to exercise jurisdiction.

That amendment will enter into force when two conditions are met:

- Ratifications by 30 States Parties before 1 January 2017;
- A further decision by the States Parties (by consensus or a two-thirds majority) on or after 1 January 2017 to activate the Amendment.

Liechtenstein has become the first State Party to deposit its ratification with the UN Secretary-General. Other States parties, including Argentina, Belgium, Botswana, Croatia, Dominican Republic, Estonia, Germany, Luxembourg, Netherlands, Peru, Slovenia, Switzerland, Trinidad and Tobago and Uruguay are expected to follow suit.

It is possible, and important, for New Zealand to be one of the 30 States Parties forming the 'activating group'. Implementation of the amendment in NZ law, at an early stage will greatly facilitate ratification.

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 the freedom of New Zealand or any other State, under the UN Charter, to use armed force in self-defence, 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 assert universal jurisdiction by New Zealand in the prosecution of aggression. The Bill thus differs from the International Crimes and ICC Act 2000, which establishes universal jurisdiction by New Zealand over genocide, war crimes and crimes against humanity.

The Bill does, however, assert jurisdiction in NZ domestic law over any crime of aggression committed by a leader of any other State against New Zealand.

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 Nuremberg:

[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. That extends to domestic prosecution of leaders committing aggression against New Zealand.

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 (i.e. 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 an act of aggression.

Clause 6 makes it unlawful (i.e. a crime in domestic law) for any leader of any other State to plan, prepare, initiate or execute an act of aggression against New Zealand and provides for a penalty for committing an act of aggression.

Clause 7 defines an act of aggression

Clause 8 sets out when armed force is lawful.

Clause 9 provides that the 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 10 provides that the allegations of a crime of aggression against New Zealand by any other State may be brought in a New Zealand court whether the act of aggression is alleged to have occurred in New Zealand or elsewhere against the armed forces of New Zealand, and whether or not the accused person was in the other State at the time of the alleged act.

Clause 11 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 12 establishes the position of the Special New Zealand Prosecutor to investigate allegations of crimes of aggression.

Clause 13 provides for the investigation and prosecution by the Special New Zealand Prosecutor in circumstances before, and after, the International Criminal Court exercises jurisdiction over the crime of aggression.

Clause 14 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 15 makes a consequential amendment to the Remuneration Act 1977

Kennedy Graham

**International Non-Aggression and the Lawful Use of Force
(Implementation of Amendment to the Statute of Rome) Bill**

Member's Bill

Contents

The Parliament of New Zealand enacts as follows:

1 Title

This Act is the International Non-Aggression and the Lawful Use of Force (Implementation of Amendment to the Statute of Rome) Act **2012**.

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,

act of aggression has the meaning given to it by **section 6**

leader of any other State means a citizen or a permanent resident of any State other than New Zealand, whether or not that State is a Party to the Statute of Rome, who is in a position in that State or elsewhere effectively to exercise control over, or to direct, political or military action by that State

manifest violation of the Charter of the United Nations means any action which contravenes the provisions of the Charter of the United Nations in a significant manner

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

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

territorial integrity means the inviolability of a state's existing territorial boundaries.

4 Purpose

The purpose of this Act is to implement the Amendment to the Rome Statute 1998, pertaining to the crime of aggression, as adopted in Resolution 6 of the Review Conference of the States Parties in Kampala, 11 June 2010, by:

1. Ensuring that the use of armed force by New Zealand is always in conformity with international law and in particular the UN Charter; and to protect New Zealand leaders from external pressure to commit the New Zealand Defence Force to any illegal action overseas.
2. Ensuring that, in the event of the use of force by any other State against New Zealand, in any manner that is inconsistent with the purposes of the United Nations, the leader or leaders of that State suspected of conducting the crime shall be brought to justice in New Zealand, or through the International Criminal Court.

5 Aggression by any New Zealand leader a criminal offence

- (1) It is unlawful for a New Zealand leader to plan, prepare, initiate or execute an act of aggression against any other State which by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.
- (2) Every person who breaches **subsection (1)** commits the crime of aggression, and is liable on conviction on indictment to a maximum sentence of ten years imprisonment.

6 Aggression against New Zealand by any leader of any other State a criminal offence

- (1) It is unlawful for any leader of any State other than New Zealand to plan, prepare, initiate or execute an act of aggression against New Zealand which by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.
- (2) Every person who breaches **subsection (1)** commits the crime of aggression, and is liable on conviction on indictment to a maximum sentence of ten years imprisonment.

7 Definition of act of aggression

- (1) For the purpose of this Act, an act of aggression means
 - (a) 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; or
 - (b) the use of armed force by any other State against the sovereignty, territorial integrity or political independence of New Zealand, or in any other manner inconsistent with the purposes of the Charter of the United Nations; or
- (2) For the purpose of **subsection (1)**, aggression shall mean any of the acts identified in Resolution 6 of the Review Conference of States Parties to the Statute of Rome, Kampala, 11 June 2010, set out in Schedule 1 of this Act.

8 Lawful use of armed force

- (1) Nothing in this Act shall prevent the lawful use of armed force by the State of New Zealand or by any other State 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.

(2) No person who directs political or military action by New Zealand or by any other State in accordance with Chapter VII of the Charter of the United Nations is liable for the crime of aggression.

9 Implementation in New Zealand of non-aggression obligation by New Zealand

(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:

- (a) whether or not any act forming part of the offence occurred in New Zealand; or
- (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 New Zealand Prosecutor appointed under **section 10**.

10 Implementation in New Zealand of non-aggression obligation by any other State

(1) Proceedings for an offence against **section 6** may be brought if the act constituting the offence charged is alleged to have occurred on or after the commencement of this section:

- (a) in the event that the offence occurred:
 - (i) within the territorial jurisdiction of New Zealand, or
 - (ii) against any of New Zealand's armed forces elsewhere, providing those forces are engaged in lawful activity; or
- (b) whether or not the person accused was in the other State 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 New Zealand Prosecutor appointed under **section 10**.

11 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 determine 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 laid before the House of Representatives for its consideration at least seven days before any decision referred to in **subsection (1)** is made.

12 Special New Zealand Prosecutor

(1) There shall be a Special New Zealand Prosecutor appointed by the Governor-General on the advice of the Attorney-General.

(2) The Special New Zealand Prosecutor holds office for five years from the date of appointment at the pleasure of the Governor-General and shall not be reappointed.

(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 New Zealand 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 or a leader of any other State.

(4) The Special New Zealand 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, or an act of aggression against New Zealand by a leader of any other State, and to consider whether to proceed with any trial pursuant to that evidence.

(5) The Special New Zealand Prosecutor shall have 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)**.

(6) If a Special New Zealand Prosecutor commences an investigation under **subsection (4)**, the Special New Zealand Prosecutor shall be paid, without further appropriation than this section, –

- (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.

13 Referral of investigation or prosecution to International Criminal Court

- (1) The Special New Zealand Prosecutor, at any time before the International Criminal Court asserts jurisdiction over the crime of aggression, may consider undertaking prosecution of any person under Section 10 in a New Zealand court.
- (2) At any time after the International Criminal Court asserts jurisdiction over the crime of aggression, the Special New Zealand Prosecutor will first consider undertaking prosecution of any person under Section 10 before deciding whether to refer the situation to the International Criminal Court, pursuant to the relevant provisions of the International Crimes and International Criminal Court Act 2000. The Special New Zealand Prosecutor may make this decision *proprio motu* without reference to any other New Zealand citizen;
- (3) The Prosecutor of the International Criminal Court may decide to accept or not accept any referral made in subsection 2.

14 Immunities

Nothing in this Act shall 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 Consequential amendment to Remuneration Act 1977

Schedule 4 of the Remuneration Act 1977 is amended by inserting in the appropriate alphabetical order:

Schedule 1

Resolution 6 of the Review Conference of the States Parties to the Statute of Rome, Pertaining to the crime of aggression, adopted at Kampala, 11 June 2010

Resolution RC/Res.6

Adopted at the 13th plenary meeting, on 11 June 2010, by consensus

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;

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;
 - (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 authorized 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.

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 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.

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.

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