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U.K Working to Kill the Crime of Aggression

By Donald M. Ferencz [\[*\]](#)

It's no secret that the 2003 war in Iraq was illegal. As unequivocally confirmed in last year's [Chilcot Report](#), the rush to war was based on false pretences. Tony Blair had advised George Bush as early as 2001 that the US and the UK should work on what Blair described as a 'clever strategy' for regime change in Iraq. In a 2002 secret memo Blair promised "I will be with you whatever." Little wonder that Sir John went on record earlier this year, saying he didn't believe Blair had been "straight with the nation."

Yet Britain remains a country whose leaders still can't be prosecuted for the crime of aggression. No matter that the UK sat in judgment at Nuremberg, where aggression was branded "the supreme international crime." Because the crime hasn't been incorporated into the domestic laws of the U.K., British politicians can do what they like in terms of waging illegal wars without fear of criminal prosecution. By contrast, British soldiers who sacrifice for their country can be criminally prosecuted for the commission of war crimes. The obvious double-standard is fuelling a growing sense of resentment. And the discrepancy in accountability doesn't end there.

In 2010, the International Criminal Court's Assembly of States Parties met in Kampala, Uganda and unanimously approved amendments intended to finally give the Court the authority to prosecute leaders for the crime of aggression. Even so, the amendments are required to be approved, yet again, by an activation decision of the Assembly before they become effective.

The amendments have been ratified by 35 countries - including over half the members of NATO - but neither Britain nor France have done so. Instead, they have joined with Canada, Japan, Norway and Colombia in arguing that, regardless of what was unanimously agreed to in Kampala, leaders of states which fail to

ratify the aggression amendments should be completely exempt from the Court's ability to prosecute for the crime. If such assurances are not forthcoming, the small group of recalcitrant non-ratifiers is tacitly threatening to completely derail the activation decision on aggression. The fact that Japan is among them is particularly surprising in light of the fact that its own constitution specifically renounces the threat or use of force.

Academics and diplomats have lined up on both sides of the argument, but there is one thing everyone agrees on: the aggression amendments are so remarkably flexible as to allow all states, at their sole discretion, to elect to remain beyond the Court's reach as to the crime of aggression, other than for cases referred by the Security Council. They need only choke down their embarrassment and file declarations saying that they don't accept that the Court can try their nationals for aggression.

The upcoming activation decision is expected to be the subject of a consensus resolution, to be considered by no later than December 14th, the last day that the Assembly is in session this year. Because of the complete unanimity which is required for the adoption of a consensus resolution, any non-consenting state has the power to kill the activation decision simply by not consenting to it. Hence, dissident non-ratifiers each have a game-ending card to play in opposition of activation. The question is, with the whole world watching, do they dare play it?

The decision on aggression may be seen by many as a test of the international justice system itself. Countries which say they believe in the rule of law, but, at the same time, try to cloak themselves in a mantle of impunity should expect to be seen as hypocrites. Nations which have already ratified the aggression amendments have signalled that they don't intend to hide from the law. Those which fail to ratify or which threaten to undermine activation of the Court's aggression jurisdiction send a very clear message in the opposite direction.

A negotiated solution is still possible, but time is short. Non-ratifiers have a distinct advantage in stalling: they need only drag their heels until time runs out this week. Afterwards, they can say "We tried, we really did, but there just wasn't enough time. Let's schedule this for consideration at some future time." A non-decision on activation of the Court's aggression jurisdiction would seem to suit them well. It guarantees continued impunity for their political leadership.

Prime Minister Theresa May's office was contacted last month with an offer to discuss a detailed solution which would allay British concerns, while at the same time activating the Court's jurisdiction over the crime of aggression. Her office has thus far declined to respond.

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Crime of Aggression



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