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Newcomers to Canada: Assessing a Civil Right of Action in Canadian Courts for Crimes Against Humanity and Aggression Committed Abroad

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ABSTRACT

Many new arrivals to Canada are victims of international crimes perpetrated by states and their agents. This article considers the reception of international law in Canada to determine whether a civil right of action exists for two crimes: crimes against humanity and the crime of aggression. It also proposes recommendations that would help remove barriers for civil redress and pave the way for victims to receive reparation orders in Canadian courts for their harm. This article is a novel addition to the subject of civil remedies in Canada for breaches of international law. While much has been written on the jurisdiction of Canadian courts to prosecute crimes at international law, the scholarship on civil remedies for such crimes is scant and outdated. This article fills this gap and proposes changes to the law in order to bring Canada more closely in line with its reputation for defending human rights on the world stage.

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RÉSUMÉ

De nombreux nouveaux arrivants au Canada sont victimes de crimes internationaux perpétrés par des États et leurs agents. Cet article analyse la manière dont le droit international est reçu au Canada afin de déterminer s'il existe un droit de recours civil pour deux types de crimes : les crimes contre l'humanité et le crime d'agression. Il formule également des recommandations qui contribueraient à lever les obstacles actuels à la réparation civile et permettre aux victimes d'obtenir des ordonnances de réparation devant les tribunaux canadiens pour les préjudices subis. L'étude apporte un éclairage nouveau sur la question des recours civils au Canada en matière de violations du droit international. Alors que la compétence des tribunaux canadiens pour juger les crimes relevant du droit international a fait l'objet de nombreux écrits, les rares travaux universitaires sur les recours civils pour ces crimes demeurent rares et ne sont pas à jour. Cet article vise à combler cette lacune et recommande des réformes législatives afin de mieux aligner le Canada avec sa réputation de défenseur des droits de la personne sur la scène internationale.

INTRODUCTION

IN 2014, then-UN High Commissioner for Refugees, António Guterres, observed that the Syrian crisis "has become the biggest humanitarian emergency of our era, yet the world is failing to meet the needs of refugees and the countries hosting them."[1] Perhaps galvanized by this plea, between 2016 and 2021, Canada admitted 60,000 Syrian refugees and over 200,000 refugees in total.[2] This policy earned Canada global commendation[3] and the lofty designation of having the highest rate of resettlement, both gross and per capita, in the world.[4] In the wake of the 2022 Russian invasion of Ukraine, Canada's openness to those fleeing war and conflict has remained high.[5]

Where conflicts induce mass migration of civilians, however, it is unfortunately common for accusations of violations of international law to soon follow. Allegations of crimes against humanity have arisen from the Syrian civil war, for instance,[6] while allegations of both crimes against

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1 Adrian Edwards, "Needs Soar as Number of Syrian Refugees Tops 3 Million" (29 August 2014), online: <unhcr.org> [perma.cc/PRP4-GKWH].

2 Statistics Canada, "Immigrants Make Up the Largest Share of the Population in over 150 Years and Continue to Shape Who We Are as Canadians", *The Daily* (26 October 2022), online: <statcan.gc.ca> [perma.cc/DK83-E399].

3 Office of the United Nations High Commissioner for Refugees, Press Release, "Canada's 2016 Record High Level of Resettlement Praised by UNHCR" (24 April 2017), online: <unhcr.org> [perma.cc/N7FP-2BXP]; Ghalia Bdiwe, "Canada's Welcoming Refugee Response Praised in Arab Media", *CBC News* (17 December 2015), online: <cbc.ca> [perma.cc/3KBJ-AYL9].

4 Jynnah Radford & Phillip Connor, "Canada Now Leads the World in Refugee Resettlement, Surpassing the U.S.", *Pew Research Center* (19 June 2019), online: <pewresearch.org> [perma.cc/U6RP-M3HY].

5 From 1 January to 25 December 2022, for instance, Canada accepted over 135,000 individuals from Ukraine (see Government of Canada, "Ukraine Immigration Measures: Key Figures" (30 December 2022), online: <canada.ca> [perma.cc/YU2K-G3KU]). In addition, although Canada is expected to reduce its refugee intake over the coming years, the projected numbers remain comparable to previous estimates (see Government of Canada, "Notice – Supplementary Information for the 2025-2027 Immigration Levels Plan" (last modified 24 October 2024), online: <canada.ca> [perma.cc/PU5Z-S3YK]; Government of Canada, "Canada-Ukraine Authorization for Emergency Travel: Key Figures" (last modified 26 July 2024), online: <canada.ca> [perma.cc/ZEN8-2WYP]).

6 "Human Rights Council Hears That Attacks on Civilians in Syria Could Amount to War Crimes, and That It Is Important to Coordinate Efforts to Achieve Accountability

humanity and the crime of aggression have followed the invasion of Ukraine.[7] It is thus foreseeable that those who have come to Canada fleeing persecution and violence may look to the country's legal system to seek redress for their harms.

One avenue for redress is to bring civil claims in Canadian courts. Framed broadly, these claims typically allege that a state government or actor violated international law, that this violation caused harm, and that damages are owed as a result. There are benefits to these suits. For one, they may serve as a deterrent to the commission of international crimes, especially in the absence of economic or military sanction.[8] Second, they contribute to state accountability[9] and can provide financial and reputational consequences for states that breach international law.[10] While some have considered the challenge in enforcing these awards as

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in Ukraine", *United Nations Information Service in Geneva* (21 March 2023), online: <ohchr.org> [perma.cc/NM3A-LMLX].

7 Amnesty International, *Amnesty International Report 2022/23: The State of the World's Human Rights* (London, UK: Amnesty International, 2023) at 377–79, online (pdf): <amnesty.org> [perma.cc/DD5Z-SA2P].

8 John F Murphy, "Civil Liability for the Commission of International Crimes as an Alternative to Criminal Prosecution" (1999) 12 Harv Hum Rts J 1 at 55–56; International Nuremberg Principles Academy, *A Practical Guide for Evaluating the Deterrent Effect of International and National Judicial Proceedings on Atrocity Crimes* (Nuremberg: International Nuremberg Principles Academy, 2020) at 21, online (pdf): <nurembergacademy.org> [perma.cc/L4AL-UDQK]; Sascha-Dominik Bachmann, "Terrorism Litigation as a Deterrence Under International Law – from Protecting Human Rights to Countering Hybrid Threats" (2011) 87 Amicus Curiae 22. Further, while the deterrent effect of civil damages on domestic crimes may not directly translate to the international context, it is notable that academic studies have still shown the capacity of civil litigation to deter both tortious and criminal acts more generally (see Claudia M Landeo, Maxim Nikitin & Scott Baker, "Deterrence, Lawsuits, and Litigation Outcomes Under Court Errors" (2007) 23:1 JL Econ & Org 57; Jonathan Klick & John MacDonald, "Deterrence and Liability for Intentional Torts" (2020) 63 Intl Rev L & Econ 1).

9 *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UNGA, 60th Sess, UN Doc A/RES/60/147 (2005) GA Res 60/147, Preamble.

10 This paper only considers civil claims brought against states, not non-state actors, as the difference in analysis between the two entities—especially in the context of immunities—is immense.

amounting to a pyrrhic victory,[11] it is worth noting that judicial acknowledgement of victims' experiences serves as both motivation for bringing claims[12] and vindication for harms.[13]

At present, however, several barriers hinder the pursuit of such claims in Canada. One is Canada's *State Immunity Act* (*SIA*), which, in certain circumstances, insulates foreign states from the jurisdiction of Canadian courts. Additional barriers arise from the interplay between Canadian common law and customary international law, which gives rise to other forms of immunity that can shield states from civil claims. As a result, this article recommends changes to Canadian law that would help pave the way for victims to seek damages for two international crimes: crimes against humanity and the crime of aggression.

These crimes were selected as a direct response to the Syrian civil war and the war in Ukraine, conflicts that have prompted many individuals to seek refuge in Canada. Moreover, crimes against humanity were chosen due to their relative neglect in public discourse compared to other serious violations of international law, primarily war crimes and genocide, despite their comparable gravity.[14] On the other hand, the crime of aggression was chosen because of its limited scholarship and legal development, having only been formally defined in international law through the 2010 Kampala amendments to the *Rome Statute of the International Criminal Court* (*Rome Statute*).[15] As a result, and given the unique challenges to seeking remedies for this crime in particular, this paper aims to support further advancement of the law in this area to improve access to justice for victims. At the same time, this paper recommends that further

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11 Emanuela-Chiara Gillard, "Reparations for Violations of International Humanitarian Law" (2003) 85:851 Intl Rev Red Cross 529 at 548.

12 Vessela Terzieva, "State Immunity and Victims' Rights to Access to Court, Reparation, and the Truth" (2022) 22:4 Intl Crim L Rev 780 at 803.

13 Prasanna Ranganathan, "Survivors of Torture, Victims of Law: Reforming State Immunity in Canada by Developing Exceptions for Terrorism and Torture" (2008) 71:2 Sask L Rev 343 at 371.

14 Austin Chandler, "Genocide or Crimes Against Humanity?", *BC Law* (6 May 2022), online: <lawmagazine.bc.edu> [perma.cc/8KQ4-VZ99].

15 *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) [*Rome Statute*] as amended by *Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression*, 11 June 2010, 2922 UNTS 207, art 8 *bis* (entered into force 17 July 2018) [*Aggression Amendments*].

study should also be directed to developing civil remedies in Canada for war crimes and genocide.[16]

This article is divided into three parts. First, to show the importance of having a civil right of action in Canada, I review the existing, and insufficient, forums at international law for civilians seeking reparation for these crimes. Second, I identify elements of Canadian law that either frustrate or support such claims. Third, I recommend changes to the law designed to strengthen Canada's civil remedy framework for serious international law violations, including: (i) Parliament should amend two pieces of legislation, the *SIA* and the *Crimes Against Humanity and War Crimes Act* (*CAHWCA*), to create an exception to state immunity for certain violations of international law; and (ii) the Supreme Court of Canada should confirm the inapplicability of other immunities and amnesties where these violations occur. While these recommendations, as well as the related analysis, demonstrate that the case for civil remedies in Canada is stronger at present for crimes against humanity than for the crime of aggression, this paper's recommendations will still increase the chances that claimants can seek justice for either crime.

I. THE INTERNATIONAL REPARATIONS FRAMEWORK

To demonstrate that a civil right of action is essential for victims' pursuit of justice, it is first necessary to show how the international legal framework provides insufficient recourse for victims of crimes against humanity and aggression.

A. Crimes Against Humanity

Crimes against humanity are one of the four enumerated crimes in the *Rome Statute*. Under Article 7(1), these crimes include acts such as murder, extermination, enslavement, deportation, torture, and rape, but only when they are committed "as part of a widespread or systematic

16 Of note, allegations of war crimes and genocide are generally more prevalent than the crime of aggression and have been raised in both the Syrian civil war and the Russian invasion of Ukraine as well. These and other international crises, such as the more recent conflicts in both Gaza and Sudan, underscore the urgent need for expanded scholarship in this area.

attack directed against a civilian population."[17] Article 7(2) of the *Rome Statute* clarifies that such an attack must be within a course of conduct that involves multiple committed acts, and pursuant to or in furtherance of a state or organization policy to commit such an attack.[18]

The international community has considered crimes against humanity as a distinct category of international crime since at least the end of World War II, as is evidenced by its inclusion in Article 6 of the *Nuremberg Charter*.[19] Since then, these crimes have been incorporated into successive international criminal statutes, including: Article 5 of the *Statute of the International Criminal Tribunal for the former Yugoslavia* (ICTY),[20] Article 3 of the *Statute of the International Criminal Tribunal for Rwanda* (ICTR),[21] and, as noted, Article 7 of the *Rome Statute*.[22]

The *Rome Statute*, which established the International Criminal Court (ICC), provides victims of crimes against humanity with a right to reparation. This reparation can include restitution, compensation, and rehabilitation.[23] In fact, Article 79 of the *Rome Statute* establishes a trust fund to finance such orders.[24]

However, there are several issues with the ICC's ability to pursue convictions and order reparation. One issue is funding. Since the court's inception, state parties have attempted to restrict the court's budget on

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17 *Rome Statute*, *supra* note 15, art 7(1).

18 *Ibid*, art 7(2).

19 *Charter of the International Military Tribunal*, annexed to the *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, 8 August 1945, 82 UNTS 279, art 6 (entered into force 8 August 1945) [*Nuremberg Charter*].

20 *Statute of the International Criminal Tribunal for the former Yugoslavia*, UNSC, 1993, UN Doc S/RES/827 SC Res 827, art 5 [*ICTY Statute*].

21 *Statute of the International Criminal Tribunal for Rwanda*, UNSC, 1994, UN Doc S/RES/955 SC Res 955, art 3 [*ICTR Statute*].

22 For a review of crimes against humanity as contained in the *Nuremberg Charter*, *ICTY Statute*, *ICTR Statute*, and *Rome Statute*, see M Cherif Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application* (New York: Cambridge University Press, 2011) at 361–73.

23 *Rome Statute*, *supra* note 15, art 75.

24 *Ibid*, arts 75, 79. Canadian legislation also establishes a "Crimes Against Humanity Fund" to make payments to the ICC Trust Fund (see *Crimes Against Humanity and War Crimes Act*, SC 2000, c 24, s 30 [*CAHWCA*]).

the basis that it can achieve its mandate without an increase in funds.[25] This conflicts with the opinions of international NGOs,[26] academics,[27] and court officials[28] that insufficient funding is impeding the ICC's work. While the Assembly of State Parties has recently answered these calls by approving the largest budget increase for the court in many years,[29] it is difficult to predict whether this signals a long-term commitment to support the court's workload. In addition, declared support does not necessarily translate to greater funding; rather, the problem of growing arrears poses a challenge to the court's functionality, as well.[30]

Another set of challenges are procedural. For one, the ICC's commitment to victim participation, while an admirable and unique dimension of the court, can extend proceedings by increasing the number of written filings that are submitted.[31] By necessitating multiple decisions on issues of disclosure, the court's disclosure of evidence rules can do the same.[32] Moreover, the existence of the Pre-Trial Chamber can further

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25 Eric Wiebelhaus-Brahm & Kirsten Ainley, "The Evolution of Funding for the International Criminal Court: Budgets, Donors and Gender Justice" (2023) 22:1 J Human Rights 31 at 33–36; Stuart Ford, "Complexity and Efficiency at International Criminal Courts" (2014) 29:1 Emory Intl L Rev 1 at 5–6.

26 Farida Deif, "Canada Should Put its Money Where its Mouth Is: Strengthen the International Criminal Court Budget", *Human Rights Watch* (30 November 2022), online: <hrw.org> [perma.cc/NFN2-UP8A].

27 Wiebelhaus-Brahm & Ainley, *supra* note 25 at 33–34.

28 Fatou Bensouda, "*Without Fear or Favour": Reflections on My Term as Prosecutor of the International Criminal Court* (The Hague: Office of the Prosecutor of the International Criminal Court, 2021) at 7–8, 10, online (pdf): <icc-cpi.int> [perma.cc/ZK33-ELXC].

29 Janet Sankale, "Larger Budget Reflects Increased ICC Workload in 2023" (15 December 2022), online: <jfjustice.net> [perma.cc/T2AM-7BEY].

30 Stuart Ford, "Funding the ICC for Its Third Decade" in Carsten Stahn, ed, *The International Criminal Court in Its Third Decade*, vol 109 (Leiden: Koninklijke Brill, 2023) 368 at 376, 382–83.

31 International Bar Association, *Enhancing Efficiency and Effectiveness of ICC Proceedings: A Work in Progress* (London, UK: International Bar Association, 2011) at 8, online (pdf): <ibanet.org> [perma.cc/G2NK-W4TT].

32 *Ibid* at 21–22.

delay prosecutions by requiring that the court confirm the charges that the Office of the Prosecutor brings.[33]

These issues, when taken together, help explain the low number of convictions and reparation orders that the court has issued to date.[34] In fact, the court has presently issued only five reparations orders against perpetrators in general,[35] three of which were for victims of crimes against humanity.[36] As a result, by allowing a civil right of action in Canadian courts, victims can pursue a remedy that is not easily accessible before the ICC.

Moreover, standing before international compensation bodies is consistently limited to state actors and international organizations. For example, only governments and international organizations were entitled to submit claims to the UN Compensation Commission,[37] and the Eritrea-Ethiopia Claims Commission rejected a system of mass claims on behalf of individuals.[38] Notably, no international compensation bodies have either emerged or become operational after certain prominent

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33 Milena Sterio, "The International Criminal Court: Current Challenges and Prospect of Future Success" (2020) 52:1/2 Case W Res J Intl L 467 at 477.

34 *Rome Statute*, *supra* note 15, art 75(2).

35 Marina Lostal, "The Ntaganda Reparations Order: A Marked Step Towards a Victim-Centred Reparations Legal Framework at the ICC" (24 May 2021), online (blog): <ejiltalk.org> [perma.cc/2SDQ-2U8S]; International Criminal Court, Press Release, "Ongwen Case: ICC Trial Chamber IX Orders Reparations for Victims" (28 February 2024), online: <icc-cpi.int> [perma.cc/8E56-XJDM].

36 *The Prosecutor v Bosco Ntaganda*, ICC-01/04-02/06, Reparations Order (8 March 2021) at paras 9–10, 27, 247 (International Criminal Court), online: <icc-cpi.int> [perma.cc/98SY-K9XS]; *The Prosecutor v Germain Katanga*, ICC-01/04-01/07, Order for Reparations pursuant to Article 75 of the Statute (24 March 2017) at paras 28, 306 (International Criminal Court), online: <icc-cpi.int> [perma.cc/4WW7-WL8T]; *The Prosecutor v Dominic Ongwen*, ICC-02/04-01/15/2074, Reparations Order (28 February 2024) at paras 1, 504, 795 (International Criminal Court), online: <icc-cpi.int> [perma.cc/9EKE-7UMY].

37 *Decision Taken by the Governing Council of the United Nations Compensation Commission at the 27th Meeting, Sixth Session Held on 26 June 1992*, UNCC, 6th Sess, UN Doc S/AC.26/1992/10, art 5(1). See also Liesbeth Zegveld, "Victims' Reparations Claims and International Criminal Courts: Incompatible Values?" (2010) 8:1 J Intl Crim Justice 79 at 96–97.

38 *Final Award, Eritrea's Damages Claims: Decision of 17 August 2009* (2009), XXVI RIAA 505 at 535, 537 (Eritrea-Ethiopia Claims Commission).

recent conflicts, including the Syrian civil war[39] and the Russian invasion of Ukraine.[40] Should victims achieve standing to bring their claims in civil courts themselves, then they will no longer need to rely on governments to establish compensation schemes or to seek, receive, and distribute awards.

B. The Crime of Aggression

As with crimes against humanity, the crime of aggression is one of the enumerated crimes under the *Rome Statute*.[41] Under Article 8 *bis*, the crime has two elements. First, there must be planning, preparation, initiation, or execution, by a person in a position to exercise control over or to direct the political or military action of a state, of an act of aggression. Second, the act of aggression must be 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* (*UN Charter*).[42]

Subsequent amendments to the *Rome Statute*, known as the Kampala amendments, provided specific examples for the crime, including the invading or bombing of another state, attacking the land, sea, or air forces of another state, and using armed groups against another state.[43] The

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39 While a commission of inquiry has been created, it does not provide recourse for victims seeking reparation for crimes against humanity (see United Nations Human Rights Council, "Independent International Commission of Inquiry on the Syrian Arab Republic: About the Commission of Inquiry" (last visited 15 January 2024), online: <ohchr.org> [perma.cc/VVK6-8ZD7]).

40 Although steps towards establishing a compensation mechanism have been taken, it remains to be seen whether, if formalized, this body would allow victim compensation and order damage payments (see Council of Europe, "Council of Europe Summit Creates Register of Damage for Ukraine as First Step Towards an International Compensation Mechanism for Victims of Russian Aggression", *Council of Europe* (17 May 2023), online: <coe.int> [perma.cc/D4K7-DNVM]; Council of Europe, "Mandate and Functions – Register of Damage for Ukraine" (last visited 20 August 2025), online: <rd4u.coe.int> [perma.cc/N8SH-PLYX]).

41 *Rome Statute*, *supra* note 15, art 5.

42 *Aggression Amendments*, *supra* note 15, art 8 *bis*.

43 *Ibid*. See generally Claus Kreß & Leonie von Holtzendorff, "The Kampala Compromise on the Crime of Aggression" (2010) 8:5 J Intl Crim Justice 1179 at 1185; Jennifer Trahan, "From Kampala to New York—The Final Negotiations to Activate the

United Nations General Assembly has also identified examples of acts of aggression themselves, including the occupation of a part of another state's territory,[44] engaging in hostilities against United Nations forces,[45] and attempting to annex a part or the whole of another state.[46] As provided under Article 8 *bis* (1) of the *Rome Statute*, an act of aggression amounts to a state act for the purposes of the crime when it constitutes a manifest violation of the *UN Charter*.[47]

Since July 17, 2018, the ICC has exercised jurisdiction over the crime of aggression.[48] The court has not yet prosecuted the crime, however, and is unlikely to secure convictions in the near future, given the budgetary and procedural issues discussed. In addition, the court cannot investigate the crime of aggression where the victim and perpetrator are not members of the court and the UN Security Council does not make a referral.[49] For example, the court does not have jurisdiction over Russian aggression in Ukraine, given that neither state is a party to the *Rome Statute,* and Russia would surely veto any referral to the court.[50] As a result, the court is unable to assert jurisdiction in any situation where the crime may arise.

Alternatives to the ICC have their own challenges, too. The International Court of Justice (ICJ), for instance, has never held a state

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Jurisdiction of the International Criminal Court over the Crime of Aggression" (2018) 18:2 Intl Crim L Rev 197 at 203.

44 *Situation in Namibia Resulting from the Illegal Occupation of the Territory by South Africa*, UNGA, 37th Sess, UN Doc A/RES/37/233A (1982) GA Res 37/233.

45 *Intervention of the Central People's Government of the People's Republic of China in Korea*, UNGA, 5th Sess, UN Doc A/RES/498(V) (1951) GA Res 498(V).

46 *Question of Basutoland, Bechuanaland and Swaziland*, UNGA, 17th Sess, UN Doc A/RES/1817(XVII) (1962) GA Res 1817(XVII); *Question of Basutoland, Bechuanaland and Swaziland*, UNGA, 18th Sess, UN Doc A/RES/1954(XVIII) (1963) GA Res 1954(XVIII).

47 *Aggression Amendments*, *supra* note 15, art 8 *bis*(1). See generally Carrie McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court*, 2nd ed (New York: Cambridge University Press, 2013) at 85–86, 154–160.

48 *Activation of the Jurisdiction of the Court over the Crime of Aggression*, ICC-ASP, 16th Sess, UN Doc ICC-ASP/16/20/Vol.I (2017) ICC-ASP Res 5.

49 Patrycja Grzebyk, "Crime of Aggression Against Ukraine: The Role of Regional Customary Law" (2023) 21:3 J Intl Crim Justice 435 at 436–437.

50 *Ibid*.

responsible for the crime of aggression.[51] Even if it does so in the coming years, only states may bring cases before it[52] and only states receive its awards.[53] As a result, like with international compensation bodies, individual victims would still be reliant on governments to develop compensation schemes to distribute any awards that are issued.

Another option is special or hybrid tribunals. In recent decades, the international community has established several of these tribunals, including the Kosovo Specialist Chambers (KSC), the Special Court for Sierra Leone (SCSL), the Special Tribunal for Lebanon (STL), and the Extraordinary Chambers in the Courts of Cambodia (ECCC). Their contributions to victim compensation, however, have been mixed. For instance, only the KSC is capable of issuing awards for monetary compensation.[54] The SCSL's statute expressly prohibits it from awarding reparations to victims,[55] and the STL's statute directs victims to seek compensation through national courts.[56] The ECCC can only award collective and moral, but not monetary, reparations to civil parties.[57]

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51 Dapo Akande & Antonios Tzanakopoulos, "The International Court of Justice and the Concept of Aggression: Lessons for the ICC?" (3 July 2015), online (blog): <ejiltalk.org> [perma.cc/6KHE-MK8L].

52 *Statute of the International Court of Justice*, 26 June 1945, Can TS 1945 No 7, art 34(1).

53 International Commission of Jurists, *The Right to a Remedy and Reparation for Gross Human Rights Violations: A Practitioners' Guide*, revised ed (Geneva: International Commission of Jurists, 2018) at 154, online: <icj.org> [perma.cc/39S9-NP7C].

54 The KSC, for instance, issued a reparations order in the case of *The Specialist Prosecutor v Salih Mustafa* (see KSC-BC-2020-05, Corrected Version of Public Redacted Version of Reparation Order Against Salih Mustafa (6 April 2023) (Kosovo Specialist Chambers), online: <repository.scp-ks.org> [perma.cc/Q8MK-SVAT]). See also Kosovo Specialist Chambers & Specialist Prosecutor's Office, "Reparations" (last visited 20 August 2025), online: <scp-ks.org> [perma.cc/25HM-TFA3].

55 Zegveld, *supra* note 36 at 91, n 62.

56 *Resolution 1757 (2007)*, UNSC, 62nd Year, UN Doc S/RES/1757 Annex, art 25(3).

57 The ECCC's rules provide that victims can seek "collective and moral reparations" (see Extraordinary Chambers in the Courts of Cambodia, "Internal Rules (Rev. 10)" (27 October 2022), online (pdf): <eccc.gov.kh> [perma.cc/PKG2-XVXE]). For further reading, see generally John D Ciorciari & Anne Heindel, *Hybrid Justice: The Extraordinary Chambers in the Courts of Cambodia* (Ann Arbor, Mich: University of Michigan Press, 2014) at 128, 212, 225.

Moreover, none of these tribunals have dealt with the crime of aggression. However, the Council of Europe,[58] the Prime Minister of Ukraine,[59] and the Foreign Ministers of the G7[60] have each called for the creation of a special or hybrid tribunal to prosecute Russian aggression in Ukraine, which is now in the early stages of its creation.[61] This proposal is not without its critics, who have noted practical concerns regarding the prosecution of individuals without Russian cooperation, such as gathering evidence and detaining suspects.[62] Besides, given the challenges victims face before other tribunals, a future tribunal for Ukraine may be similarly constrained from making awards for material compensation.[63]

One final option is for victims to seek reparation before the Human Rights Committee, a body of experts that monitors the implementation of the *International Covenant on Civil and Political Rights* (*ICCPR*). While this option provides the advantage of individual standing for claimants,[64] it has drawbacks as well. First, insufficient state funding affects the

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58 Council of Europe, "PACE Calls for an Ad Hoc International Criminal Tribunal to Hold to Account Perpetrators of the Crime of Aggression Against Ukraine" (28 April 2022), online: <coe.int> [perma.cc/F9VJ-BUVZ].

59 President Volodymyr Zelenskyy, "We Must Create a Special Tribunal on the Crime of Aggression Against Ukraine: Address by President Volodymyr Zelenskyy to the Participants of the Public Debate 'War and Law' in Paris" (5 October 2022), online: <president.gov.ua> [perma.cc/QN4W-WCEA].

60 Government of Canada, "Foreign Ministers' Meeting Communiqué – G7 Japan 2023" (18 April 2023), online: <international.gc.ca> [perma.cc/3H7H-B46Q].

61 Hannah Lobel & Nema Milaninia, "Building a Special Tribunal for the Crime of Aggression Against Ukraine" (25 July 2025), online (blog): <ejiltalk.org> [perma.cc/KSV6-YK86].

62 Kevin Jon Heller, "Creating a Special Tribunal for Aggression Against Ukraine Is a Bad Idea" (7 March 2022), online (blog): <opiniojuris.org> [perma.cc/L2JK-WELM]; Sergey Vasiliev, "Aggression Against Ukraine: Avenues for Accountability for Core Crimes" (3 March 2022), online (blog): <ejiltalk.org> [perma.cc/47R6-MWG7].

63 The mechanics of compensation for a future tribunal for Ukraine are presently unclear (see Council of Europe, Committee of Ministers, *Consequences of the Aggression of the Russian Federation Against Ukraine – Statute of the Special Tribunal for the Crime of Aggression Against Ukraine*, CM(2025)103-final (2025), art 37).

64 Eliav Lieblich, "The Humanization of *Jus Ad Bellum*: Prospects and Perils" (2021) 32:2 Eur J Intl L 579 at 583.

committee's ability to hear and decide complaints[65] and can therefore cause significant delay and backlog.[66] Second, because the committee serves as an oversight body and not as a court or tribunal,[67] its quasi-judicial nature may make states less willing to comply with its requests for compensation. This can, in turn, make it difficult for victims to ever receive meaningful compensation for their harm.

Lastly, many of these avenues require a criminal conviction before victims can receive reparation. As a result, one advantage to an independent civil action is the lower standard of proof that applies. While criminal proceedings require evidence that establishes guilt beyond a reasonable doubt, civil proceedings can find wrongdoing based on a balance of probabilities. This lower threshold is beneficial for victims whose cases may lack evidence, allowing them to achieve successful outcomes that would not be possible where a criminal conviction was necessary.[68]

II. THE VIABILITY OF CIVIL CLAIMS IN CANADA FOR CRIMES AGAINST HUMANITY AND AGGRESSION

A. Reception of International Law in Canada

To determine the viability of civil claims against foreign states in Canadian courts, it is important to understand the relationship between Canadian law and two primary sources of international law: international conventions and custom. International conventions, or treaty law, refer to legally binding agreements between states or between states and

65 Shane Darcy, "Accident and Design: Recognizing Victims of Aggression in International Law" (2021) 70:1 Intl & CLQ 103 at 129–30.

66 United Nations, Meetings Coverage, GA/SHC/4381, "With Human Rights Complaints Spiraling Worldwide, Third Committee Underscores Need to Protect Defenders of Victims, Increase Staff, Funding for Treaty Bodies" (11 October 2023), online: <press.un.org> [perma.cc/6SZR-XM2J].

67 Office of the United Nations High Commissioner for Human Rights, "Introduction to the Committee: Human Rights Committee" (last visited 14 January 2024), online: <ohchr.org> [perma.cc/ 99R5-MABK].

68 Murphy, *supra* note 8 at 47–48.

international organizations.[69] Custom, on the other hand, refers to rules that enjoy widespread and uniform state practice and the general recognition by states that these rules constitute a legal obligation.[70] Certain customary rules, referred to as *jus cogens* or peremptory norms, are norms that the international community considers superior to other rules of international law and from which no state can derogate.[71] Below, I examine how Canadian law treats both treaties and custom.

The Canadian system of government is a direct product of the United Kingdom's model of parliamentary sovereignty. The Preamble to the *Canadian Constitution Act, 1867* confirms this, referring to a system "similar in Principle to that of the United Kingdom."[72] In this model, legislative supremacy is protected by giving treaties domestic legal effect only after they receive parliamentary approval.[73] Treaty law is thus not binding in Canada until it is implemented by legislation and passed pursuant to a valid head of power.[74]

The common law confirms the same model. In *Canada (Attorney General) v. Ontario (Attorney General)*, the United Kingdom's Judicial Committee of the Privy Council recognized the "well-established rule"

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69 See United Nations, "Definition of Key Terms Used in the UN Treaty Collection" (last visited 25 January 2025), online: <treaties.un.org> [perma.cc/EQG7-VV8G] [United Nations, "Treaty Definitions"].

70 *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)*, [1969] ICJ Rep 3 at para 77. See also "Report of the International Law Commission on the Work of Its Seventieth Session" (UN Doc A/73/10) in *Yearbook of the International Law Commission 2018*, vol 2, part 2 (New York: UN, 2018) at 138 (UNDOC A/CN.4/SER.A/2018/Add.1).

71 Anne Lagerwall, "Jus Cogens" (last modified 29 May 2015), online: <oxfordbibliographies.com> [perma.cc/W3PY-ZCWU]. Some examples of *jus cogens* include the prohibition against crimes against humanity, aggression, genocide, slavery, and torture (see *Report of the International Law Commission*, UNGA, 74th Sess, UN Doc A/74/10 (2019) at 146–47, 205).

72 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, Preamble, reprinted in RSC 1985, Appendix II, No 5.

73 Tom Ginsburg, Svitlana Chernykh & Zachary Elkins, "Commitment and Diffusion: How and Why National Constitutions Incorporate International Law" [2008] 1 U Ill L Rev 201 at 205.

74 Armand de Mestral & Evan Fox-Decent, "Rethinking the Relationship Between International and Domestic Law" (2008) 53:4 McGill LJ 573 at 595. See also *Nevsun Resources Ltd v Araya*, 2020 SCC 5 at para 158 [*Nevsun Resources*].

in England that the legislature must implement treaty obligations where they diverge from the domestic law.[75] It then held that this legislative requirement existed in Canada and that it would apply both federally and provincially.[76] The Supreme Court would acknowledge this rule in future cases,[77] emphasizing the corollary that the executive's ratification of a treaty does not on its own render it binding in Canadian law.[78]

In contrast to international treaties, the UK does not require international ratification to recognize custom.[79] Specifically, Lord Denning confirmed in *Trendtex Trading Corporation v. Central Bank of Nigeria* that "the rules of international law, as existing from time to time, do form part of our English law."[80] Like with treaty law, Canada also inherited this framework from the United Kingdom.[81] As a result, customary international law is incorporated directly into Canada's domestic common law[82] under the doctrine of incorporation or adoption.[83]

In recent years, however, the Supreme Court of Canada has commented on the role of custom in Canada in three watershed decisions: *R. v. Hape* (*Hape*), *Kazemi Estate v. Islamic Republic of Iran* (*Kazemi Estate*), and *Nevsun Resources Ltd. v. Araya* (*Nevsun Resources*).

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75 *Canada (Attorney General) v Ontario (Attorney General)*, 1937 CanLII 362 at 678 (UK JCPC).

76 *Ibid* at 678–84. See also Hugo Cyr, *Canadian Federalism and Treaty Powers: Organic Constitutionalism at Work* (Brussels: Peter Lang, 2009) at 50.

77 *Francis v The Queen*, 1956 CanLII 79 at 621 (SCC); *Operation Dismantle v The Queen*, 1985 CanLII 74 at para 90 (SCC); *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 at para 69 (SCC).

78 *Capital Cities Comm v CRTC*, 1977 CanLII 12 at 188 (SCC).

79 Michael D Ramsey, "The Constitution's Text and Customary International Law" (2018) 106:6 Geo LJ 1747 at 1766.

80 [1977] 1 QB 529 at 554, [1977] 1 All ER 881 (EWCA Civ UK).

81 Stéphane Beaulac & John H Currie, "Canada" in Dinah Shelton, ed, *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (Oxford, UK: Oxford University Press, 2011) 116 at 118.

82 Roger O'Keefe, "The Doctrine of Incorporation Revisited" (2008) 79 Brit YB Intl L 7 at 9–11.

83 Oliver Jones, "The Doctrine of Adoption of Customary International Law: A Future in Conflicting Domestic Law and Crown Tort Liability" (2010) 89:2 Can Bar Rev 401 at 401–402.

1. *R v. Hape*

In *Hape*, the Supreme Court considered whether RCMP evidence against an accused money launderer should be excluded on the basis that it was obtained in breach of section 8 of the *Canadian Charter of Rights and Freedoms* (*Charter*). Since the evidence had been collected in the Turks and Caicos, the question arose as to whether the *Charter* had extraterritorial application to police conduct.

To answer this question, the Supreme Court considered the role of customary international law in interpreting the *Charter*. Writing for the majority, Justice Lebel affirmed that "prohibitive rules of customary international law should be incorporated into domestic law in the absence of conflicting legislation."[84] He also stated that "[a]bsent any express derogation, the courts may look to prohibitive rules of customary international law to aid in the interpretation of Canadian law and the development of the common law."[85] However, these comments did not conclusively determine that customary international law automatically formed part of the common law, since the second statement suggested that custom was instead used as an interpretive tool.[86] As a result, while *Hape* was an important affirmation that customary international law plays a role in Canadian law, it raised the question of whether and how it is directly incorporated.

2. *Kazemi Estate v. Islamic Republic of Iran*

In *Kazemi Estate*, the son and estate of Ms. Kazemi, an Iranian-Canadian citizen, sued the Iranian government after she was tortured by Iranian authorities and died from her injuries. The son sought damages both on behalf of his mother, for her pain and suffering, and on his own behalf, for the loss of his mother.[87]

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84 *R v Hape*, 2007 SCC 26 at para 39.

85 *Ibid.*

86 See John H Currie, "Weaving a Tangled Web: *Hape* and the Obfuscation of Canadian Reception Law" (2007) 45 Can YB Intl Law 55 at 85–86.

87 *Kazemi Estate v Islamic Republic of Iran*, 2014 SCC 62 at paras 5–11 [*Kazemi* SCC].

The Superior Court of Quebec dismissed the estate's claim, finding it barred under the immunity provisions of Canada's *SIA*.[88] It held, however, that the son's personal action could proceed under a legislative exception for injuries suffered in Canada.[89] The Court of Appeal of Quebec found that neither claim could proceed given the *SIA*.[90] Both courts also dismissed the argument that the *SIA* was unconstitutional.[91]

The Supreme Court ultimately agreed with the court of appeal. Referring to the principles of sovereignty and equality, the court held that the *SIA*'s grant of immunity to foreign governments barred the civil claims.[92] In particular, the *SIA* granted immunity to foreign states except where discrete, well-defined circumstances applied.[93] The court therefore held that the *SIA*'s immunity provisions reflected "domestic choices made for policy reasons,"[94] and it was not the court's role to override these reasons in favour of providing a civil remedy.

The Supreme Court also commented on the doctrine of incorporation and appeared to step back from the ambiguous approach taken in *Hape*. It held that "the mere existence of a customary rule in international law does not automatically incorporate that rule into the domestic legal order."[95] Instead, even if a customary rule exists, such as an exception to state immunity, it would still require legislative adoption to become Canadian law.

Finally, the court stated that, even where a customary law rule did exist, it would "have to be weighed against other rules of customary

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88 Specifically, section 3(1) of the *State Immunity Act* provides that a foreign state is immune from the jurisdiction of any court in Canada except in certain circumstances (see RSC, 1985, c S-18, s 3(1) [*SIA*]).

89 *Kazemi (Estate of) c Islamic Republic of Iran*, 2011 QCCS 196 at paras 92–93 [*Kazemi* SC]. See also *Kazemi* SCC, *supra* note 87 at paras 17–18.

90 *Islamic Republic of Iran c Hashemi*, 2012 QCCA 1449 at paras 3–4, 61, 84, 122 [*Hashemi*]. For the Supreme Court's discussion of *Hashemi*, see *Kazemi* SCC, *supra* note 87 at paras 25–30.

91 *Kazemi* SC, *supra* note 89 at paras 158, 177, 191, 210, 215; *Hashemi*, *supra* note 90 at para 9.

92 *Kazemi* SCC, *supra* note 87 at paras 35, 72–78.

93 *SIA*, *supra* note 88, ss 3–4.

94 *Kazemi* SCC, *supra* note 87 at para 45.

95 *Ibid* at para 61.

international law ... namely the rule of state immunity."[96] The court therefore noted that customary rules may present additional barriers for claimants that are entirely separate from those in the *SIA*.

3. *Nevsun Resources Ltd. v. Araya*

In *Nevsun Resources*, three refugees sued the Canadian company Nevsun for damages resulting from breaches of international law. The refugees claimed they were forced to work at a mine owned by Nevsun in Eritrea and that they were victims of cruel and degrading treatment, including crimes against humanity, while working there.[97]

The Supreme Court concluded that it was not plain and obvious that the international law claims, characterized as breaches of customary international law, should fail.[98] Mirroring the finding in *Kazemi Estate* regarding torture, both the majority and dissent agreed that crimes against humanity are prohibited by custom.[99] However, the majority in *Nevsun Resources* went further than *Kazemi Estate*, embracing the position set out in *Trendtex*: that *all* customary international law is adopted into Canadian law in the absence of conflicting legislation.[100] Thus, in contrast to *Kazemi Estate*, which required an act of legislative adoption in order to incorporate custom into Canadian law, *Nevsun Resources* only required the absence of legislation that conflicts with such custom. As a result, Canadian courts have already begun accepting that there is now "no principled or practical" reason to distinguish between implemented treaties and custom in Canada.[101]

Lastly, *Nevsun Resources* also acknowledged that independent torts may exist in Canada that could give rise to civil remedies for breaches of

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96 *Ibid* at para 101.

97 *Nevsun Resources*, *supra* note 74 at paras 3–4.

98 *Ibid* at paras 4, 59, 113.

99 *Ibid* at paras 124, 126, 179.

100 *Ibid* at paras 86, 93–95. Justice Abella, who penned the majority decision in *Nevsun Resources*, is likely most responsible for moving the needle on the role of custom in Canada, having long been recognized for her expertise in human rights and her references to international law in her legal opinions.

101 *International Air Transport Association v Canadian Transportation Agency*, 2022 FCA 211 at para 64.

rules of customary international law.[102] I will explore these comments further when considering the existence of a civil remedy in Canada for violations of international law.

B. Bringing Civil Claims in Canadian Courts

Taken together, if *Kazemi Estate* and *Nevsun Resources* are extended to crimes against humanity and aggression, they establish that claimants seeking civil remedies for these crimes must meet five requirements: (i) the alleged crime must exist in Canadian legislation or under customary international law; (ii) if part of custom, there must be no conflicting legislation preventing their adoption into Canadian law; (iii) a civil remedy must exist in Canada for the alleged crime; (iv) there must be no legislative bar to this remedy; and (v) there must be no customary bar to this remedy. Moreover, the issue of standing remains a threshold requirement, even if it was not addressed as a standalone issue in *Kazemi Estate* or *Nevsun Resources*.

1. Individual Standing to Seek Civil Remedies for Crimes Against Humanity and Aggression

As *Kazemi Estate* and *Nevsun Resources* show, there is no issue of standing for those pursuing claims arising from crimes against humanity. While *Kazemi Estate* ultimately found that the claims were barred by the *SIA*, it did not raise concerns regarding the ability of the individual or estate to bring the claims themselves. Similarly, in *Nevsun Resources*, the court concluded that it was not "plain and obvious" that the Eritrean workers' claims could not succeed.[103]

This approach is consistent with accepted principles of international law. For example, provisions from numerous international agreements, including Article 8 of the *Universal Declaration of Human Rights* and Article 2 of the *ICCPR*, recognize a victim's right to an effective remedy.[104] This recognition is further supported by the nature of the crimes

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102 *Supra* note 74 at para 128.

103 *Ibid* at para 132.

104 *Universal Declaration of Human Rights*, UNGA, 3rd Sess, UN Doc A/810 (1948) GA Res 217A (III), art 8; *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, art 2 (entered into force 23 March 1976, accession by

themselves, which are not perpetrated against states but against individuals and "civilian populations."[105] There are similarly many examples of domestic legislation which allow individuals to pursue civil remedies for crimes against humanity.[106]

There are, on the other hand, issues of standing with respect to the crime of aggression. These arise from the fact that states, not individuals, have historically been treated as the victim of aggression and the proper party to bring a claim.[107] The *Rome Statute*, for instance, provides that states are the target of aggression and that the aggressive act offends their "sovereignty, territorial integrity or political independence."[108]

As a result, Canadian judges would likely rule that individuals do not have standing to pursue civil claims for the crime of aggression. In the recommendations section, I address how this barrier may be overcome, namely by recommending that Canadian courts refrain from dismissing these claims outright and that they recognize that granting standing would be consistent with international criminal law and international human rights law principles.

2. Crimes Against Humanity and Aggression in Canadian Law

The prohibition against crimes against humanity has been adopted into Canadian law through both statute and custom. In statute, the prohibition is recognized by the implementing legislation of several of

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Canada 19 May 1976) [*ICCPR*]. See also Amnesty International, *Recommendations for the Diplomatic Conference on the Draft Convention on International Cooperation in the Investigation and Prosecution of Genocide, Crimes Against Humanity, War Crimes and Other International Crimes* (London, UK: Amnesty International Publications, 2023) at 21, online (pdf): <amnesty.org> [perma.cc/5KLS-HLXY].

105 *Rome Statute*, *supra* note 15, art 7.

106 See Amnesty International, "Universal Jurisdiction: The Scope of Civil Universal Jurisdiction" (1 July 2007) at 5–9, online (pdf): <amnesty.org> [perma.cc/AQU4-GBY8]; Donald Francis Donovan & Anthea Roberts, "The Emerging Recognition of Universal Civil Jurisdiction" (2006) 100:1 Am J Intl L 142 at 145.

107 Marissa R Brodney, "Accounting for Victim Constituencies and the Crime of Aggression: New Questions Facing the International Criminal Court" (2017) 58 Harv Intl L J Online 37 at 37–38.

108 *Aggression Amendments*, *supra* note 15, art 8 *bis*(2). The amendments to the Elements of Crime adopted into the 2010 Resolution on the Crime of Aggression similarly identify states as the wronged party.

Canada's international humanitarian law treaty commitments, including both the *Geneva Conventions Act* and the *Immigration and Refugee Protection Act*.[109] By implementing its *Rome Statute* obligations through the *CAHWCA*, Canada has also endowed superior courts with criminal jurisdiction over these crimes and classifies them as indictable offences under Canadian law.[110]

In addition to this statutory basis, crimes against humanity have also been prohibited by custom since the end of World War II. Article 6 of the *Nuremberg Charter*, for instance, endowed the newly created International Military Tribunal with jurisdiction to prosecute crimes against humanity. These crimes were to include murder, extermination, enslavement, deportation, and other inhumane acts committed against a civilian population.[111] Similar language was later reflected in the *Tokyo Charter* of 1945.[112] At the end of the 20th century, the *Rome Statute* would further define these crimes to include torture, rape, enforced disappearance of persons, and the crime of apartheid.[113]

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109 *Geneva Conventions Act*, RSC 1985, c G-3, Schedule V, art 75; *Immigration and Refugee Protection Act*, SC 2001, c 27, Schedule [*IRPA*]. Canada's *Geneva Conventions Act* approves the four Geneva Conventions of 1949 and the Additional Protocols of 1977 and 2005. It provides that persons accused of crimes against humanity should be submitted for prosecution and trial in accordance with applicable rules of international law (*Geneva Conventions Act*, *supra* note 109, art 75). Similarly, the *Immigration and Refugee Protection Act* incorporates article 1(f) of the *United Nations Convention Relating to the Status of Refugees*, which excludes from protection individuals who have committed crimes against humanity (see *IRPA*, *supra* note 109, Schedule; *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137, art 1(f)). See also Christopher K Penny, "Domestic Reception and Application of International Humanitarian Law: Coming Challenges for Canadian Courts in the 'Campaign against Terror'" in Chios Carmody, ed, *Is Our House in Order?: Canada's Implementation of International Law* (Montreal: McGill-Queen's University Press, 2010) 225 at 231, 236–39.

110 *CAHWCA*, *supra* note 24, ss 4, 6. See also Fannie Lafontaine, "The Unbearable Lightness of International Obligations: When and How to Exercise Jurisdiction under Canada's *Crimes Against Humanity and War Crimes Act*" (2010) 23:2 RQDI 1 at 12–13.

111 *Nuremberg Charter*, *supra* note 19, art 6(c). See also Miles M Jackson, "The Customary International Law Duty to Prosecute Crimes Against Humanity: A New Framework" (2007) 16:1 Tul J Intl & Comp L 117 at 121.

112 International Military Tribunal for the Far East, 19 January 1946, TIAS 1589, art 5 [*Tokyo Charter*].

113 *Rome Statute*, *supra* note 15, art 7.

Ratified by 20 allied states[114] and 125 states[115] respectively, the *Nuremberg Charter* and *Rome Statute* are widely acknowledged as evidence of the customary rule prohibiting crimes against humanity.[116] *Nevsun Resources* itself confirmed that crimes against humanity are among the "least controversial examples" of violations of *jus cogens*,[117] allowing courts to take judicial notice of their customary stature.[118]

In stark contrast to the other three *Rome Statute* crimes, Canada's *CAHWCA* does not define nor adopt the crime of aggression.[119] Canada also has not otherwise adopted the Kampala amendments to the *Rome Statute*,[120] which came into effect after the *CAHWCA* was passed into Canadian law.[121] Further, the legislation implementing Canada's international humanitarian law obligations do not mention the crime of aggression.[122] As a result, no statute has implemented the crime of aggression into Canada's domestic legal order.

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114 United Nations, "Agreement by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis" (last visited 20 August 2025), online: <treaties.un.org> [perma.cc/5D38-Y8NW].

115 United Nations, "Rome Statute of the International Criminal Court" (last visited 20 August 2025), online: <treaties.un.org> [perma.cc/ZBD2-272L].

116 In fact, Canada's *CAHWCA* states at section 6(5) that crimes against humanity were part of the customary international law even before the *Nuremberg Charter* came into effect (see *CAHWCA*, *supra* note 24, s 6(5)).

117 *Supra* note 74 at para 100.

118 *Ibid* at para 99.

119 *CAHWCA*, *supra* note 24, ss 4, 6.

120 *Aggression Amendments*, *supra* note 15.

121 Abraham Rash, "Canada and Germany: Cowardice and Courage in Implementation of the Rome Statute" (2019) 1:1 Can JL & Justice 61 at 71, n 20.

122 This is likely explained by Canada's cautious and at times oppositional stance towards the prosecution of the crime of aggression by the ICC. Most recently, during the July 2025 Special Session of the Assembly of States Parties, Canada joined a minority of states in opposing a proposed amendment to harmonize the ICC's jurisdiction over all four of its crimes. Had it been adopted, the reform would have strengthened the Court's ability to investigate and prosecute acts of aggression, which would have placed the crime on more equal footing with crimes against humanity, genocide, and war crimes. As a result, Canada's support for prosecuting the crime of aggression, at least through

Nevertheless, the prohibition against the crime of aggression is recognized under customary international law.[123] First introduced as "crimes against peace" in the *Nuremberg Charter*,[124] the concept was reaffirmed in the *Tokyo Charter* of 1945[125] and also reflected in the *UN Charter*.[126] As previously noted, the ICC now has jurisdiction over the crime of aggression, as well.[127] Consequently, although the crime has not been formally implemented into Canadian law by statute, *Nevsun Resources* makes it clear that its prohibition is *de facto* part of Canada's common law in the absence of conflicting legislation.

3. Conflicting Legislation

While legislation can conflict with custom directly, conflicts may also arise where Parliament's express or implied intention was to legislate an area of the law exhaustively.[128] Conflicting legislation presents no hurdle for victims who seek remedies for crimes against humanity. To date, no legislation has rejected these crimes as part of Canadian law. In fact, and as noted, Canada's legislation explicitly adopts them.[129] Canada's *Criminal Code* provisions similarly reference the *CAHWCA* when outlining these crimes in its domestic code.[130]

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the ICC's present mechanisms, remains tenuous at best (see Jennifer Trahan, "Crime of Aggression Negotiations Blocked by France, the United Kingdom, and Canada" (31 July 2025), online (blog): <opiniojuris.org> [perma.cc/UK6Y-JNQZ]).

123 Ian Brownlie, *Principles of Public International Law*, 5th ed (Oxford, UK: Oxford University Press, 1998) at 566; Bing Bing Jia, "The Crime of Aggression as Custom and the Mechanisms for Determining Acts of Aggression" (2015) 109:3 Am J Int Law 569 at 571. See also *R v Jones*, [2006] UKHL 16 at paras 12–18.

124 *Nuremberg Charter*, *supra* note 19, art 6.

125 *Tokyo Charter*, *supra* note 112, art 5. The *Tokyo Charter* arguably had a greater impact on the conception of the crime than the *Nuremberg Charter* (see Kirsten Sellars, '*Crimes Against Peace' and International Law* (Cambridge, UK: Cambridge University Press, 2013) at 260).

126 *UN Charter*, 26 June 1945, Can TS 1945 No 7, arts 1(1), 39.

127 International Criminal Court, Press Release, ICC-ASP-20171214-PR1350, "Assembly Activates Court's Jurisdiction over Crime of Aggression" (15 December 2017), online: <icc-cpi.int> [perma.cc/2PU7-YGL3].

128 Jones, *supra* note 83 at 403–08.

129 *CAHWCA*, *supra* note 24, ss 4, 6.

130 See *Criminal Code*, RSC 1985, c C-46, ss 469(c.1), 607(6), 745(b.1).

On the other hand, courts may find that the *CAHWCA* conflicts with the customary prohibition against the crime of aggression. In particular, courts could deduce that because neither the *CAHWCA* nor the *Criminal Code* mention the crime of aggression, Parliament's implied intention was to prevent its inclusion into Canadian law.[131] As a result, this presents a second barrier for victims of the crime of aggression, which I argue in the recommendations section can be addressed if Parliament adds the crime of aggression to the *CAHWCA*.

4. Existence of a Civil Remedy for Violations of International Law

Unlike many civil law countries and the United States, individuals in Canada have no statutory right to a civil remedy for violations of international law.[132] Thus, unless Canada passes such legislation, these rights must be established at common law.

In *Nevsun Resources*, the Supreme Court held that Canada had common law capacity to develop civil remedies for violations of custom.[133] Citing Canada's obligations under the *ICCPR*, as well as previous commentary in *Kazemi Estate* on an individual's right to a remedy for human rights violations, Justice Abella held that it was not "plain and obvious" that Canadian courts could not develop a civil remedy for violations of customary rules incorporated into Canadian law.[134] Importantly, she also noted that the plaintiffs would not necessarily need to make out the elements of an existing tort at domestic law to succeed.[135] Rather, and while not definitively deciding the question in this case, it was held that

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131 This is supported by one of the accepted rules of statutory interpretation—the implied exclusion rule, which states that something is excluded by implication when it is not mentioned where one would expect it to be (see Ruth Sullivan, "Statutory Interpretation in a New Nutshell" (2003) 82:1 Can Bar Rev 51 at 60).

132 For a cross-section of countries with universal civil jurisdiction, see Amnesty International, *Canada: End Impunity through Universal Jurisdiction* (London: Amnesty International Publications, 2020) at 54, n 276 [Amnesty International, *End Impunity*], online: <amnesty.org> [perma.cc/2XX4-QB7P].

133 *Supra* note 74 at paras 116–18.

134 *Ibid* at paras 119–22.

135 *Ibid* at para 128.

remedies could flow directly from breaches of customary rules, since they "form part of the Canadian common law."[136]

Despite a strong dissent, which argued that customary prohibitions do not create civil liability rules,[137] the majority's holding is consistent with the right to a remedy for violations of IHRL[138] and the duty of states to make reparation for these violations.[139] As a result, the decision is an important step forward in the development of civil remedies in Canada.[140] I will therefore consider, in the recommendation section, how Canadian courts could expand on this decision by formally recognizing a right to a civil remedy for international law violations in future decisions.

5. Presence of a Legislative Bar: *The State Immunity Act*

The *SIA* grants foreign states broad immunity from the jurisdiction of Canadian courts under section 3(1). However, the *SIA* provides several exceptions to this immunity. The first exception occurs where states submit to the jurisdiction of the court, either by written agreement or by engaging in proceedings.[141] However, for states accused of crimes against humanity or aggression, the chance that they would voluntarily submit to the jurisdiction of Canadian courts is low. There are no examples of states doing so,[142] and given the tendency of government officials

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136 *Ibid* at paras 116–17, 129–32. Nevsun and the Eritrean claimants ultimately settled the case out of court under confidential terms. As a result, there is no court award for damages that resulted from the litigation.

137 *Ibid* at para 203.

138 Gillard, *supra* note 11 at 536; Riccardo Pisillo Mazzeschi, "Reparation Claims by Individuals for State Breaches of Humanitarian Law and Human Rights: An Overview" [2003] 2 J Intl Crim Justice 339 at 343, 347.

139 *Responsibility of States for Internationally Wrongful Acts*, UNGA, 56th Sess, UN Doc A/RES/56/83 (2001) Annex, art 31(1). See also Jean-Marie Henckaerts & Louise Doswald-Beck, *Customary International Humanitarian Law* (New York: Cambridge University Press, 2005) vol 1 at 537.

140 Beatrice Walton, "Nevsun Resources Ltd. v. Araya" (2021) 115:1 Am J Int Law 107.

141 *SIA*, *supra* note 88, s 4.

142 Predictably, states typically deny having waived immunity under the *SIA* (see e.g. *Canadian Planning and Design Consultants Inc v Libya*, 2015 ONCA 661 at para 37).

to publicly dispute or deny that these crimes occurred or were sanctioned by the state,[143] this finding is largely unsurprising.

A second exception is for cases involving death, bodily injury, or damage to property occurring in Canada.[144] These acts must have occurred within Canada and the injury must be physical.[145] The Supreme Court discussed this exception in *Kazemi Estate*, ruling that since the torture and death occurred in Iran, and because the plaintiff, the victim's son, did not suffer physical harm from her death, his claim did not fall within the *SIA*'s exceptions.[146] These findings will likely apply to individuals seeking remedies against states for crimes against humanity or aggression occurring outside of Canada. While foreign governments or agents may have caused them harm, their claims cannot proceed unless the harm occurred within Canada. Until this link is established, there is not "a sufficient connection with the forum state to justify bringing the foreign state's actions under Canadian scrutiny."[147]

The *SIA*'s exceptions to state immunity are exhaustive, and prevent further exceptions at common law.[148] *Kazemi Estate* exemplified this, when noting that Parliament's introduction of a further exception to immunity for states supporting terrorism was evidence of the *SIA*'s "exhaustive codification of Canadian law of state immunity in civil suits."[149] The Supreme Court has therefore confirmed that, even where civil remedies exist for violations of international law, these claims are still barred by the *SIA*.[150] As a result, I will set out in the recommendation section why Parliament should amend the *SIA* to remove this legislative bar for

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143 Suleiman Al-Khalidi, "Syria's Rebels Hail Ex-Officer's Conviction, Want Justice to Go Higher", *Reuters* (14 January 2022), online: <reuters.com> [perma.cc/6HD3-2FC8]; Joanna Plucinska, Anthony Deutsch & Stefaniia Bern, "Insight: Some Russian Commanders Encouraged Sexual Violence, Says Lawyer Advising Kyiv", *Reuters* (23 November 2022), online: <reuters.com> [perma.cc/SY9R-UXRZ].

144 *SIA*, *supra* note 88, ss 6(a)–(b).

145 *Kazemi* SCC, *supra* note 87 at paras 69–70, 77.

146 *Ibid* at paras 77–78.

147 *Ibid* at para 72.

148 *Ibid* at para 58. See also *Tracy v Iran (Information and Security)*, 2017 ONCA 549 at para 52 [*Tracy*].

149 *Kazemi* SCC, *supra* note 87 at para 44.

150 *Ibid* at para 61.

victims of certain international crimes, and will look to Parliament's previous amendment to the *SIA*, which removed immunity for states that support terrorism as support for this proposition.

6. Other Preventative Rules of Custom: Immunities from Jurisdiction

There are four immunities at international law that could potentially bar civil claims for damages: (i) state immunity, (ii) diplomatic immunity, (iii) immunity *ratione personae* (personal immunity), and (iv) immunity *ratione materiae* (functional immunity). The application of these immunities may also depend on whether the prohibited crime is a peremptory norm, which includes both the prohibition against crimes against humanity[151] and aggression.[152]

State immunity is immunity that shields the state itself from the jurisdiction of foreign courts[153] and is grounded in the principle of state sovereignty.[154] Unlike some states,[155] Canada is not a party to an international convention that outlines the obligations that states owe one another with respect to non-diplomatic immunities.[156] This absence, however, is not conclusive of Canada's duties under international law. Rather, one must still assess jurisdiction to award civil remedies under

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151 International Law Commission, *Report of the International Law Commission*, UNGA, 74th Sess, UN Doc A/74/10 (2019) at 146–47. See also at Norman Geras, *Crimes Against Humanity: Birth of a Concept* (Manchester, UK: Manchester University Press, 2011) at 95–97.

152 International Law Commission, *supra* note 151 at 146–47. See also Frédéric Mégret, "What is the Specific Evil of Aggression?" in Claus Kreß & Stefan Barriga, eds, *The Crime of Aggression: A Commentary* (Cambridge, UK: Cambridge University Press, 2017) 1398 at 1412–13.

153 *United Nations Convention on Jurisdictional Immunities of States and Their Property*, UNGA, 59th Sess, UN Doc A/RES/59/38 (2004) Annex, art 5.

154 "Report of the Working Group on Jurisdictional Immunities of States and their Property" (UN Doc A/CN.4/L.279/Rev.1) in *Yearbook of the International Law Commission 1978*, vol 2, part 2 (New York: UN, 1979) at para 11 (UN Doc A/CN.4/SER.A/1978/Add.1).

155 *European Convention on State Immunity*, 16 May 1972, 1495 UNTS 181 (entered into force 11 June 1976).

156 However, as noted *below*, Canada is party to international agreements with respect to the exercise of diplomatic immunities.

"other rules of customary international law ... namely the rule of state immunity."[157]

Prevailing state practice shows that state immunity generally applies in situations of serious breaches of international law. Specifically, domestic courts have historically granted state immunity in cases where claimants have alleged violations of *jus cogens* norms.[158] While some domestic courts have recently found an exception to state immunity where serious violations of international law have occurred,[159] these decisions have generally done so where the violation occurred *within* the forum state's territory.[160] Moreover, these decisions remain at odds with broader state practice that has continued to apply state immunity,[161] and have faced criticism for their legal reasoning.[162]

As a result, Canadian courts will likely find that state immunity shields state perpetrators of crimes against humanity and aggression, so long as the prohibited conduct occurred outside Canada. I address whether this is an insurmountable barrier for victims seeking redress for these crimes in the recommendations section, finding that it is not if Canada is willing to take a principled position that breaks with prevailing custom, as it has done with the terrorism exception it introduced for state immunity.

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157 *Kazemi* SCC, *supra* note 87 at para 101.

158 *Jurisdictional Immunities of the State (Germany v Italy)*, [2012] ICJ Rep 99 at paras 83–85, 96 [*Jurisdictional Immunities*]. See also "Report of the Working Group on Jurisdictional Immunities of States and Their Property" (UN Doc A/CN.4/L.576) in *Yearbook of the International Law Commission 1999*, vol 2, part 2 (New York: UN, 2003) at 172, paras 4–7 (UN Doc A/CN.4/SER.A/1999/Add.1).

159 Seoul Central District Court, 8 January 2021, *Judgment Case 2016 Ga-Hap 505092 Compensation for Damages (Others)*, Korean J Intl & Comp L 10:1 at 104, 107–8 (South Korea); Supremo Tribunal Federal [Federal Supreme Court], Brasília, 23 August 2021, *Recurso Extraordinário com Agravo 954.858 Rio de Janeiro*, ARE 954858/RJ at 30 (Brazil). See also Terzieva, *supra* note 12 at 783–88.

160 Terzieva, *supra* note 12 at 794.

161 Michele Potestà, "State Immunity and *Jus Cogens* Violations: The Alien Tort Statute Against the Backdrop of the Latest Developments in the 'Law of Nations'" (2010) 28:2 BJIL 571 at 584–85.

162 *Ibid* at 583–84. See also Terzieva, *supra* note 12 at 782.

Diplomatic immunities may arise under the *Vienna Convention on Diplomatic Relations* (*VCDR*) or customary international law.[163] In addition, Canada has occasionally codified the diplomatic immunities available to foreign service personnel when exercising their functions.[164] It is thus important to determine how diplomatic immunity applies to see whether it could bar civil claims for violations of international law.

Diplomatic immunity is intended to shield diplomatic and consular personnel from the jurisdiction of foreign courts.[165] Under the *VCDR*,[166] diplomatic agents enjoy immunity from a state's civil and administrative jurisdiction, subject to three exceptions: (i) claims relating to private immovable property; (ii) claims relating to succession; and (iii) certain claims relating to the agent's professional or commercial activities in the host state.[167] Diplomatic immunity generally applies from the moment a diplomatic agent enters the receiving state's territory to when they leave the territory.[168]

Given the details of its invocation, this immunity is unlikely to apply in circumstances where victims make civil claims for crimes against humanity and aggression. As the immunity only applies when diplomatic agents are present in Canadian territory, it would not bar civil claims brought before these individuals enter or after they depart from Canada.

Personal immunity protects incumbent high-ranking officials from the jurisdiction of a foreign state, such as heads of state, heads of

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163 *Tracy*, *supra* note 148 at para 103.

164 *African Union Privileges and Immunities Order*, SOR/2020-129, s 2. See also *Foreign Missions and International Organizations Act*, SC 1991, c 41, ss 3–6.

165 United States Department of State, *Diplomatic and Consular Immunity: Guidance for Law Enforcement and Judicial Authorities* (Washington, DC: United States Department of State, 2018) at 2, online (pdf): <state.gov> [perma.cc/7Q48-TX38].

166 *Vienna Convention on Diplomatic Relations*, 18 April 1961, 500 UNTS 95, arts 31, 37–39.

167 *Ibid*, art 31.

168 *Ibid*, art 39.

government, and ministers of foreign affairs.[169] To apply, the state concerned must invoke the immunity itself.[170]

Personal immunity currently prevents foreign courts from assuming jurisdiction over criminal and civil proceedings against these officials, even where the proceedings relate to the violation of peremptory norms.[171] The ICJ,[172] scholars,[173] and state courts[174] have all affirmed this rule. The rule is also particularly well accepted in the civil context, with numerous judicial decisions recognizing personal immunity for heads of state.[175] Thus, while it has been argued that "officials accused of violations of clearly defined, widely accepted international law norms should not be entitled to immunity,"[176] these comments do not reflect the present state of customary international law.

Unlike personal immunity, functional immunity is a limited protection that applies to certain state officials when they act in their official

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169 Alexandre Skander Galand, *UN Security Council Referrals to the International Criminal Court*, vol 5 (Leiden, Netherlands: Koninklijke Brill, 2019) at 154.

170 Zachary Douglas, "State Immunity for the Acts of State Officials" (2012) 82:1 Brit YB Intl L 281 at 287.

171 *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, [2002] ICJ Rep 3 at paras 51, 55, 58.

172 *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)*, [2008] ICJ Rep 177 at para 170.

173 Sevrine Knuchel, "State Immunity and the Promise of *Jus Cogens*" (2011) 9:2 Northwestern J Intl Human Rights 149 at 156. See also Curtis A Bradley & Jack L Goldsmith, "Foreign Sovereign Immunity, Individual Officials, and Human Rights Litigation" (2009) 13:1 Green Bag 9 at 21.

174 *Jones v Ministry of the Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia)*, [2006] UKHL 26 at paras 8–10, 48–49; *Habyarimana v Kagame*, 821 F Supp (2d) 1244 at 1262–1264 (WD Okla 2011); Obserste Gerichtshof [Supreme Court], 14 February 2001, *AW v J(H) AF v L*, No 7Ob316/00x (Austria).

175 "Immunity of State Officials from Foreign Criminal Jurisdiction" (UN Doc A/68/10) in *Yearbook of the International Law Commission 2013*, vol 2, part 2 (New York: UN, 2013) at 44, n 260 (UN Doc A/CN.4/SER.A/2013/Add.1).

176 Beth Stephens, "The Modern Common Law of Foreign Official Immunity" (2011) 79:6 Fordham L Rev 2669 at 2673.

role.[177] It attaches to individuals based on their office or status[178] and exists because state "officials are mere instruments of a State and their official actions can only be attributed to the State."[179]

The authorities show that functional immunity does not apply to state officials who are subject to criminal proceedings.[180] The same cannot be said, however, for civil proceedings. Specifically, there are many examples where domestic courts have applied functional immunity to claims that seek remedies for severe violations of international law.[181] In *Kazemi Estate*, for instance, the court noted that an exception to functional immunity for peremptory norm violations was not yet developed in the civil context.[182]

As a result, both personal and functional immunities are barriers for individuals who bring civil claims in Canada. In the absence of new and uniform state practice introducing an exception to these immunities in

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177 Rosanne van Alebeek, "Functional Immunity of State Officials from the Criminal Jurisdiction of Foreign National Courts" in Tom Ruys, Nicolas Angelet & Luca Ferro, eds, *The Cambridge Handbook of Immunities and International Law* (Cambridge, UK: Cambridge University Press, 2019) 496 at 496.

178 Dapo Akande & Sangeeta Shah, "Immunities of State Officials, International Crimes, and Foreign Domestic Courts" (2010) 21:4 Eur J Intl L 815 at 817.

179 *Prosecutor v Tihomir Blaškić*, IT-95-14-AR108 *bis*, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997 (29 October 1997) at para 38 (International Criminal Tribunal for the former Yugoslavia), online: <cld.irmct.org> [perma.cc/5HN6-E9B7]. See also *ibid* at para 41. For the Supreme Court of Canada's endorsement of the authority of the ICTY, see *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40 at para 126.

180 *R v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte*, [1998] 4 All ER 897 at 939–40, [1998] UKHL 41, aff'd in [1999] 2 All ER 97 at 190, [1999] UKHL 17; Guénaël Mettraux, John Dugard & Max du Plessis, "Heads of State Immunities, International Crimes and President Bashir's Visit to South Africa" (2018) 18:4 Int Crim L Rev 577 at 578; *Rome Statute*, *supra* note 15, art 27; *Prosecutor v Charles Ghankay Taylor*, SCSL-2003-01-I, Decision on Immunity from Jurisdiction (31 May 2004) at para 47 (Special Court for Sierra Leone), online: <rscsl.org> [perma.cc/78DV-FK8L].

181 See e.g. *Jones and Others v the United Kingdom*, No 34356/06, [2014] I ECHR 1 at para 188. See also Anthony Chang, Sadaf Kashfi & Shirin Kiamanesh, *Accountability in Foreign Courts for State Officials' Serious Illegal Acts: When Do Immunities Apply?* (Vancouver: Peter A Allard School of Law, 2016) at 20–22, online: <allard.ubc.ca> [perma.cc/XS6A-4MBP].

182 *Kazemi* SCC, *supra* note 87 at paras 102–103, 208.

cases of peremptory norm violations, Canadian courts are right to be cautious in lifting these immunities. I will therefore consider how courts can address these immunities, as well as the challenge presented by state immunity, in the recommendations section.

7. Other Arguments Defendants May Invoke: *Forum Non Conveniens* and the Act of State Doctrine

Lastly, even if the legislature amends the *SIA* to allow claims for violations of peremptory norms, state defendants could still raise other arguments to preclude civil liability. However, because the Supreme Court considered and rejected such arguments in *Nevsun Resources*, they are unlikely to pose additional barriers here.

In *Nevsun Resources*, the alleged harms occurred at a mine in Eritrea, Eritrean nationals were the supposed victims of the crimes, and an Eritrean corporation owned and operated the mine where the wrongdoing took place.[183] As a result, Nevsun argued that Eritrea, not Canada, was the more appropriate forum for adjudication.

The chambers judge disagreed. While an Eritrean corporation directly owned the mine, Nevsun exercised effective control over the corporation through its majority board representation.[184] In addition, there was a "real risk ... of an unfair trial occurring in Eritrea."[185] Upheld on appeal,[186] Nevsun did not challenge the finding before the Supreme Court.[187]

Courts are likely to decide similarly where state defendants raise these arguments. In *Club Resorts Ltd. v. Van Breda* (*Van Breda*), the Supreme Court stated that where a defendant raises an issue of *forum non conveniens*, the burden is on the defendant to show why the court should decline to exercise its jurisdiction and displace the plaintiff's chosen forum.[188] To do so, the defendant must (i) identify an alternative forum

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183 *Supra* note 74 at paras 7–9, 16.

184 *Araya v Nevsun Resources Ltd*, 2016 BCSC 1856 at paras 51–52.

185 *Ibid* at para 296.

186 *Araya v Nevsun Resources Ltd*, 2017 BCCA 401 at para 119.

187 *Nevsun Resources*, *supra* note 74 at para 26.

188 *Club Resorts Ltd v Van Breda*, 2012 SCC 17 at para 103.

and establish a real and substantial connection between that forum and the subject matter of the litigation and (ii) demonstrate why the proposed alternative is clearly more appropriate and should be used.[189]

State defendants could likely satisfy this first element. As *Van Breda* noted, factors a court may consider in deciding whether to apply *forum non conveniens* include the domicile of the parties and the location of witnesses and evidence.[190] In cases regarding violations of international law, state defendants would have a *prima facie* connection if they are the state to which the domestic courts belong and the state in which the crimes occurred—or for crimes of aggression, the state in which the crime was planned and initiated. Claimants would also have a real and substantial connection to that forum's legal system, through citizenship or as individuals who were present within the state's territory when the crime took place, and it is likely that witnesses and evidence would be more available and accessible to the courts of the defendant state.

However, it would be difficult for state defendants to satisfy the second element of the test. As in *Nevsun Resources*, Canadian courts would probably reject the proposition that state defendants could fairly judge these claims, as they have already done in other instances where claimants have suffered injuries overseas.[191] This is supported by evidence showing questionable judicial independence in states that have been accused of crimes against humanity or aggression in the past.[192] Without evidence establishing the opposite, Canadian courts would likely find that their own forum is more appropriate for adjudication.

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189 *Ibid* at paras 103, 109.

190 *Ibid* at paras 107, 110.

191 For instance, the British Columbia Court of Appeal overturned a stay based on *forum non conveniens* partly on the basis that there was a serious risk of an unfair trial process in Guatemala (see *Garcia v Tahoe Resources Inc*, 2017 BCCA 39). In particular, the court determined that there was a "real risk that the appellants will not obtain justice in Guatemala given the context of the dispute and the evidence of endemic corruption in the Guatemala judiciary" (see *ibid* at para 127).

192 Nils Muižnieks, Thomas Hammarberg & Álvaro Gil-Robles, "As Long as the Judicial System of the Russian Federation Does Not Become More Independent, Doubts About Its Effectiveness Remain" (25 February 2016), online: <coe.int> [perma.cc/Q62V-93WL]; Yousef Wehbe, Obai Kurdali & Zahra Al-Barazi, *The Syrian Judiciary's Independence: Broader Constitutional Lenses* (Beirut: Konrad-Adenauer-Stiftung, 2021) at 12, online (pdf): <kas.de> [perma.cc/88UK-4NG7].

In *Nevsun Resources*, the defendant also moved to strike the pleadings on the basis of the act of state doctrine. This doctrine bars domestic courts from scrutinizing the sovereign acts of a foreign state.[193] *Nevsun Resources* confirmed, however, that the doctrine is not part of Canadian common law and that Canadian courts apply private international law principles, such as conflict of laws and judicial restraint, when considering the enforcement of foreign laws.[194] Given this conclusion, neither the doctrine nor its underlying principles precluded the Eritrean workers' claims. The Supreme Court's clear rejection of this defence should therefore prevent state defendants from raising this argument in future cases.

8. Sources of Compensation

Lastly, this paper does not seek to comprehensively explore how, or from whom, claimants would recover their damages awards should the above challenges be addressed. However, for the sake of completeness, it is sufficient to note that guidance on this question can be drawn from Canada's experience in remedying harm to victims of terrorism, where recent Canadian jurisprudence under the *Justice for Victims of Terrorism Act* (*JVTA*) offers a potential blueprint that could be applied to other international crimes.

In three decisions by Ontario's court of appeal and superior courts—*Tracy v. Iran*,[195] *Zarei v. Iran* (*Zarei*),[196] and *Akins v. Iran*[197]—plaintiffs were awarded substantial damages for harms caused by acts of terrorism.[198] These decisions relied on the *JVTA*'s exception to state immunity under section 6.1 of the *SIA*, which permits civil suits against foreign states that are listed as supporters of terrorism.[199] Once liability was

193 *Nevsun Resources*, *supra* note 74 at para 5.

194 *Ibid* at paras 57, 59.

195 *Tracy*, *supra* note 148 at paras 1–6, 8.

196 *Zarei v Iran*, 2021 ONSC 3377 at paras 53–56 [*Zarei No 1*]; *Zarei v Iran*, 2021 ONSC 8569 at para 74 [*Zarei No 2*].

197 *Akins v The Islamic Republic of Iran*, 2024 ONSC 337 at paras 4, 38 [*Akins*].

198 See also *Estate of Marla Bennett v Islamic Republic of Iran*, 2013 ONSC 5662 at para 11; *Estate of Marla Bennett v Islamic Republic of Iran*, 2013 ONSC 6832 at para 50 [*Bennett Estate*].

199 *Tracy*, *supra* note 148 at para 46; *Zarei No 1*, *supra* note 196 at paras 23–24; *Akins*, *supra* note 197 at paras 23–25. See also *Bennett Estate*, *supra* note 198 at para 38.

established, the courts ordered damages directly against the foreign state, and the plaintiffs were permitted to enforce these judgments against non-diplomatic assets that were located in Canada.[200] Moreover, and despite being a live consideration for the court in *Zarei*, the challenge of enforcement was not considered a sufficient factor to negate an award of damages.[201]

As a result, where the below changes to Canadian law are made, counsel representing victims of crimes against humanity and the crime of aggression may rely on *JVTA* case law as a persuasive model for securing compensation. While potential challenges in enforcement would likely remain an issue, including the defendant state's willingness to honour such judgments, Canadian courts have not yet viewed these difficulties as grounds to deny awards. Moreover, and as noted above,[202] the issuance of such judgments can itself serve as a powerful form of legal recognition and vindication for victims, even where enforcement proves complex or difficult.

III. PROPOSED CHANGES TO CANADIAN LAW

This paper identified five challenges for claimants seeking to pursue their civil claims: (1) obtaining standing to pursue claims stemming from the crime of aggression; (2) conflicting legislation that prevents the crime of aggression from being adopted into Canadian law; (3) whether a right to a remedy exists for these crimes; (4) the *SIA*'s legislative bar; and (5) the application of customary immunities under Canadian common law. This section addresses each of these challenges in turn.

A. Attaining Individual Standing for the Crime of Aggression

Due to the traditional view that states are the victims of the crime of aggression, individuals will find it difficult to achieve standing before Canadian courts. However, this barrier may not always exist, as recent

200 *Tracy*, *supra* note 148 at para 128; *Edward Tracy v The Iranian Ministry of Information and Security*, 2014 ONSC 1696 at paras 17, 26; *Zarei No 2*, *supra* note 196 at paras 61, 74; *Akins*, *supra* note 197 at para 38.

201 *Zarei No 2*, *supra* note 196 at paras 60–61.

202 See Terzieva, *supra* note 12; Ranganathan, *supra* note 13.

scholarship demonstrates that the way the crime of aggression is perceived is changing.

For example, scholars have noted the increasing emphasis in international law on the role of victims.[203] This is evident in several developments, such as the 1985 *UN Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power*,[204] the significant participatory rights of victims before the ICC,[205] and the growing number of norms related to victims, both regional and international, which have arisen.[206] Some scholars have thus begun to recharacterize the crime of aggression as not a wrong primarily against sovereignty, but as one against the individuals harmed by it.[207] While examples of compensation awards still typically involve states[208] or civil associations[209] as the claimants of the funds, victims of aggression could acquire standing to seek individual reparations before human rights bodies in the future.[210] Support for such a development can also be found in the broader shift away from a strictly state-centric model of international law and towards a focus on human

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203 Erin Pobjie, "Victims of the Crime of Aggression" in Claus Kreß & Stefan Barriga, eds, *The Crime of Aggression: A Commentary* (Cambridge, UK: Cambridge University Press, 2017) 816 at 818.

204 *Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power*, UNGA, 40th Sess, UN Doc A/RES/40/34 (1985) GA Res 40/34. See also Mina Rauschenbach & Damien Scalia, "Victims and International Criminal Justice: A Vexed Question?" (2008) 90:870 Intl Rev Red Cross 441 at 443.

205 *Rome Statute*, *supra* note 15, arts 68, 75. See also Alessandra Cuppini, "A Restorative Response to Victims in Proceedings Before the International Criminal Court: Reality or Chimaera?" (2021) 21:2 Intl Crim L Rev 313 at 314, 318–19.

206 Carlos Fernández de Casadevante Romani, "International Law of Victims" (2010) 14 Max Planck YB United Nations L 219 at 221–23, 228.

207 Tom Dannenbaum, "The Criminalization of Aggression and Soldiers' Rights" (2018) 29:3 Eur J Intl L 859 at 860, 862–63.

208 *Provisional Rules for Claims Procedure*, UNCC, 6th Sess, UN Doc S/AC.26/1992/10 (1992) Annex, art 5(1); Vera Shikhelman, "Implementing Decisions of International Human Rights Institutions–Evidence from the United Nations Human Rights Committee" (2019) 30:3 Eur J Intl L 753 at 760.

209 Zegveld, *supra* note 37 at 96–97, 99.

210 Lieblich, *supra* note 64.

rights following World War II[211]; specifically, the international human rights law principle that states should ensure legal standing to any wronged party, including any person who has a legitimate interest in the proceeding.[212]

As a result, the recasting of the crime of aggression remains an academic exercise that has not yet entered the domain of international or domestic courts. A blanket recommendation that Canadian courts grant standing to claimants for the crime of aggression is thus untenable at present. However, should a claim be brought in a Canadian court seeking damages for this crime, the presiding judge should not dismiss it outright on the basis of a lack of standing. Rather, the court should survey the existing state practice and academic literature at the time of the claim to determine whether a right to standing has emerged. Even where the court finds that one does not exist, the court should recognize the possibility that standing could arise in the future, and that such a development would be in accordance with the principles of both international criminal and human rights law.

B. Removing Conflicting Legislation for the Crime of Aggression

Given that the *CAHWCA* codifies the international crimes that Canada has adopted, courts are likely to hold that Parliament's failure to include the crime of aggression is evidence that it intended not to adopt it into Canadian law. To avoid such a judicial finding, I therefore recommend that Parliament add the crime of aggression to the *CAHWCA*.

The necessary amendments to the *CAHWCA* would not be arduous. Rather, they would include four discrete additions that would include and define the crime of aggression, alongside crimes against humanity, genocide, and war crimes. First, Parliament should amend the full title of the *CAHWCA* to state that the *Act* is "respecting genocide, crimes against humanity, war crimes, and the crime of aggression." Second, under sections 4(1) and 6(1), Parliament should amend the *CAHWCA* to list the crime of aggression after each of the three other

211 Martti Koskenniemi, "History of International Law, Since World War II" (last modified June 2011) at paras 14–15, 25, 44, online: <opil.ouplaw.com> [perma.cc/9HSW-WMCT].

212 International Commission of Jurists, *supra* note 53 at 321.

Rome Statute crimes.[213] Third, respecting the definitions listed under sections 4(3) and 6(3), the *CAHWCA* should now include a definition for the crime of aggression. As was done with the definitions of crimes against humanity, genocide, and war crimes, this definition could be lifted from the wording of the *Rome Statute*. For example, mirroring the language used in both Article 8 *bis* (1) of the *Rome Statute* and section 4(3) of the *CAHWCA*, a definition for the crime of aggression could be the following:

> Crimes of aggression mean the planning, preparation, initiation or execution, by a person who effectively exercises control over or directs the political or military action of a State, of an act of aggression which constitutes a manifest violation of the *Charter of the United Nations*. An act of aggression is defined according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and place of its commission.[214]

Finally, as was done with respect to genocide, crimes against humanity, and war crimes, additional articles of the *Rome Statute* can be included at the end of the legislation. For the crime of aggression, the *CAHWCA* could include Article 8 *bis* (2)[215] to further clarify the types of acts that constitute an act of aggression for the purpose of the crime.

There is no principled reason why Parliament should refrain from making these amendments. As noted, the Kampala amendments did not yet exist when the *CAHWCA* first received Royal Assent on June 29, 2000.[216] The *Rome Statute* had thus not defined the crime of aggression, and the ICC could not exercise jurisdiction over it when Parliament originally considered the wording of the *CAHWCA*. As one Parliamentarian noted during the third reading of Bill C-19, the bill that proposed the *CAHWCA*, the absence of key definitions for terms that were included

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213 *CAHWCA*, *supra* note 24, ss 4(1), 6(1).

214 *Ibid*, s 4(3); *Aggression Amendments*, *supra* note 15, art 8 *bis*(1).

215 *Aggression Amendments*, *supra* note 15, art 8 *bis*(2).

216 Canada, Library of Parliament, *Bill C-19: Crimes Against Humanity Act*, by David Goetz, Catalogue Number YM32-3/360-2000-04-IN (Ottawa: Library of Parliament, 5 April 2000), online: <publications.gc.ca> [perma.cc/4CD5-DL5N].

in the court's rules of procedure and evidence, including the definition of aggression, made it difficult to debate the legislation and ensure that Canada could fulfil its obligations to the ICC.[217]

As a result, in light of the Kampala amendments and the court's present jurisdiction over the crime of aggression, it is timely for Canada to amend the *CAHWCA* to include the crime of aggression alongside the other three *Rome Statute* crimes. This would bring Canada in line with other states who have implemented the crime of aggression into their national legislation since the passing of the Kampala amendments.[218] Canadian courts could then point to no conflicting legislation that would bar the incorporation of this crime into Canadian law.

C. Declaring the Existence of a Civil Remedy

As a result of *Nevsun Resources*, it remains open to courts to recognize the existence of civil remedies for violations of custom. I therefore recommend that courts make this declaration with respect to crimes against humanity. However, due to the slower development of the law with respect to the crime of aggression, I recommend that courts adopt a more incremental approach for this crime, that remains congruous with current state practice.

Canadian courts should declare a civil right to a remedy for crimes against humanity for several reasons. First, as *Nevsun Resources* recognized, the development of the common law can occur to "keep the law aligned with the evolution of society."[219] As discussed, the characterization of crimes against humanity has seen remarkable development since

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217 "Bill C-19, An Act respecting genocide, crimes against humanity and war crimes and to implement the Rome Statute of the International Criminal Court, and to make consequential amendments to other Acts", 3rd reading, *House of Commons Debates*, 36-2, No 113 (13 June 2000) at 1125 (Gurmant Grewal), online: <outcommons.ca> [perma.cc/9Q2J-DY6T].

218 For examples of the crime's domestic implementation, see *Kazenski zakonik – KZ-1* [Criminal Code], UL, 31 October 2008, 50/12, art 103 (Slovenia); *Zazneki zakon* [Criminal Code] NN, 2 April 2024, 36/2024, art 89 (Croatia). See also Eurojust, *The Crime of Aggression in the National Laws of EU Member States, Genocide Network Observer States and Ukraine* (Luxembourg: Publications Office of the European Union, 2023) at 14.

219 *Supra* note 74 at para 118 [reference omitted].

World War II. The prohibition of these crimes is now universally regarded as not only a rule of customary international law, but as a *jus cogens* norm. Its integration into the statutes of the ICC, ICTR, and ICTY,[220] and domestic legislation of many states, including that of Canada, highlights the broad-based consensus surrounding the magnitude of these crimes. It would be inconsistent with this recognition for Canada to reject the idea that victims of these crimes can seek civil damages when they are harmed by them.

Second, the *ICCPR* requires Canada to ensure an effective remedy for breaches of the Covenant's rights.[221] These include rights that are violated by crimes against humanity, including the inherent right to life, the freedom from cruel, inhuman or degrading treatment or punishment, and the right to liberty and security of the person.[222] Given the Supreme Court's comments in *Nevsun Resources* that civil remedies can theoretically follow breaches of custom, and acknowledging the customary rule prohibiting crimes against humanity, the next logical step would be to recognize civil remedies for these crimes.

Third, a civil right to a remedy for crimes against humanity exists in many other states, including Belgium, Denmark, Finland, Germany, Italy, and the Netherlands.[223] Depending on the state, these civil claims can be brought as part of criminal proceedings in the forum state's courts, or as separate civil proceedings.[224] As a result, a declaration in Canadian courts that there is a right to a remedy for crimes against humanity in Canada, if the legislative recommendations this article suggests are accepted, would not serve as a novel example of international state practice.

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220 *ICTR Statute*, *supra* note 21, art 3; *ICTY Statute*, *supra* note 20, art 5.

221 *ICCPR*, *supra* note 104, art 2(3).

222 *Ibid*, arts 6–7, 9.

223 See Open Society Justice Initiative & TRIAL International, "Briefing Paper: Universal Jurisdiction Law and Practice in Belgium" (May 2022) at 27, online (pdf): <trialinternational.org> [perma.cc/Z6GQ-RWPB]. See also Amnesty International, *supra* note 106 at 5.

224 See Amnesty International, *supra* note 106 at 5–9; Donovan & Roberts, *supra* note 106 at 145. For a review of states where civil compensation schemes are in place for victims of international crimes, see REDRESS & International Federation for Human Rights, "Legal Remedies for Victims of 'International Crimes': Fostering an EU Approach to Extraterritorial Jurisdiction" (March 2004), online (pdf): <redress.org> [perma.cc/A7NK-38BR].

Fourth, legal decisions of other states have not only declared a civil right to a remedy for violations of international law but have made awards for reparations against foreign states. These decisions may serve as a guide for how Canadian courts might consider claims for breaches of international law, should this paper's proposed legislative amendments be accepted.

One such decision is *Ferrini v. Federal Republic of Germany* (*Ferrini*), a 2004 decision by Italy's highest court, the Supreme Court of Cassation.[225] While the crimes at issue in that case were war crimes, not crimes of humanity, its analysis is relevant to all serious violations of international law. The facts are as follows: Luigi Ferrini, an Italian national, brought a civil claim for compensation against the state of Germany for damages he sustained during World War II. Both the district court and court of appeal declined to exercise jurisdiction over the case on the basis that Germany was entitled to state immunity. Upon appeal to the Court of Cassation, however, the court overturned the prior decisions and held that state immunity could not be preserved in cases of *jus cogens* violations.

In its decision, the court's analysis was two-pronged. First, it determined that the crimes at issue—deportation and forced labour—were crimes of war prohibited by a binding norm of international law.[226] Second, the court then held that in instances where the crimes are violations of *jus cogens*, they prevail over customary or conventional norms, including the rule on sovereign immunity.[227]

Upon release of the decision, several scholars commended the court for its determination that state immunity could not be applied in the face of severe violations of international law.[228] For instance, scholars Pasquale De Sena and Francesca De Vittor noted the innovative nature of the judgment and its potential to serve as a starting point for future

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225 Corte Suprema di Cassazione [Supreme Court of Cassation], Rome, 11 March 2004, *Ferrini v Federal Republic of Germany*, No 5044 (Italy).

226 *Ibid* at para 7.4.

227 *Ibid* at paras 9.2, 10.

228 See e.g. Massimo Iovane, "The *Ferrini* Judgment of the Italian Supreme Court: Opening Up Domestic Courts to Claims of Reparation for Victims of Serious Violations of Fundamental Human Rights" (2004) 14 Italian YB Intl L 165 at 180; Andrea Bianchi, "Ferrini v Federal Republic of Germany" (2005) 99:1 Am J Intl L 242 at 245–46.

judicial decision-making on the topic of immunities and breaches of international law.[229] On the other hand, the decision was criticized by scholars who argued that the court misunderstood the customary rule on state immunity. Andrea Gattini argued, for instance, that because state immunity was simply a rule that affects the jurisdiction of domestic courts, "[T]he assertion of the automatic prevalence of *jus cogens* over state immunity is a non sequitur, because the two sets of rules concern two different perspectives."[230]

Regardless of the intervening academic debate, the decision was not the final point in this saga before the courts. Rather, as a result of this decision, and others by the Court of Cassation that failed to grant state immunity to Germany, Germany ultimately applied to the ICJ for a declaration that Italy had failed to respect the country's state immunity in allowing these civil claims to proceed against it. In the ICJ's judgment, delivered on 3 February 2012, the court agreed with Germany's position, finding that Italy was in breach of its international obligations when it denied immunity to Germany. As the court concluded, "under customary international law as it presently stands, a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law or the international law of armed conflict."[231]

As a result, the *Ferrini* saga provides two lessons for Canada. First, as the decision by the Court of Cassation has shown, it is entirely possible for courts to issue decisions that do allow civil claims for breaches of international law, and for these decisions to be consistent with the domestic law of that state. If Canada amends its domestic laws to remove legislative barriers to such claims, Canadian courts would thus be free to declare that a civil right to a remedy exists for crimes against humanity in Canadian law. Second, however—and especially if Canadian courts begin to award such claims for compensation against foreign states—Canada risks inviting international legal challenges to the practice of its domestic courts. As a result, while Canadian courts should consider the state of

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229 Pasquale De Sena & Francesca De Vittor, "State Immunity and Human Rights: The Italian Supreme Court Decision on the Ferrini Case" (2005) 16:1 Eur J Intl L 89 at 110–12.

230 Andrea Gattini, "War Crimes and State Immunity in the *Ferrini* Decision" (2005) 3:1 J Intl Crim Justice 224 at 236–37.

231 *Jurisdictional Immunities*, *supra* note 158 at paras 91, 107.

customary law when making these decisions, particularly on state immunity, this concern should not ultimately limit their decision to make these awards for civil damages.

However, with respect to the crime of aggression, there are reasons for Canadian courts to be more cautious in declaring a right to a civil remedy. The most prominent reason is that, to date, there are no judicial decisions that have declared an individual's right to seek civil damages for the crime of aggression.[232] As a result, should Canadian courts do so, Canada would be the first state to make such a declaration with respect to the crime. While this may be appropriate in certain circumstances, such as when it is designed to provide recourse to victims and is consistent with other principles of international law, as discussed below, Canadian courts may struggle to identify a sufficient legal basis for taking this step. This is particularly true when it is recalled that states, not individuals, are traditionally considered the entity whose legal rights are violated by the crime of aggression.

It is therefore more reasonable for Canadian courts to declare, as in *Nevsun Resources*, that it is not "plain and obvious" that a right to a remedy does not exist. This would allow the common law to continue its progressive development towards recognizing such a right without disregarding the present state of custom. It would also be consistent with recent developments that have occurred regarding the increasing focus on individuals as victims of the crime of aggression.

D. Addressing the SIA*'s Legislative Bar*

To address the *SIA*'s legislative bar, I will review several previous attempts to amend the *SIA* and how these efforts could inform a future exception to its immunity provisions for crimes against humanity and the crime of aggression.

In 2004, the Court of Appeal for Ontario released its ruling in *Bouzari v. Islamic Republic of Iran* (*Bouzari*). In that case, the court considered whether the plaintiff's claims for compensation for torture could proceed in light of the *SIA*. The court ultimately found that the *SIA* barred the claims because they were brought against a foreign state and

232 Darcy, *supra* note 65 at 113.

because no exception for torture existed under the legislation.[233] The decision was poorly received,[234] with the UN Committee Against Torture calling on Canada to "review its position under article 14 of the Convention [against Torture] to ensure the provision of compensation through its civil jurisdiction to all victims of torture."[235]

As a result of *Bouzari*, as well as the subsequent decision in *Kazemi Estate*, elected representatives made efforts to amend the *SIA*. The most prominent example is Bill C-632. Sponsored as a private member's bill by Irwin Cotler, a member of parliament and former attorney general of Canada, Bill C-632 was intended to remove state immunity for foreign states and their officials, and allow civil suits in cases of genocide, crimes against humanity, war crimes, and torture. Mr. Cotler's comments in Parliament made it clear that the bill was inspired, at least in part, by the Supreme Court's decision in *Kazemi Estate*, and in particular its pronouncement that any change in the country's law on state immunity would fall to Parliament to make.[236]

Despite its noble intentions, the bill ultimately languished and never came to a vote. However, this was not the result of concerns raised on the merits of the bill. In fact, the bill had enjoyed support across multiple parties when previously introduced into Parliament.[237] Rather, one can more accurately explain the bill's failure by the fact that it was brought by a private member, not by the governing majority of the time, and was unable to garner the requisite support to move beyond first reading.[238]

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233 *Bouzari v Iran*, 2004 CanLII 871 at paras 1, 90, 104 (ONCA) [*Bouzari*].

234 Karinne Coombes, "The Quest for Justice for Victims of Terrorism: International Law and the Immunity of States in Canada and the United States" (2018) 69 UNBLJ 251 at 270.

235 *Conclusions and Recommendations of the Committee Against Torture: Canada*, CAT, 34th Sess, UN Doc CAT/C/CR/34/CAN (2005) at para 5(f).

236 "Bill C-632, An Act to amend the State Immunity Act (genocide, crimes against humanity, war crimes or torture)", first reading, *House of Commons Debates*, 41-2, No 128 (20 October 2014) at 1510 (Hon Irwin Cotler), online: <ourcommons.ca> [perma.cc/6ZRF-YSLF].

237 Christopher Cornell, "*Kazemi Estate v. Islamic Republic of Iran* and the Doctrine of State Immunity under Canadian Law" (2015) 21:4 Law & Bus Rev Americas 411 at 421.

238 For example, there is another private member's bill to create an exception to the *SIA* for states that have supported torture or extrajudicial killing (see C-350, *An Act to*

In contrast to this attempted amendment, Parliament did in fact amend the *SIA* to remove jurisdictional immunity for states that support terrorism. The amendment came as part of Bill C-10, the *Safe Streets and Communities Act*, and removed immunity for foreign states who supported terrorism on or after January 1, 1985.[239] Notably, this bill was brought by a member acting on behalf of the executive branch[240] and was able to move through first, second, and third reading all within the span of three months. Since coming into force, courts have interpreted the amendment in the context of claims for damages resulting from state-sponsored terrorism.[241]

Parliament has therefore demonstrated its willingness to amend the *SIA* to address "emergent international challenges"[242] in the past. While similar efforts have been made to remove immunity in the case of other international law violations, they have not yet achieved the necessary political will to become law. This discrepancy could be explained by the fear that some elected officials may have that, by more broadly amending the *SIA* to remove immunity for state actors, Canada will weaken its foreign relations by according less respect to state sovereignty and the principle that state officials should not be subject to another nation's jurisdiction.

These concerns can be addressed by asking the following questions: First, in the context of tense geopolitical crises, where states are

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amend the State Immunity Act, the Criminal Code and the Immigration and Refugee Protection Act, 1st Sess, 44th Parl, 2023 (first reading 21 June 2023)). The bill has also only undergone its first reading and has not yet won the draw to be debated in Parliament.

239 Bill C-10, *An Act to enact the Justice for Victims of Terrorism Act and to amend the State Immunity Act, the Criminal Code, the Controlled Drugs and Substances Act, the Corrections and Conditional Release Act, the Youth Criminal Justice Act, the Immigration and Refugee Protection Act and other Acts*, 1st Sess, 41st Parl, 2011, cl 5 (assented to 13 March 2012), RSC 1985, c S-18, s 6.1(1).

240 "Bill C-10, An Act to enact the Justice for Victims of Terrorism Act and to amend the State Immunity Act, the Criminal Code, the Controlled Drugs and Substances Act, the Corrections and Conditional Release Act, the Youth Criminal Justice Act, the Immigration and Refugee Protection Act and other Acts", 1st reading, *House of Commons Debates*, 41-1, No 016 (20 September 2011) at 1005 (Hon Peter Van Loan), online: <ourcommons.ca> [perma.cc/ESU3-NAHG].

241 *Arsalani v Islamic Republic of Iran*, 2020 ONSC 6843 at paras 40, 89–106; *Zarei No 1*, *supra* note 196 at paras 5, 19–31, 53.

242 *Kazemi* SCC, *supra* note 87 at para 44.

responsible for serious violations of international law, do the *SIA*'s provisions actually uphold a harmonious relationship between Canada and those who commit international crimes? Second, even if they do, is such a harmonious relationship desirable or just? The answers to these questions are clear. Canada has imposed economic sanctions, provided military support, and issued harsh diplomatic rebukes against governments responsible for some of the world's greatest modern-day atrocities. Its own *CAHWCA* already permits the criminal prosecution of the same crimes "for which a victim is unable to seek civil redress."[243] The idea, then, that the *SIA* is responsible for maintaining a positive relationship between Canada and certain governments is not only easily rejected, but is something that should be denounced.

I therefore recommend that a further bill be brought before Parliament to introduce exceptions to the *SIA*'s state immunity provisions to allow civil suits against states that have committed serious violations of international law. This amendment could mirror the terrorism amendment and declare that foreign states are not immune from the jurisdiction of Canadian courts in proceedings against them for violations of peremptory norms.[244] It is worth noting, however, that this amendment is more probable for crimes against humanity than for the crime of aggression. The bill Mr. Cotler sponsored, for instance, included all *Rome Statute* crimes except for the crime of aggression. This is likely because of the issues of standing previously canvassed, and the concern that an amendment to the *SIA* for crimes of aggression would grant individual standing to claimants that is inconsistent with international law. It is likely also a function of Canada's ongoing resistance to the ICC's jurisdiction over and prosecution of this crime.[245] Consequently, Parliament should consider whether the principle of standing in international law has emerged

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243 Noah Benjamin Novogrodsky, "Immunity for Torture: Lessons from Bouzari v. Iran" (2007) 18:5 Eur J Intl L 939 at 949.

244 It may be argued that Canada benefits from the absence of such an amendment because, under the doctrine of comity, by removing immunity for serious violations of international law, Canada may become subject to the legal orders of other states for such violations. This is not, however, a convincing argument for not amending the *SIA*, as Canada should not be committing serious violations of international law and, if it does, should accept the consequences of those actions as a member of the international legal order.

245 Trahan, *supra* note 122.

for victims of aggression and, if so, whether the *SIA* should include an exception to state immunity for the crime of aggression. If not, and if Parliament is concerned about shifting away from the customary law, it could amend the *SIA* when such a principle has emerged.

E. Clarifying Customary Immunities and Amnesty in Canada

The last barrier to civil suits is the existence of certain customary immunities in international law. In future cases where the Supreme Court is asked to deliberate on the application of immunities to perpetrators of international crimes, it should canvas existing state practice to determine whether exceptions to state, personal, and functional immunity for violations of peremptory norms have emerged as custom. If the court finds that they have, it can then hold that these immunities do not apply to bar civil claims brought in Canadian courts. Coupled with this article's proposed amendments to the *SIA* and *CAHWCA*, this would allow claimants to seek damages for crimes against humanity and potentially the crime of aggression should its issue of standing be resolved.

However, even if the Supreme Court is unprepared to make these findings, it may be possible for the court to still pronounce—where the legislative amendments this paper recommends are made—that the law of Canada does not apply these immunities. While this would require the court's comfort with setting Canadian practice outside the bounds of custom, there may be a legal basis to do so. To demonstrate this, I look to Canada's previous positions regarding issues of foreign immunity, and acknowledge that for custom to evolve, it is inevitable that changes in state practice will require individual states to first be in breach of customary rules.

Canada's previous introduction of an exception to state immunity for acts of terrorism, and why this exception is able to exist under international law, serves as a useful example. To date, only the United States and Canada have adopted exceptions to state immunity for terrorism. The aim of Canada's immunity legislation, as noted, is centred around preserving state sovereignty and the comity of nations, and to encourage a cooperative relationship between Canada and the global community. With respect to the terrorism amendment to the *SIA*, on the other hand, debate in both the House of Commons and Senate revealed that its objective was to deter terrorism and to provide access to justice for victims

of terror.[246] It is clear from these debates that elected officials understood the serious implications of lifting state immunity to accomplish that goal.[247]

Some legal decisions have accepted the statutory force of a terrorism exception to immunity.[248] It is too soon, however, to declare that this trend has crystallized into a rule of international law. For instance, the ICJ acknowledged in its consideration of the *Ferrini* decision only a decade ago, that there was, overall, "almost no State practice" to support the removal of immunity from a state in international law.[249] As a result, Canada is a "custom breaker" with respect to its position on a state immunity

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246 "Bill C-10, An Act to enact the Justice for Victims of Terrorism Act and to amend the State Immunity Act, the Criminal Code, the Controlled Drugs and Substances Act, the Corrections and Conditional Release Act, the Youth Criminal Justice Act, the Immigration and Refugee Protection Act and other Acts", 2nd reading, *House of Commons Debates*, 41-1, No 021 (27 September 2011) at 1125–400, 1505–900, online: <ourcommons.ca> [perma.cc/EX3W-RKBK]; "Bill C-10, An Act to enact the Justice for Victims of Terrorism Act and to amend the State Immunity Act, the Criminal Code, the Controlled Drugs and Substances Act, the Corrections and Conditional Release Act, the Youth Criminal Justice Act, the Immigration and Refugee Protection Act and other Acts", 2nd reading, *Debates of the Senate*, 41-1, No 39 (8 December 2011) at 1450–550, online: <sencanada.ca> [perma.cc/RME4-7RQR].

247 "Bill C-10, An Act to enact the Justice for Victims of Terrorism Act and to amend the State Immunity Act, the Criminal Code, the Controlled Drugs and Substances Act, the Corrections and Conditional Release Act, the Youth Criminal Justice Act, the Immigration and Refugee Protection Act and other Acts", Report stage, *House of Commons Debates*, 41-1, No 056 (29 November 2011) at 1050–400, 1510–730, online: <ourcommons.ca> [perma.cc/JJN4-ZCPA].

248 Corte Suprema di Cassazione [Supreme Court of Cassation], 20 October 2015, *Flatow v Islamic Republic of Iran*, No 21946 at paras 4.1–5, 6.6 (Italy); *Tracy*, *supra* note 148 at para 53. See also European Union, European Parliamentary Research Service, *Justice Against Sponsors of Terrorism: JASTA and Its International Impact*, by Carmen-Cristina Cîrlig & Patryk Pawlak (Brussels: European Parliamentary Research Service, October 2016) at 4, online (pdf): <europarl.europa.eu> [perma.cc/NX4A-23U7]. Others have also argued that where a state has breached particularly serious norms of international law, the state cannot expect immunity because its conduct shows an implicit waiver of it (see Ranganathan, *supra* note 13 at 381).

249 *Jurisdictional Immunities*, *supra* note 158 at paras 83–85. See also Mohsen Abdollahi, "Alleged Support of Terrorism as a Ground for Denying State Immunity" in James Crawford et al, eds, *The International Legal Order: Current Needs and Possible Responses* (Leiden, Netherlands: Koninklijke Brill, 2017) 187 at 193.

exception for terrorism.[250] This has not, however, prompted Canada to walk back its amendment to the *SIA*.

Nor necessarily should it. Although the label of custom breaker might evoke connotations of roguish behaviour and a failure to adhere to the accepted legal norms of the international community, states should embrace a custom-breaking role from time to time when doing so is rooted in legal principle[251] and is aimed at better protecting the rights of victims. As Karinne Lantz has aptly put it, even where a Canadian exception to state immunity may be at odds with the existing international law, it is not necessarily an improper attempt at providing recourse for victims.[252] Exceptions to immunity, either for states supporting terrorism or those responsible for crimes against humanity or aggression, could thus provoke positive legal change in the common law of other nations, which would in turn ultimately support new rules of customary law.

There does, however, remain the issue of *Nevsun Resources* and its commentary on the automatic incorporation of custom in Canada. If custom still provides that states and their officials are shielded by immunity for violations of peremptory norms, and this rule is automatically adopted into Canadian law, how can Canadian courts resist its application? The answer may be found in *Nevsun Resources*. As the Supreme Court noted, rules of custom are not incorporated where conflicting legislation exists. As a result, it is theoretically open to Canadian courts to find that, where the *SIA* and *CAHWCA* are amended, Canada's legislation provides a civil right of action for crimes against humanity and the crime of aggression that conflicts with the existence of customary immunities that would bar these claims. The Supreme Court could therefore hold that Parliament has ousted the incorporation of these customary immunities, given the legislation that it has adopted. While this finding would ultimately depend on the amended wording of Canada's legislation, this provides one

250 Coombes, *supra* note 234 at 286, 287, 290, 304.

251 As the Committee Against Torture noted when considering *Bouzari*, it was available to Canada to remove immunity via an exception for torture, for instance (see *supra* note 235; Ranganathan, *supra* note 13 at 376). See also Robert E Goodin, "Toward an International Rule of Law: Distinguishing International Law-Breakers from Would-Be Law-Makers" (2005) 9:1/2 J Ethics 225 at 234–235.

252 Coombes, *supra* note 234 at 293.

option that the Supreme Court could consider to advance the law of civil remedies for serious violations of international law.

This article's recommendations would have little practical effect if courts could still find that amnesties at international law (i.e., pardons by a state upon those who have committed a particular crime) applied to bar civil recovery for violations of international law.[253] As a result, the Supreme Court should recognize that there is no rule of custom that holds that amnesties can apply to bar awards in damages. In fact, there is growing evidence that the opposite rule is true.[254] For instance, international human rights bodies have frequently held that "amnesties contravene the rights of victims of gross human rights violations to justice and reparation and the international obligation of States to prosecute and punish their authors."[255] This includes comments by the Human Rights Committee that amnesties are incompatible with the *ICCPR*,[256] as well as those by the Commission on Human Rights that amnesties should not be granted to individuals who commit serious crimes of international law.[257] Modern trends in international treaties and the judicial decisions of states have also rejected amnesties for gross human rights violations.[258]

CONCLUSION

Under Canada's statutory and common law framework, victims cannot successfully seek remedies for crimes against humanity and

253 This is why Amnesty International recommended that these measures of impunity be given no legal effect with respect to either criminal or civil proceedings (see *End Impunity*, *supra* note 132 at 129).

254 Juan E Méndez & Francisco J Bariffi, "Truth, Right to, International Protection" (last modified January 2011) at paras 3, 10, online: <opil.oouplaw.com> [perma.cc/J8MJ-JW8V].

255 International Commission of Jurists, *supra* note 53 at 251.

256 *Comments of the Human Rights Committee: El Salvador*, CCPR, 15th Sess, UN Doc CCPR/C/79/Add.34 (1994) at para 7; *Concluding Observations of the Human Rights Committee: Republic of the Congo*, CCPR, 68th Sess, UN Doc CCPR/C/79/Add.118 (2000) at para 12; *Concluding Observations of the Human Rights Committee: Lebanon*, CCPR, 59th Sess, UN Doc CCPR/C/79/Add.78 (1997) at para 12.

257 *Impunity*, OHCHR, 59th Sess, UN Doc E/CN.4/RES/2003/72 (2003) CHR Res 2003/72 at para 2.

258 Anja Seibert-Fohr, "Amnesties" (last visited 11 November 2025), online: <opil.ouplaw.com> [perma.cc/G4CG-9K3L].

aggression. While the bar for these claims is definitive, it is not necessarily immutable. Rather, this article demonstrates that several changes to Canadian law would remove barriers to attaining civil remedies. First, Parliament should amend the *CAHWCA* to add the crime of aggression. This would incorporate the crime into Canada's domestic law and would avoid a finding by courts that it is excluded because of conflicting legislation. Second, courts should recognize that the right to a civil remedy for crimes against humanity exists in Canadian law and should declare that it is not "plain and obvious" that this right does not exist for the crime of aggression. Third, Parliament should amend the *SIA* to allow exceptions to state immunity for states who have committed serious violations of international law, including crimes against humanity and possibly the crime of aggression, should the customary law on standing have since progressed for victims of this crime. Fourth, courts should recognize that custom does not allow amnesty for perpetrators of serious violations of international law.

These changes, on their own, would not remove all barriers for claimants. Rather, issues of standing for victims of the crime of aggression and the existence of customary immunities for both crimes against humanity and aggression would still pose challenges. As a result, this article has provided additional recommendations to address these issues. First, with respect to individual standing for the crime of aggression, Canadian courts should canvass the law at the time of a claim to determine whether individual victims may seek standing to pursue their claims. Where the law does not support such a finding, courts should at least recognize that such a right may exist in the future, on the basis of growing academic and legal support for the right of victims to pursue remedies for violations of international law. Second, if the recommended amendments are made to the *SIA* and *CAHWCA*, Canadian courts should consider whether the law of Canada rejects customary immunities on the basis that conflicting legislation provides a civil right of action for crimes against humanity and, potentially, the crime of aggression. While this would move Canada outside the bounds of most existing state practice, it can be supported on the ground that a principled, custom-breaking role is essential to the progressive development of the customary international law and is an approach that Canada has already taken with respect to an exception to immunity for terrorism.

Canada has long served as a destination for those fleeing persecution, war, and civil unrest. While doing so has contributed to the country's reputation as a welcoming place for refugees and displaced people, Canada cannot in good conscience continue its policies while simultaneously depriving these individuals of their ability to seek remedies through the domestic legal system. Rather, Canada can mirror its leadership in the realm of immigration and refugee policy with a renewed position in public international law, serving as a leader in state practice towards a fairer outcome for victims of international crime. Thus, taken either together or individually, these changes to Canadian law would represent an important and meaningful step forward in allowing vulnerable members of both Canadian and global society to seek justice for international crimes.