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

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TOPIC AND IMPORTANCE

This paper examines a civil right of action in Canadian courts for two crimes at international law: crimes against humanity (a deliberate act that causes human suffering or death) and the crime of aggression (using an armed force against another state's independence). It begins by assessing the existing—yet insufficient—avenues for victims seeking reparations for these crimes under international law. It specifically identifies barriers in Canadian law to the success of these claims, recommending changes to said law to increase the chances that claimants can receive damages for these crimes.

Currently, there are a number of difficulties victims may face when seeking reparations for these crimes outside of domestic legal systems, including before the International Criminal Court, international compensation bodies, and special or hybrid tribunals. These challenges—like a lack of funding for compensation—ultimately render the international legal framework an insufficient recourse for victims of crimes against humanity and aggression.

MAIN ARGUMENTS

Logically, some victims may instead look to making a civil claim in Canada for these crimes, where resources for compensation may be more readily available. To explore this possibility, this paper first looks at the relationship between Canadian law and two major sources of international law: treaty law and custom. In doing so, it shows how claimants must satisfy five requirements to successfully pursue remedies for crimes against humanity and aggression in Canada, namely that: i) these crimes must exist in Canadian legislation or custom (i.e., something that isn't exclusively written, but is a common practice in the 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 these crimes; iv) there must be no legislation preventing this remedy; and v) there must be no custom preventing this remedy. It also identifies "standing" (or the legal right to bring a case to court by showing you have a close enough connection to the case) as a way to prevent too many of these claims from moving forward.

Looking at each of these requirements, there are presently five challenges claimants face when pursuing their civil claims in Canada's courts. These are a) attaining standing to pursue claims stemming from the specific crime of aggression; b) conflicting legislation which prevents the crime of aggression from being adopted into Canadian law; iii) whether a right to a remedy exists for both crimes against humanity and the crime of aggression; iv) barriers imposed by the *State Immunity Act* (*SIA*); and v) the application of customary immunities to such claims in Canada's common law.

CONCLUSION AND ADDITIONAL CONSIDERATIONS

To overcome these challenges, the paper makes several recommendations. First, Parliament should amend the *Crimes Against Humanity and War Crimes Act* to explicitly include the crime of aggression, ensuring civil claims are not prevented due to a "conflicting legislation" argument. Second, courts should affirm that the right to a civil remedy for crimes against humanity exists in Canadian law and should recognize that it is not "plain and obvious" that such a remedy 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. Finally, courts should recognize that custom does not permit amnesties (or pardons) for those responsible for serious violations of international law. These changes would increase the chances of claimants successfully seeking justice for either crime, serving as a contributor to the progressive development of international law.