

## Written Brief

### **House of Commons Standing Committee on Foreign Affairs and International Development**

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#### **Introduction**

The following brief, submitted on request of Members of Parliament and members of the Standing Committee on Foreign Affairs and International Development, is intended to expand on recommendations I provided to the Committee on 29 November 2023. A copy of the speech given on that date can be found below, in the annex of this brief. I purposefully have omitted burdening this submission with citations or technical legal language and jargon. However, should members of the Committee wish, I stand prepared to submit a more thorough brief with additional relevant supporting facts and sources.

The recommendations that follow emphasize the important role that Canada can and should play in relation to the investigation and prosecution of international crimes and serious violations of human rights law, both internationally and in Canada itself. International law is the very currency of diplomacy. Without respect for it, there can be no rules-based order. In a world in which mass atrocities and human rights violations are all too commonplace and are perpetrated on every populated continent, the demand for accountability must be met by a steady supply of accountability.

In recent years, Canada has played an important role in some respects by, for example, supporting the International Criminal Court (ICC) investigation in Ukraine, by bringing Syria to the International Court of Justice (ICJ) over allegations of state-sponsored torture, and by supporting a case brought by The Gambia against Myanmar in relation to the alleged genocide committed against the Rohingya people. Yet, Canada's commitment to international law also reflects a remarkable and consistent embrace of double standards, only supporting justice and accountability for international crimes and human rights violations in some places, for some people, and some of the time. The international community, including our partners and allies as well as those working in international organizations and tribunals, have noticed.

Whatever rules-based order Canada envisages for this troubled world of ours, it cannot be one that is so inconsistent as to be rendered arbitrary. In order to regain its lost prestige and respect, Canada must abandon double standards and instead double down on impartial and independent investigations into international crimes and serious human rights violations whenever and wherever they take place.

The following recommendations can further this pressing diplomatic goal and urgent moral need.

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## 1) **Establish a diplomatic post of Ambassador for International Justice**

Canada's diplomatic presence is low among its peer countries, with the country having the fewest consulates and embassies among the 10 largest economies in the world.<sup>2</sup> One way that Canada can do better is to create thematic ambassadorships, including in relation to the subject and pursuit of international justice.<sup>3</sup>

Our closest ally, the United States, has long had an Ambassador-at-Large for War Crimes Issues. Canada should follow suit with a similar post and supporting office. This would allow it to coordinate efforts on international accountability efforts, contribute consistently to the pursuit of justice in atrocity contexts, and play a persistent and permanent leadership role in addressing international crimes.

In 2016, then-U.S. Ambassador at-large for War Crimes Issues Stephen Rapp spoke in Ottawa on the benefits of Canada creating the post of International Justice Ambassador. The event noted that “Canada has historically been a global leader on international justice issues. That tradition should continue — but it requires some innovative thinking,” and that “the creation of an international justice ambassadorship can help the Canadian government meet its foreign policy objectives.”<sup>4</sup>

More recently, international law professor and jurist Payam Akhavan and Ukrainian Prosecutor-General Andriy Kostin wrote that: “Canada could appoint a special envoy for international justice, who could serve as a focal point within Canada for our efforts to support the retrieval of these children. A special envoy could also co-ordinate our efforts to support the creation of these international justice mechanisms.”<sup>5</sup>

Such an ambassador must not be a representative of Canada's current double standards, but an independent beacon of universal accountability and Canadian representative for global justice efforts. Whether it is called a special envoy or international justice ambassador, creating such a post and supporting office would help Canada get back on track, further its diplomatic interests, and re-establish the country as a leader, rather than haphazard laggard, on international law and justice.

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<sup>2</sup> See James Griffiths, ‘As Canada seeks to define its place in the world, the fight for global influence has never been hotter’, *The Globe and Mail* (8 January 2024), at <https://www.theglobeandmail.com/world/article-as-canada-seeks-to-define-its-place-in-the-world-the-fight-for-global/>

<sup>3</sup> In 2015, I detailed what this position could look like here: Mark Kersten, ‘Canada's Back: Let it be – and have – an Ambassador of International Justice’, *Justice in Conflict* (22 October 2015), at <https://justiceinconflict.org/2015/10/22/canadas-back-let-it-be-and-have-an-ambassador-of-international-justice/>

<sup>4</sup> Centre for International Policy Studies, ‘Why Canada Needs an International Justice Ambassador’, University of Ottawa (4 April 2016), at <https://www.cips-cepi.ca/event/why-canada-needs-an-international-justice-ambassador/>

<sup>5</sup> Payam Akhavan and Andriy Kostin, ‘Canada must do everything possible to combat Russia's abduction of Ukrainian children’, *The Globe and Mail* (20 November 2023), at <https://www.theglobeandmail.com/opinion/article-canada-must-do-everything-possible-to-combat-russias-abduction-of/>

**2) Invest in holding atrocity perpetrators living in our midst to account, in our courts, under Universal Jurisdiction, or work with deportation destination countries to ensure they are held accountable there.**

Under the *Crimes Against Humanity and War Crimes Act* (2000), Canada has the legal ability to exercise universal jurisdiction over international crimes, including war crimes, crimes against humanity and genocide. In short, this means that Canada can prosecute suspects of these crimes irrespective of their nationality, regardless of where the crimes took place, and no matter the nationality of the victims. In the 2010s, Canada prosecuted two such cases, both in relation to the 1994 Rwandan Genocide. One individual was convicted, the other acquitted.

Since then, and due to cost concerns, Canada has abandoned the use of universal jurisdiction, preferring instead to use immigration law to deport alleged international criminals. This is despite the fact that the Department of Justice's 2016 report on the subject estimated that at least 200 perpetrators of international crimes resided in Canada.<sup>6</sup> As it stands, Canada is more likely to host an alleged Nazi in Parliament than to prosecute a war criminal in its own courts.

Canada's position is in sharp contrast to its closest allies, including the United States, Germany, France, Finland, and Switzerland, which all continue to investigate and prosecute international crimes in their own courts under the principle of universal jurisdiction. These countries have done so in relation to perpetrators from Syria, Liberia, Rwanda, The Gambia, Ukraine, and so on.

Under Canada's current approach, if a perpetrator of war crimes from, for example, the Wagner Group or a mid-level Hamas leader entered Canada, they would not be prosecuted. Canada would fail victims and survivors of international crimes. It would simply seek to deport these alleged perpetrators and claim that doing so amounted to justice and accountability. It does not, as the United Nations Committee Against Torture has made clear.<sup>7</sup> This is in large part because, even if such immigration law proceedings are successful, Canada seeks zero guarantees that the individuals will be brought to account for their alleged atrocities in the country to which they are deported. The suspect can return and live freely, sometimes even among their victims.

This not accountability. It is a hand-washing exercise and an abdication of Canada's responsibilities and obligations under international law.

To avoid being complicit in impunity for international crimes, Canada should re-invest in universal jurisdiction and provide its War Crimes Program with an adequate budget to investigate and prosecute perpetrators of international crimes in Canada's courts. Canada should also consider removing the gate-keeping role that the Attorney General currently plays on cases related to international crimes,<sup>8</sup> and permit victims, survivors and their representatives to initiate proceedings that may lead to investigations and prosecutions.

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<sup>6</sup> Department of Justice, 'CRIMES AGAINST HUMANITY AND WAR CRIMES PROGRAM EVALUATION: Final Report (August 2016) <https://www.justice.gc.ca/eng/rp-pr/cp-pm/eval/rep-rap/2016/cahwc-cchcg/cahwc-cchcg.pdf>

<sup>7</sup> A report by the Committee in 2012 said it "notes with regret the recent initiative to publicize the names and faces of 30 individuals living in Canada who had been found inadmissible to Canada on grounds they may have been responsible for war crimes or crimes against humanity. If they are apprehended and deported, they may escape justice and remain unpunished." <https://www.cbc.ca/news/politics/canada-accused-of-complicity-in-torture-in-un-report-1.1166597>

<sup>8</sup> As it currently stands, only if the Attorney General gives the green light for a case relating to international crimes can such a case proceed.

Finally, when prosecuting perpetrators of international crimes in Canada is genuinely not possible, Canada should seek guarantees and work with deportation destination countries to ensure that alleged perpetrators of international crimes are brought to justice.

**3) Support the ICC in all the situations under its jurisdiction. To do so, Canada does not have to immediately recognize Palestine as a state.**

Canada is a signatory of the 1998 *Rome Statute of the International Criminal Court* and has often contributed positively to the ICC's work, including its impressive support for the Court's investigations in Darfur and Ukraine. However, Canada's current position with respect to the ICC's investigation into Palestine is that because Palestine is not a state, the Court cannot exercise jurisdiction there.<sup>9</sup>

This position not only undermines the impartiality and independence of the ICC, but it also undermines the only existing avenue to impartial, independent, and international criminal justice and accountability available to Israeli and Palestinian victims of mass atrocities. The retort that Israeli courts and institutions are themselves able to address alleged international crimes committed against Israeli and Palestinian civilians does not bare out in reality. The UN Independent International Commission of Inquiry into the mass killings of Palestinian protesters during the 2018 Great March of Return has found, for example, that “[t]o date, the Government of Israel has consistently failed to meaningfully investigate and prosecute commanders and soldiers for crimes and violations committed against Palestinians or to provide reparation to victims in accordance with international norms.”<sup>10</sup>

Canada's position is untenable and immoral. Canada should clearly state that it supports *all* investigations undertaken by the ICC. To do so, it is not necessary for Canada to immediately recognize Palestinian statehood. Both Belgium and Switzerland, for example, have stated clearly that they support the ICC's work in Palestine, with Belgium providing 5 million Euros to the Court to help its investigation. Neither Switzerland nor Belgium currently recognize Palestine as a state.

Canada cannot and should not pick and choose which ICC situations it supports. If it is to be a full and respected member of international organizations, it must combat rather than entrench double standards.

**4) Study the possible creation of a hybrid court for Israel and Palestine staffed by international prosecutors and judges, with some Israeli and Palestinian staff too.**

Even if it had sufficient state support, the ICC would only ever be able to investigate and prosecute a handful of those responsible for international crimes in Palestine and Israel. Given the scale of international crimes committed before and after 7 October 2023, more is needed.

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<sup>9</sup> Global Affairs Canada, ‘Statement by Minister of Foreign Affairs on International Criminal Court’s decision regarding its jurisdiction over West Bank and Gaza’, (7 February 2021) at <https://www.canada.ca/en/global-affairs/news/2021/02/statement-by-minister-of-foreign-affairs-on-international-criminal-courts-decision-regarding-its-jurisdiction-over-west-bank-and-gaza.html>

<sup>10</sup> Report of the independent international commission of inquiry on the protests in the Occupied Palestinian Territory (25 February 2019), para 111 [available here: [https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/CoIOPT/A\\_HRC\\_40\\_74.pdf](https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/CoIOPT/A_HRC_40_74.pdf)]

Beyond the ICC, Canada and its allies should support other efforts to address war crimes, crimes against humanity, and any alleged acts of genocide in Israel and Palestine. Canada should therefore study the creation of a hybrid court, a tribunal that would bring together Palestinian, Israeli, and international prosecutors, judges, and staff in an effort to address international crimes committed in both Israel and Palestine. When properly designed, hybrid courts can help bolster accountability efforts and address a far greater number of allegations and prosecute more perpetrators than the ICC.

In 2019, I co-authored the Dakar Guidelines on the Establishment of Hybrid Courts which details how such tribunals can be established and how they can be designed to optimize the effective delivery of independent and impartial justice and accountability.<sup>11</sup> Canada and its allies would have to work with a multilateral organization like the United Nations to create such a court. Critically, they would have to ensure that any hybrid court had jurisdiction to prosecute international crimes committed in *both* Israel and Palestine. If it is only one or the other, it would not be accountability. It would be an exercise of victor's justice, entrench double standards, and potentially do harm than good.

The creation of a Hybrid Court for Israel and Palestine is worth exploring and Canada, through an International Justice Ambassadorship, could help lead that effort.

**5) Lead international efforts to trace and where possible, seize assets of perpetrators of international crimes, transnational organized crimes, and large-scale corruption.**

The sad truth is that committing war crimes, crimes against humanity, and genocide is often lucrative for perpetrators. The same groups and actors who perpetrate atrocities also and often simultaneously commit transnational organized crimes (e.g. money laundering, human trafficking, drug and wildlife trafficking, etc), as well as large-scale corruption.<sup>12</sup>

Canada should lead efforts to link the investigation and prosecution of these crimes rather than attempt to address them in distinct silos. In many cases, addressing large-scale corruption or trans-border organized crime can, in and of itself, be strategic in mitigating and preventing international crimes and mass human rights violations.

Canada also has the powers and laws to trace and where appropriate, seize and repurpose the assets of perpetrators of international crimes, transnational organized crimes, and large-scale corruption. This is a subject that the Senate of Canada's Standing Committee on Foreign Affairs and International Trade covered in March 2022.<sup>13</sup> Canadian experts have also published persuasive legal

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<sup>11</sup> Kirstin Ainley and Mark Kersten, 'Dakar Guidelines on the Establishment of Hybrid Courts, (2019), at [https://hybridjustice.files.wordpress.com/2019/08/dakar-guidelines\\_digital-version.pdf](https://hybridjustice.files.wordpress.com/2019/08/dakar-guidelines_digital-version.pdf)

<sup>12</sup> In previous work, I have detailed these linkages, including in relation to Syria, Sierra Leone, Kosovo, and Uganda. See Mark Kersten, 'This Mass Atrocity Was Brought to You by the Ivory Trade: Linking Transnational Organized and International Crimes', *International Criminal Review* 22 (2022)

<sup>13</sup> Senate of Canada, The Standing Senate Committee on Foreign Affairs and International Trade, Evidence (24 March 2022), at <https://sencanada.ca/en/Content/Sen/Committee/441/AEFA/04EV-55430-E>

analyses on this matter.<sup>14</sup> I joined those experts in explaining how it would pay to seize assets of atrocity perpetrators and repurpose the assets as reparations for victims.<sup>15</sup>

In a welcome development, Canada has led on this file in relation to Russian assets seized in response to Russia's atrocities in Ukraine. But it can do more: it can lead a global effort not only to seize assets, but to ensure that they are repurposed to fund the recovery and reconstruction of communities devastated by international crimes and reparations for victims of atrocities.

#### **6) Support efforts to amend the Rome Statute of the ICC so it can prosecute the crime of aggression in cases like Ukraine.**

The ICC should be able to investigate and prosecute the crime of aggression in Ukraine, but it cannot. That is, in part, because of Canada's efforts to undermine the Court's jurisdiction of the crime.

The crime of aggression was called the "supreme crime" at the 1946 Nuremberg trials because all other international crimes flow from its perpetration. Put another way, in Ukraine, crimes against humanity, war crimes, and alleged acts of genocide are only possible because of Russia's illegal and criminal invasion of Ukraine.

Unfortunately, Canada was among those states that sought to constrain the ICC and ensure that the Court's jurisdiction over the crime of aggression was severely neutered. For one, the ICC cannot investigate leaders of states that are not party to the Court's *Rome Statute*, even if they commit the crime of aggression on the territory of a state-party. Second, Canada helped to ensure that state parties to the Rome Statute had to opt into the Court's jurisdiction over aggression. The upshot is that The ICC cannot investigate the crime of aggression in member-states of the ICC or Ukraine, even if Kyiv wanted it to.

Canada should reverse course and lead a multilateral effort to amend the *Rome Statute* to ensure that the crime of aggression can be investigated and prosecuted whenever it is committed by or on the territory of a state-party to the Rome Statute.

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<sup>14</sup> See, e.g., Robert J. Currie, Fen Osler Hampson, and Allan Rock, 'Leading by Example Canada's Approach to Seizing Frozen Assets and Holding Corrupt Leaders to Account', World Refugee & Migration Council, Working Paper (June 2023), at <https://wrmcouncil.org/wp-content/uploads/2023/06/Leading-By-Example-Canada-Frozen-Assets-Final.pdf>

<sup>15</sup> Mark Kersten, 'Why it will pay to seize Russian assets for Ukraine's recovery', The Globe and Mail (10 July 2023), at <https://www.theglobeandmail.com/opinion/article-why-it-will-pay-to-seize-russian-assets-for-ukraines-recovery/>

## **Annex: Speech Delivered by Mark Kersten, 29 November 2023**

Thank you, Mr. Chair.

I want to speak to Canada's commitment to a rules-based system in relation to the very currency of diplomacy: international law.

In particular, I will focus on Canada's approach to prosecuting international crimes – war crimes, crimes against humanity, genocide, and the crime of aggression.

Canada has done a great deal to support accountability efforts in recent years.

Since 2022, Canada has consistently supported the prosecution of international crimes in Ukraine.

With The Netherlands, Canada has taken Syria to the International Court of Justice over torture.

But many question why there are so many inconsistencies in Canada's support for international law and accountability efforts.

I want to explore two questions I believe are instructive in relation to Canada's position on prosecuting international crimes and Canada's standing in the world.

First, what would Canada do if a mid-level Russian or Syrian war criminal, or a member of the Wagner Group entered Canada?

As a signatory to the Geneva Conventions, Canada is obligated to investigate war crimes and prosecute them in its own courts.

Canada's diplomatic partners would expect it to prosecute, and not become a safe haven for war criminals.

Yet all too often Canada does nothing or only attempts to deport the alleged war criminal instead of prosecuting them. And if Canada did deport that person, it would seek zero guarantees that they would be held accountable in the country they were deported to.

In 2016, the Department of Justice released a report that stated over 200 perpetrators of international crimes reside in Canada. It has not prosecuted any of them.

Canada has the laws to do it, the resources to do it, but it won't do it.

Unlike its allies, since the early 2010s, Canada has abandoned the use of universal jurisdiction.

My second question is: what would Canada do if the International Criminal Court issued arrest warrants for senior Hamas leaders and those responsible for the atrocities committed on 7 October? There is a real prospect that this will happen in the coming weeks.

What would Canada say to the Israeli families of hostages who have asked the ICC to investigate Hamas' war crimes? What would it tell Palestinians victims and survivors?

Right now, the only answer consistent with Canadian policy would be to say that Canada would oppose ICC arrest warrants for Hamas leaders because it believes Palestine is not a state and the ICC has no role to play in the situation in Palestine.

Indeed, Canada has opposed every single independent, impartial, and international effort to investigate and prosecute international crimes committed in Israel and Palestine. Every single one.

The question arises: what *are* the rules when Canada supports victims and survivors of international crimes sometimes and in some places, but not other times and in other places?

Those who look to Canada – victims of atrocities, diplomats, staff in international organizations, and others that I engage with – want leadership on a *consistent* rules-based system.

They still expect Canada to lead, but they wonder why it is unwilling or unable to do so.

It is not too late. I believe Canada can lead.

My recommendations are as follows:

- 1) Establish a diplomatic post of Ambassador for International Justice to help coordinate accountability efforts.
- 2) Invest in holding atrocity perpetrators living in our midst to account here, in our courts, under Universal Jurisdiction or work with deportation destination countries to ensure they are held accountable there.
- 3) Support the ICC in all of the situations under its jurisdiction. To do so, Canada does not have to accept Palestine is a state (Belgium, Switzerland)
- 4) Study the possible creation of a hybrid court for Israel and Palestine staffed by international prosecutors and judges, with some Israeli and Palestinian staff too.
- 5) Lead international efforts to trace and where possible seize assets of perpetrators of international crimes, transnational organized crimes, and large-scale corruption.
- 6) Support efforts to amend the Rome Statute of the ICC so it can prosecute the crime of aggression in cases like Ukraine.

Thank you.