

THE NEXUS ELEMENT IN THE DEFINITION OF CRIMES AGAINST HUMANITY: AN ANALYSIS OF ARGENTINE JURISPRUDENCE

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individual act forms part of an attack; rather, I pursue a more modest objective, which is to show some flaws in the dominant criterion followed by most Argentine courts.

In my view, this policy-focused criterion (a) is not coherent with the current development of the law of crimes against humanity because it demands that the punishable act be committed on discriminatory grounds; (b) is burdensome and difficult to apply because, in certain contexts, it may be difficult to prove the precise content and scope of the policy behind the attack and delimit the targeted population; and (c) underestimates other factors that should be considered to determine whether the act is sufficiently connected to the attack, thus making it a crime against humanity, such as the guarantee of impunity granted to perpetrators.

This article is organized as follows. Section II sets out the legal framework of crimes against humanity. It briefly explains the meaning of the *chapeau* elements and shows how they reflect the collective dimension of

the same time, however, crimes against humanity are committed by individuals against other people, in the same manner in which common crimes are committed. Thus, in applying international criminal law, courts adjudicate criminal responsibility to individuals, not abstract entities, for their concrete acts.⁶ Likewise, victims suffer injury to their fundamental rights in their own flesh, not only because they belong to a particular community or humankind. The nexus element is the glue that holds together the collective and the individual dimensions of crimes against humanity. It allows the connection between the abhorrent conduct of an aggressor and a broader context of human rights violations promoted or tolerated by a higher authority. Ultimately, the nexus between the individual act and that context is what makes it a crime against humanity and a matter of international concern.

This modern formulation of crimes against humanity is the result of a complex evolution in international custom. Initially, the distinctive element of crimes against humanity was the link with war. The first positive definition of crimes against humanity established in the Charter of the International Military Tribunal of Nuremberg (IMT) requires that they be committed in connection with war crimes or crimes against peace.⁷ The war nexus is the element that turned into international crimes acts that would otherwise be considered ordinary crimes of domestic jurisdiction. However, this

knowledge of the attack . . . For the purpose of paragraph 1: (a)
 3 \$ W W D F N G L U H F W H G D J D L Q V W D Q \ F L Y L O L D Q S R S X O D W
 conduct involving the multiple commission of acts referred to in
 paragraph 1 against any civilian population, pursuant to or in
 furtherance of a State or organizational policy to commit such attack
¹⁴

These context elements reflect the collective nature of crimes against
 humanity, and they seek to exclude isolated or random acts from the scope
 R I W K L V F D W H J R U \ R I L Q W H U Q D W L R Q D O F U L P H V 7 K H W H
 where individual acts must form part. It has been defined as a course of
 conduct, a campaign, or an operation. The ICC Trial Chamber in *Bemba*¹⁵
 H P S K D V L J H G 3 > W @ K H U H T X L U H P H Q W W K D W W K H D F W V I R U
 shows that the provision is not designed to capture single isolated acts,¹⁶ but
 μ G H V F U L E H V D V H U L H V R U R Y H U D O O I O R Z R I H Y H Q W V D V
 R I U D Q G R P 7 X F W W H J U P 3 S R S X O D W L R Q ' D O V R F R Q Y H \ V W K H
 crimes. Crimes against humanity are directed against populations, not to one
 individual or a group of randomly selected individuals. As Werle and
 - D V V E H U J H U S R L Q W R X W 3 W K L V F U L W H U L R Q H P S K D V L J H
 crime, thus ruling out attacks against individuals and isolated acts of
 Y L R O H Q F H '

Furthermore, attacks are characterized as widespread or systematic.
 3 : L G H V S U H D G ' U H I H U L Y - W R D W K H Q D W X U D F N D Q G 3 W K H Q X P E H
 targeted persons.¹⁹ X Q O L N H 3 V \ V W H P D W L F ' Z K L F K 3 U H I O H F W V W K H
 of the acts of violence and the improbability of their random occurrence.
 Q F H '
 These terms are directed to exclude ordinary criminality. As Margaret
 O F \$ X O L I I H G H * X] P D Q H [S O D L Q V 3 > L @ W L V W K L V H O H P H Q
 into attacks against humanity rather than isolated violations of the rights of

14. *Id.*

15. Prosecutor v. Bemba, Case No. ICC-01/05-01/08-3343, Judgment pursuant to Article 74
 of the Statute (Mar. 21, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_02238.PDF.

16. *Id.* ¶ 149 (citing Prosecutor v. Katanga, Case No. ICC-01/04-01/07-3436, Judgment
 pursuant to article 74 of the Statute, ¶ 1101 (Mar. 7, 2014), https://www.icc-cpi.int/courtrecords/cr2015_04025.pdf).

17. *Id.* (citing Prosecutor v. Gbagbo, Case No. ICC-02/11-01/11, Decision on the
 Confirmation of Charges Against Laurent ET1 0675120049>70q0.00000912 0 612 79Q912 0 612 792BT/Fp9 6120 Ws187010 0 612 792

act, and on the other, the characteristics of the attack as a whole and in relation to each of its components. While the policy behind the attack is a particularly important factor, other circumstances must also be considered, including the pattern of crimes (*modus operandi*) and the type of victims.

III. THE APPLICATION OF THE LAW OF CRIMES AGAINST HUMANITY IN ARGENTINE JURISPRUDENCE

During the past three decades, Argentine courts have gradually applied the category of crimes against humanity in cases referring to human rights violations committed during the last military dictatorship (1976-1983), to other events that occurred before and after that time, and in extradition cases.⁴⁰ This trend is part of a progressive opening of the Argentine legal system towards international law, specifically regarding the protection of human rights. This process began with the ratification of human rights conventions at the outset of the democratic restoration in 1983 and deepened after the reform of the National Constitution in 1994, which granted constitutional hierarchy to a series of international human rights instruments.⁴¹ In this context, driven by the intense activism of human rights organizations,⁴² the judiciary progressively turned to international criminal law to address the crimes committed during the last military regime.

The application of the law of crimes against humanity in domestic cases in Argentina has some peculiarities. At the time of the events, Argentine law did not strictly describe these crimes as an autonomous category.⁴³ For this reason, local courts developed a complex and original interpretation of the FOD VVL ¶¶ of the ROL, they affirmed that the arbitrary detentions, tortures, homicides, and forced disappearances committed during the dictatorship constituted crimes against humanity under international customary law and that neither statutory limitations nor amnesties or pardons could prevent their prosecution. Based on a progressive interpretation of a

40. See Pablo F. Parenti, *The Prosecution of International Crimes in Argentina*, 10 INT ¶ CRIM. L. REV. 491 (2010).

41. See Jose Sebastian Elias, *Constitutional Changes, Transitional Justice, and Legitimacy: The Life and Death of Ar J H Q W L Q D ¶ V ³ \$ P CHASTINGS INT ¶ & V* COMP. L. REV. 58755.35 238.83 Tm0 g0 G[(C)-8(ons)7(t)13(i)

clause of the National Constitution, they concluded that this norm of customary international law was part of the Argentine legal system.⁴⁵ On the other hand, courts found these acts were prohibited by the Argentine Penal Code in force at the time of their commission. The Argentine Penal Code criminalized the illegal deprivation of liberty,⁴⁶ and the application of torture and murder.⁴⁷ In this way, the *nullum crime sine lege* principle was fulfilled since the conduct and penalty were previously described in the law in a formal sense.⁴⁸ In short, through this process of double classification of the acts, the international customary law of crimes against humanity provided the rule of non-applicability of the statute of limitations and amnesty laws; and the Argentine criminal law described the prohibited conduct and the penalty.

The current stance of Argentine courts *vis-à-vis* international criminal law is the result of three decades of debate. During the first years after the democratic transition of the 80s, Argentine courts were reluctant to consider arguments of international law; they did not classify the human rights violations committed during the dictatorship as crimes against humanity.⁴⁹ In the *Trial of the Juntas*,⁵⁰ held in 1985, the Federal Court of Appeals of Buenos Aires convicted former dictator Jorge Rafael Videla and other members of the military juntas for human rights abuses.⁵¹ The Court found that the military government implemented a systematic plan to kidnap thousands of people, detain them in clandestine centers, interrogate them under torture, and finally kill them and disappear their bodies, all with the alleged purpose of fighting subversion. Despite these findings, the Court did not consider the events to be crimes against humanity. For this reason, some

45. Art. 118,

violation] of the norms and principles of contemporary international criminal law.

Though Argentina had not ratified that treaty, international criminal law slowly made its way into Argentine jurisprudence through extradition cases. These precedents provided arguments that would later be decisive in annulling the amnesty laws and allowing the prosecution of past human rights violations. The *Schwammberger* case,⁶¹ ruled upon by the Federal Court of Appeals of La Plata in 1989, was one of the first to introduce arguments of international criminal law. This case consisted of an extradition request of an alleged Nazi criminal for crimes committed during World War II. The issue was whether statutory limitations barred the prosecution of those events under Argentine law. In the leading opinion, Judge Leopoldo Schiffrin explained how the acts constituted crimes against humanity, international customary law mandates their prosecution regardless of statutory limitations, and this obligation took precedence over Argentine domestic law.⁶² This precedent is relevant because, for the first time, it established the supremacy of international law over Argentine law.⁶³

The Supreme Court acknowledged the non-applicability of statutory limitations to international crimes in the *Priebke* case,⁶⁴ held in 1995. This case concerned the extradition of the German army officer Erich Priebke, accused of the massacre of 335 people in the Ardeatine Fosses, Italy, in 1944. The members of the Supreme Court disagreed on whether the acts constituted genocide, war crimes, or crimes against humanity. However, they all agreed that statutory limitations did not apply under international law and that this rule was part of the Argentine legal system.⁶⁵ The next step in the reception

60. *Id.*

61. Cámara Federal de Apelaciones de La Plata [CFed.] [Federal Court of Appeals of La Plata] (1989), 30 DWD @ 36 FKZ DPW B D G L F U y Q R V H (Arg.).

62. *Id.*

63. Judge Schiffrin states:

³, Q VXP , E H O L H Y H W K D W W K H 1 D W L R Q D O & R Q V W L W X W L R Q V X E P L W V supremacy of the law of ius gentium (article 102 [current 118]), which is the source of criminal law in the international sphere, in which the principle of *nullum crimen nulla poena sine lege* does not apply in a strict sense; that under that law, crimes against humanity are not subject to statutory limitations, and that because of this, Argentine courts must recognize the formally retroactive effects of laws sanctioned by other countries in order to guarantee the inapplicability of statutory limitations to those F U L P H V

Id. at 3.

64. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 30 DWD @ 30 ULHENH (ULFK V R O L F L W X G G H H [WUDG L F L y Q

Altos v. Peru case⁷³ and international criminal law arguments. The majority classified the crimes committed during the military regime as crimes against humanity and declared that neither the Full Stop Law, the Due Obedience Law, nor statutory limitations could obstruct their investigation and prosecution.⁷⁴

However, in *Simón*, the Supreme Court did not conduct a thorough

responsible for their commission. But as in *Simón*, the Court did not elaborate upon why the acts constituted crimes against humanity.

The Supreme Court did address the elements of crimes against humanity in the *Derecho* case.⁷⁸ There, it had to decide whether the illegal detention and torture inflicted upon an individual in a police station in 1988, during the democratic ruling, constituted a crime against humanity.⁷⁹ Endorsing the

events as crimes against humanity. The decision is built on two main arguments. First, it anal

of crimes against humanity,⁸⁰ it argues that the distinctive feature of these crimes is that they injure the universal characte

to coexist in society become perverse machineries against them.⁸¹ From there, the Court posits that a general test to determine whether an atrocious

Applying this test to the case, the Court concluded that, in 1988, no state or organization that would be protected from the test stated above if it had

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crimes against humanity under Article 7 of the Rome Statute:

(1) they are acts of extreme cruelty such as murder, extermination, slavery, torture, rape, forced disappearance of people, among others;

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and (4) that it was carried out in accordance with a policy of a state or an organization, or to promote that policy.⁸⁴

Then, the Court examined whether these requirements were fulfilled in the case and concluded that the crimes committed against the victim did not form part of an attack carried out as a state policy and, therefore could not be classified as crimes against humanity.⁸⁵

78. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice],
Fallos (2007-330-3074) (Arg.).

79. *Id.*

80. *See* Luban, *supra* note 5.

81. & 6 - 1

82. *Id.*

83. *Id.*

84. *Id.* at 3084-85.

85. *Id.* at 3086.

time.¹⁰⁵ She concluded that the acts of torture were committed through the systematic and generalized attack against workers suspected of having any

committed clandestinely.¹¹⁴ The Prosecution filed an appeal of the decision, which is pending before the Supreme Court.¹¹⁵

In the meantime, the Supreme Court reversed the jurisdictional decision in the *Levin* case in 2018.¹¹⁶ In a tight decision, the Court concluded that the crimes committed against *some of the victims* could be classified as crimes against humanity, and therefore, the federal court of Salta was competent to continue the proceedings.¹¹⁷ The Supreme Court rejected the assertion that the events could not be considered part of the attack carried out during the dictatorship because they originated in a complaint concerning the commiss

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classified *prima facie* as crimes against humanity.¹³⁴ The Court affirmed that that the accused was a member of a police group suspected of crimes against humanity, acting in political enemies and people who had no ties to political organizations targeted by the regime. This reasoning seems to be in tension with focus on the policy element of the attack. However, this two-page decision is too poorly reasoned to establish a criterion on the nexus element.

In 2014, the Trial Court of Salta classified the acts as crimes against humanity and convicted Del Valle Soraire to life imprisonment.¹³⁶ The court intended by the military regime.¹³⁷ It pointed out that the victims of state terrorism were not only political activists or subversives but also individuals without any political affiliation.¹³⁸ In addition, the Trial Court highlighted the context of impunity in which the murders were perpetrated. It found that immediately after the events, the Police of Salta conducted a summary investigation aimed to exonerate Del Valle Soraire and to plant the alternative version that the crimes had been commissioned by local farmers as revenge for the acts of cattle rustling that they had suffered from Salvatierra and Rodríguez.¹³⁹ secrecy, concealment of evidences, [and] obstruction of the investigation by that the victims were persecuted by the police not on political grounds but

¹³⁴ Based on that, the Trial Court concluded

The Federal Chamber of Cassation I, in a 2-

in the context of the attack, and, for that reason, they are more likely to go unpunished. This idea is based on a test developed by Ambos and Wirth.

If the dangerousness of an individual criminal is increased because his or her conduct occurs in such a context the act must be regarded

JHQHUDOO\ WKH SHUSHWUDWRUV¹⁷⁴ Although Judge Hornos avoided mentioning it, his reasoning was related to the policy of illegal repression promoted by the military regime.¹⁷⁵ DWDFN VHOH

V. CRITICAL REMARKS TO THE ARGENTINE DOMINANT CRITERION ON THE NEXUS ELEMENT

The dominant criterion on the nexus element in Argentine case law focuses on the conformity of the individual act with the policy behind the attack. In determining the nexus, most courts give decisive value to whether the specific act was committed pursuant to, or in furtherance of, the policy of H[WHUPLQDWLRQ RI ³VXEYHUVLYHV´ WKR VH WKDW LQVS the military government). In assessing the nexus, the courts first check if the victim had any political affiliation with the groups persecuted by the regime and, based on that, they establish if the victim belonged to the population against which the attack was directed. When the victim belonged to the targeted population, courts tend to conclude that the act was committed as part of the attack, regardless of other circumstances that may differ from typical acts within the attack (e.g., the specific act did not follow the pattern of the attack or exceeded the plan). To the contrary, when the victim did not belong to the targeted population and the act seemed to have been committed for purposes other than the repression of political opponents, most courts consider that the acts constitute ordinary crimes. Below I will make three critical remarks to this criterion.

First, this analysis of the nexus element is not consistent with the current development of the law of crimes against humanity. First, it conflates the characteristics of the attack with those of the individual act. It is the attack that must be committed pursuant to or in furtherance of a policy of a state or an organization. The individual act must be part of that attack, but it must not

GHVLJQ RU SODQ¹⁸¹ ~~Who~~ ~~in~~ ~~Argentina,~~ ~~where~~ ~~the~~ ~~attack~~ ~~developed~~ ~~over~~ ~~several~~ ~~years~~ ~~and~~ ~~was~~ ~~redefined~~ ~~as~~ ~~it~~ ~~was~~ ~~carried~~ ~~out,~~ ~~it~~ ~~is~~ ~~difficult~~ ~~to~~ ~~delimit~~ ~~against~~ ~~whom~~ ~~the~~ ~~attack~~ ~~was~~ ~~directed.~~¹⁸² ~~In~~ ~~fact,~~ ~~courts~~ ~~applying~~ ~~this~~ ~~criterion~~ ~~have~~ ~~held~~ ~~different~~ ~~views~~ ~~on~~ ~~the~~ ~~scope~~ ~~of~~ ~~the~~ ~~attack.~~ ~~In~~ ~~Levin,~~ ~~the~~ ~~Federal~~ ~~Chamber~~ ~~of~~ ~~Cassation~~ ~~Supreme~~ ~~Court~~ ~~affirmed~~ ~~that~~ ~~it~~ ~~also~~ ~~targeted~~ ~~unionized~~ ~~workers.~~¹⁸³ ~~However,~~ ~~the~~ ~~Saravia~~ ~~trial~~ ~~court~~ ~~did,~~ ~~it~~ ~~may~~ ~~be~~ ~~interpreted~~ ~~to~~ ~~include~~ ~~any~~ ~~person~~ ~~whom~~ ~~the~~ ~~perpetrators~~ ~~targeted.~~¹⁸⁴

Besides, this criterion is not as objective as the Supreme Court intended. In certain situations, it is impossible to determine if the act fits into the policy without inquiring into the motives of the perpetrators. Several victims of state terrorism had no connection with subversive or political organizations of any kind, but they were kidnapped and tortured because the perpetrators mistakenly attributed these links to them.¹⁸⁵ If a court only looks at the exterior features of these events, it might conclude that the victims did not belong to the targeted population and that these crimes did not form part of the attack, which is clearly not the case. However, a nexus criterion that requires proof of mental elements that exceed the *mens rea* requirement of crimes against humanity. Since the Nuremberg trials, it has been clearly established that the motive of the aggressor for committing the specific act is irrelevant and that a crime against humanity may be committed for purely personal reasons.¹⁸⁶

Third, the dominant criterion gives excessive weight to the policy and does not consider other circumstances that may also show the link between the act and the attack. For instance, in the *Saravia* case discussed above, the

181. *Katanga*, Case No. ICC-01/04-01/07, ¶ 1109.
 182. *HQ, EpULFR 6DLQW -HDQ¶V LQIDR XGvert R Wthos SURQRXQFHG LQ D VS \$LUHV RQ OD\ LOOXVWUDWHV WKLV SRLQW ³)LUVW ZH ZLOO NLOO kill their collaborators; then . . . their sympathizers; then . . . those who remain indifferent; and finally we will kill the tim L GSeé Jerry W. Knudson, *Veil of Silence: The Argentine Press and the Dirty War, 1976-1983*, 24 LATIN AM. PERSP. 93, 93 (1997).
 183. CFPC ³/HYLQ ´ 1 R
 184. *Id.*
 185. For instance, Eduardo Covarrubias was a psychiatric member of the FAP (Federación Argentina de Psiquiatría) [Argentine Federation of Psychiatry]. On April 17, 1977, he and his wife were kidnaped and tortured because the executors of the attack wrongfully assumed that he was DIILOLDWHG ZLWK WKH ³)XHU]DV \$UPDG DvshHURQL VWDV´ >3HURQLVW \$UP Criminal Federal Nro. 1 de San Martín [Federal District Court No. 1 for San Martín], 18/05/2010, ³5LYHURV 6DQWLDJR 2PDD OSEHYVFLQAWB HBBQGR HWF ´
 186. *Kunarac*, Case No. IT-96-23-T& IT-96-23/1-T, ¶ 418; CRYER, *supra* note 29, at 243-44.

Chamber disregarded that the murders were committed by members of the criminal apparatus that carried out the attack and that, after the events, the authorities actively obstructed the investigation.¹⁸⁷ Unlike most Argentine courts, the ICC Trial Chamber in *Katanga*¹⁸⁸ made clear that in determining whether an act forms part of the attack, not only is the policy relevant, but also other circumstances, such as the pattern of crimes, the types of victims, and so on.

In my view, a useful criterion to assess the nexus is to inquire whether the perpetrators committed the specific acts under a cloak of impunity, because of their link with the state or organization promoting or tolerating the attack.¹⁸⁹ This circumstance will be clear when there are concrete actions to ensure impunity, such as the destruction of evidence.¹⁹⁰ But in most cases, it may be inferred from the circumstances of the investigation. Likewise, it could be deduced from the characteristics of the events and the totality of the circumstances when it is not reasonable to assume that the author would have acted as they did, but the *de facto* immunity enjoyed.

According to this criterion, not only would acts that directly advance the policy fall within the attack, but also those foreseeable and tolerated during events. Rarely will a widespread or systematic attack consist solely of acts aimed at complying with the policy of the state or the organization launching the attack. Large-scale attacks on civilians generally include excesses and opportunistic acts. The ICC Trial Chamber recognized this situation in *Bemba*.

[T]he course of conduct must reflect a link to the State or organizational policy, in order to exclude those acts which are perpetrated by isolated and uncoordinated individuals acting randomly on their own.

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case,¹⁹² it is likely that the perpetrators did not kill the victims to advance the criminal apparatus set up to carry out the attack and knew that they would not be prosecuted. Nevertheless, these crimes were sufficiently connected to the authority encouraging the attack as to regard them as isolated or random.

The alternative criterion I suggest places the focus on the impunity guaranteed to perpetrators; this is consistent with the UDLVRO of Crimes WUH DJDLQVW KXPDLW\ \$V 'XEOHU DQG .DO\N H[SODLQ ³W DJDLQVW KXPDLW\¶ LV QRUW, it is equally about piercing the veil of state sovereignty and invoking an international criminal jurisdiction because the perpetrators enjoy impunity due to state FRPSOLFLW\ LPSRW\¶¹⁹³ The Supreme Court for the British Zone advanced this idea in *Weller*,¹⁹⁴ a case handed down in 1948. This case concerned three German soldiers who, acting in a private capacity and, on their own initiative, committed atrocities against Jewish civilians. The Supreme Court held that crimes against humanity do not only include ³DFWLRQV ZKLFK DUH RUGHUHG DQG DSSURYHG E\ WKH also:

[W]hen those actions can only be explained by the atmosphere and conditions created by the authorities in power. The trial court was [thus] wrong when it attached decisive value to the fact that the DFFXVHG DIWHU KLV DFWLRQ ZDV μUHEXNHG¶ DQG WK disapproved of the excess as an isolated infringement. That this action nevertheless fitted into the persecution of Jews affected by the State and the party, *is shown by the fact that the accused . . . was not held criminally responsible in proportion to the gravity of his guilt.*¹⁹⁵

Therefore, the fact that the aggressor acted with a guarantee of impunity is a clear indicium that his or her act was part of the attack, because even if not aimed at advancing the policy, it was at least tolerated by the authority backing the attack.

acted under a cloak of impunity due to the general context of widespread or systematic abuses. Inhumane acts tolerated by the state or the organization promoting an attack on civilians are not isolated and unconnected crimes. Rather, they are linked to a higher authority and should be considered crimes against humanity to prevent their perpetrators from benefiting from *de facto* immunity.