

**MINDING THE IMPUNITY GAP IN
DOMESTIC PROSECUTIONS OF CRIMES
AGAINST HUMANITY UNDER
CUSTOMARY INTERNATIONAL LAW:
REFLECTIONS ON MARIANO GAITÁ 1 ¶ 6
ANALYSIS OF ARGENTINE
JURISPRUDENCE**

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3 U R I H V V R U * provides a detailed contribution from the Argentine legal perspective to existing scholarship on the definition of † F U L P H V D J D L The Argentine Example demonstrates some of the difficulties encountered during the truth and justice process when domestic prosecutions of serious human rights violations apply yet-to-be codified standards of international criminal law. In particular, Gaitán K L J K O L J K W V W K H O D F N R I X Q L I R U P F U L W H U L D X V H G D J D L Q V W K X P D On knowing atypical links between the criminal conduct and the underlying widespread or systematic attack.² Gaitán argues that the Argentine courts place too much emphasis on analyzing the nexus between the underlying act and the state or organizational po

humanity.³ Rather, Gaitán suggests that courts take a flexible approach and

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making treaty such as the Rome Statute,¹⁴ constitutes a source of international law that is distinct from customary international law,¹⁵ particularly when the treaty is not widely ratified. In addition, it is important to note that some states, scholars, and jurists take the position that customary international law is distinct from international humanitarian law and human rights law. The distinction is that customary international law serves as

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to identify *the precedents* WKDW FRPSULVH WKH GHILQLWLRQ
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 conclude unequivocally that the version of the definition that exists in the
 Rome Statute necessarily constitutes customary international law.

Therefore, I echo my concern that judges and practitioners both in the
 United States and abroad continue to refer generally to the Rome Statute as
 a source of codified customary international law. First, as states undertake

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LQWHUQD³WLRQDO ODZ .

To be clear, this is not to say that the Rome Statute and ICC
jurisprudence should be ignored as a reference or source of international
criminal law, that there are no principles of customary international law
interwoven among its articles, or that domestic courts should refrain from
looking to the Rome Statute for guidance when enacting laws that bridge the
impunity gap³² or provide domestic remedies for human rights violations.³³

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understated. However, the practical reality is that ending impunity for *j u*
cogis violations requires national jurisdictions t (ona)-s visduQ (ona)-s 2C be e onHÀÏ3O C5B3P3Xt-ÿ

‡ L Q F O X G L Q J W K H F R P S R D Q H O M D W J H O R D U W I R Q J J D W R] D W L R
 S R O L⁵ F T h e ' S p e c L D O 5 D S S R U W H X U F R Q F H G H G W K D W \$ U
 5 R P H 6 W D W X W H ‡ P L J K W E H L P S U R Y H G . D Q G
 ‡ G L V D J U H H B H O D M V G L Q J Z K H W K H U L W U H I O H F W V F X V
 O D⁴⁷ .

1 R W Z L W K V W D O G L Q J W K H ‡ Z L G H U D Q J H R I P L O R
 G L I I H⁴⁷ H o u d f i n d i n g t h e r e l a t i v e l y s m a l l n u m b e r o f n a t i o n a l l a w s
 w i t h S U R Y L V L R Q V V S H F L I L F W R⁴⁸ W F U H P H S H D L J D Q Q V W K
 5 D S S R U W H X U H e y o u r e c o m m e n d s t h a t t h e C o n v e n t i o n a d o p t t h e
 v e r b a t i m d e f i n i t i o n o f t h e c r i m e a s s e t f o r t h i n t h e R o m e S t a t u t e.⁴⁹ I n
 s u p p o r t o f h i s p r o p o s a l , t h e S p e c i a l R a p p o r t e u r c i t e d a n u m b e r o f
 c o n c e r n s , i n c l u d i n g f r a g m e n t a t i o n i n t h e f i e l d o f i n t e r n a t i o n a l c r i m i n a l l a w ,
 a n d h e e c h o e d t h e v i e w o f s i x s t a t e s t h a t w o r k o n t h e t o p i c m u s t a v o i d t h e
 u n i n t e n d e d c o n s e q u e n c e o f i n t e r f e r i n g Z L W K W K H , & & ¶ V V \ V W H P R
 F R P S O H P⁵⁰ H Q W D U L W \

I n w h a t m a y p o t e n t i a l l y s e r v e a s a c o u n t e r b a l a n c e t o t h e S p e c i a l
 5 D S S R U W H X U ¶ V D U J X P H Q W W R D G R S W W K H O D Q J X D
 r e p r e s e n t c u s t o m a r y i n t e r n a t i o n a l l a w , h e s e e m s t o s u g g e s t t h a t I C C
 j u r i s p r u d e n c e i n t e r p r e t i n g t h e d e f i n i t i o n o f c r i m e s a g a i n s t h u m a n i t y
 e s t a b l i s h e s a l o w t h r e s h o l d.⁵¹ A s t o t h e p o l i c y e l e m e n t t h a t i s t h e s u b j e c t o f I n t o A s u 6 (a s 45

well as a failure to act,⁵⁵ a showing of policy at the municipal level,⁵⁶ and a showing of motive, common features, and links between acts.⁵⁷ The element does not need to be formally established in advance of the attack;⁵⁸ it can be deduced from the repetition of acts, preparatory activities, or from a collective mobilization.⁵⁹ It can be established by showing a pattern,⁶⁰ does not need to be accurate or precise,⁶¹ may evolve over time,⁶² and need not be carried out by a State actor.⁶³ Also, the prosecutor must prove the individual

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d HIHQGDQW † KDG NQRZO HGHJH RI DOO F KDUDFWHULV
GHWDLOV RI WKH SODQ RU \$ROLF\ RI WKH 6WDWH R

By this comment, there are four points with which I hope to have succeeded in persuading practitioners and jurists to find comfort, without feeling like they are somehow betraying the nature and purpose of the ICC or the general progression of human rights and international criminal law. First, the entirety of the Rome Statute is not a general codification of customary international law (and so stating does not undermine its capacity for or contribution to ending impunity for the crimes enumerated in the Statute). Second, the lack of international consensus on the elements of the

FULPH † FULPHV DJDLQVW KXPDLW\ · SUHFOXGHV
LQWHUQDWLRQDO FRQVHQQV RQ WKH HOHPHQWV R
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55. *Id.* ¶ 141 (citing International Criminal Court, *Elements of Crimes*, U.N. Doc. PCNICC/2000/1/Add.2 at 5 (2000)).

56. *Id.* ¶ 142 (citing Situation in the Republic of Kenya, Case No. ICC-01/09, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ¶ 89 (Mar. 31, 2010)).

57. *Id.* ¶ 144 (citing Prosecutor v. Gbagbo, Case No. ICC-02/11-01/11, Decision on the

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accounts for the broad scope of factual scenarios in which a violation might occur.⁶⁷

Lawmakers and jurists at the national level should, therefore, incorporate a degree of flexibility to how the HOHPHQWV RI †FULPHV DJDL

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to or in I X U W K H U D Q F H R I D 6 W ⁷⁶ D A V D H R O U R V U E I D Q L F] D S A D L E R O C H D O
R I S U H F L V H G H I L Q L W L R Q ⁷³ T h e r e f o r e , a f l e x i b l e
approach to the definition that combines certain core elements with a number
of additional factors to consider, as, for example, those enumerated by the
Special Rapporteur concerning the policy element, would also enable courts
to apply the core elements of the crime with uniformity, while effectively