

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

Mariano Gaitán*

I.	INTRODUCTION	266
II.	THE DEFINITION OF CRIMES AGAINST HUMANITY AND THE NEXUS ELEMENT IN INTERNATIONAL CRIMINAL LAW	268
III.	THE APPLICATION OF THE LAW OF CRIMES AGAINST HUMANITY IN ARGENTINE JURISPRUDENCE	275
IV.	THE NEXUS ELEMENT OF CRIMES AGAINST HUMANITY IN ARGENTINE CASE LAW.....	282
	A. <i>The Federal Chamber of Cassation and the Supreme Court Rulings in the Levín Case.....</i>	283
	B. <i>The Federal Chamber of Cassation Rulings in the Saravia Case.....</i>	289
	C. <i>The Federal Chamber of Cassation ruling in the Molina Case.....</i>	292
V.	CRITICAL REMARKS TO THE ARGENTINE DOMINANT CRITERION ON THE NEXUS ELEMENT.....	296
VI.	CONCLUSION.....	301

* LL.M., Southwestern Law School (Los Angeles). Fulbright-Siderman Scholar. Professor, Universidad Nacional de José C. Paz (Argentina). I am grateful to Florencia Ini for research assistance and to Amanda Gutiérrez for text and footnote review. I also thank Alexis Álvarez Nakagawa and Agustín Cavana for their comments on the draft. I thank Pablo Parenti for providing me with some sources. Finally, I thank Florencia Sotelo for her support and the discussions on central ideas developed in this article.

I. INTRODUCTION

The question of how to distinguish crimes against humanity from common crimes has been present since the origin of this category of international crimes. Both types of crimes can be heinous and injure victims in a brutal way. What distinguishes a crime against humanity from a common crime is not its cruelty, but the fact that it forms part of a broader context of human rights violations that are promoted or tolerated by a state or an organization that exercises *de facto* power on a territory. To constitute a crime against humanity, a specific inhumane act such as murder, torture, or rape, must be committed “as part of” a widespread or systematic attack against a civilian population, pursuant to a policy of a state or an organization to commit such an attack.¹ It is the fact that the crime occurred within that context that makes it an issue of global concern. Thus, the nexus between an individual act and the attack is a vital element to determine whether it constitutes a crime against humanity or a violation of domestic criminal law.

However, the nexus element has not been thoroughly examined and properly defined in international criminal law. International criminal tribunals have made great efforts in defining other elements of crimes against humanity, such as “attack,” “widespread or systematic,” and “against any civilian population.” However, they have paid little attention to the requirement that the specific act be committed “as part of” an attack. One possible explanation for the under-explored nature of the nexus element is that the cases that reach international criminal tribunals are typically at the core of widespread or systematic attacks against civilian populations. United Nations *ad hoc* tribunals and the International Criminal Court (ICC) usually do not deal with borderline situations because they have a mandate to focus on major criminals and the gravest offenses.² In these cases, the nexus between specific acts and the attack is obvious and it does not require much elaboration.

Unlike international criminal tribunals, Argentine courts have faced numerous situations in which they had to decide whether an individual action was part of an attack. Argentine courts have been applying international criminal law for almost three decades, mainly in cases related to the immense violations of human rights committed during the last military dictatorship (1976-1983). As of December 2020, Argentine courts have handed down 250

1. Rome Statute of the International Criminal Court, art. 7, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

2. See S.C. Res. 1534, ¶ 5 (Mar. 26, 2004) (mandating that *ad hoc* Tribunals “concentrate on the most senior leaders suspected of being responsible”); Rome Statute, *supra* note 1, art. 17(1)(d) (stating that a case is inadmissible before the ICC when it “is not of sufficient gravity”).

sentences, and 1177 perpetrators have been convicted for crimes against humanity.³ As the prosecution of these crimes deepened, courts were required to judge events that were not typical instances of the criminal plan implemented by the military regime; they differed in some relevant respects from other acts that clearly formed part of the attack. These borderline cases were situated in the outer limits of the attack or in a grey area between the attack and isolated events. In addressing these cases, Argentine courts have elaborated different criteria to determine whether the acts formed part of an attack.

In this article, I pursue three goals. First, I review the most relevant cases in which Argentine courts have analyzed the nexus element of crimes against humanity. These cases may be of interest not only for their rationales, but also for the variety of situations examined therein. Argentine case law on the nexus requirement is quite unique but mostly unknown at international forums. For this reason, I briefly narrate the facts that prompted discussions on their link with the attack. While Argentine courts have addressed other contexts, elements and even the underlying acts of crimes against humanity,⁴ in this article I only comment on cases dealing with the nexus element. Second, I show that Argentine jurisprudence on this issue heavily relies on the correlation between the specific act and the policy behind the attack. When the act injures a victim or a group of victims who belonged to the targeted population, courts tend to consider that the specific act formed part of the attack, regardless of other circumstances that may differ from typical cases. Conversely, when victims had no political affiliation, and the acts seemed to have been committed for motives other than the regime's repressive policy, courts have concluded that those acts constitute common crimes, despite any similarities to other cases undisputedly within the scope of the attack. Third, I do not intend to establish a test to identify when an

3. *See generally* Ministerio Público Fiscal, Procuración General de la Nación, "Informe Estadístico Sobre el Estado de las Causas por Delitos de Lesa Humanidad en Argentina [Statistical Report About the State of Cases Concerning Crimes Against Humanity in Argentina] (2020) (Arg.), <https://www.fiscales.gob.ar/wp-content/uploads/2020/12/Lesa-informe-diciembre-1-2020.pdf>.

4. *See, e.g.*, Cámara Federal de Casación Penal [CFPC] [National Court of Appeal on Criminal Matters], 19/3/2014, "Paccagnini, Norberto Rubén / recurso de casación," sala III, No. 346,14 (Arg.) (analyzing the attack); Cámara Federal de Casación Penal [CFPC] [National Court of Appeal on Criminal Matters], 3/22/3011, "Salgado, José María / recurso de casación," sala II, No. 222/16 (Arg.) (analyzing the organization policy requirement); Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 24/8/2004, "Arancibia Clavel, Enrique Lautaro / homicidio calificado y asociación ilícita," Fallos (2004-327-3312) (Arg.) (considering the crime of illegal association as a crime against humanity); Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 10/05/2005, "Lariz Iriondo, Jesus María / solicitud de extradición," Fallos (2005-328-1268) (Arg.) (analyzing whether terrorist acts constitute crimes against humanity).

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 crimes against humanity. Then, it reviews the construction of the nexus element in the case law of international criminal tribunals and shows the importance of this element to tie the collective dimension of crimes against humanity to specific acts committed by individuals. Section III provides some theoretical and historical background to the application of the law of crimes against humanity in Argentine jurisprudence. It explains that Argentine courts apply international criminal law in domestic cases and how historical development led to the current discussion of the nexus requirement. Section IV analyzes the Argentine jurisprudence on the nexus element. It discusses the leading cases that have established the dominant legal standard on this matter, which, as I mentioned, is strongly tied to the policy element. Section V develops the three critical remarks to the dominant Argentine jurisprudence on the nexus element listed in the previous paragraph. Finally, Section VI summarizes and highlights the key ideas advanced in this article.

II. THE DEFINITION OF CRIMES AGAINST HUMANITY AND THE NEXUS ELEMENT IN INTERNATIONAL CRIMINAL LAW

Crimes against humanity have a collective nature in two senses. On the one hand, they are mass crimes because they are perpetrated on a large scale—against populations, not isolated individuals. On the other hand, they are systemic crimes, promoted or tolerated by states or organizations that exercise similar power in a territory. This characteristic makes them international crimes and thus justifies the international community's interest in their prosecution over the will of the states where they are committed.⁵ At

5. David Luban, *A Theory of Crimes Against Humanity*, 29 YALE J. INT'L L. 86, 95 (2004).

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 requirement was quickly dropped from the definition. In fact, a nexus with war is not required by the Allied Control Council's definition of crimes against humanity, which laid the basis for numerous trials in Germany after the Nuremberg trial.⁸ The nexus with an armed conflict reappeared in the

6. The International Military Tribunal ("IMT") of Nuremberg famously held: "Crimes against international law are committed by men, not abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." The Trial of German Major War Criminals, Proceedings of the International Military Tribunal of Nuremberg, Germany 223 (Oct. 1, 1946), https://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-I.pdf.

7. See Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Charter of the International Military Tribunal, art. 6, 82 U.N.T.S. 280 (Aug. 8, 1945) [hereinafter IMT Charter], which defines crimes against humanity as follows:

Murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in the execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Id. art. 6(a).

8. Article II (1)(c) of Control Council Law No. 10 defined crimes against humanity as follows: "Atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecution on political, racial or religious grounds, whether or not in violation of the domestic laws of the country where perpetrated." Punishment of Persons Guilty of

definition included in Article 5 of the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY).⁹ However, early ICTY case law dismissed this requirement as a jurisdictional element and not an element of the contemporary definition of crimes against humanity under customary law.¹⁰ The definition adopted in Article 3 of the Statute of the International Criminal Tribunal for Rwanda (ICTR) did away with the war nexus and instead introduced the key contextual element of the modern definition of crimes against humanity, that is, the “widespread or systematic attack against any civilian population.”¹¹ Nevertheless, it added a requirement of discriminatory intent (“on national, political, ethnic, racial or religious grounds”), which has also been dismissed as a jurisdictional element in ICTR case law.¹²

In the absence of a specific convention on crimes against humanity, the definition adopted in Article 7 of the Rome Statute for the International Criminal Court (ICC) can be regarded as the crystallization of the contemporary definition of this international crime, which has reached broad consensus in the international community.¹³ Accordingly, Article 7 sets out the *chapeau* of the definition of crimes against humanity as follows:

For the purpose of this Statute, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with

War Crimes, Crimes Against Peace and Against Humanity, Control Council Law No. 10, Dec. 20, 1945, 3 Official Gazette Control Council for Germany 50 (1946), *reprinted in* 1 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 XVI-XIX (1949).

9. Article 5 defines crimes against humanity as: “the following crimes when committed in armed conflicts, whether international or internal in character, and directed against any civilian population: (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecution on political, racial and religious grounds; (i) other inhumane acts.” S.C. Res. 827, art. 5 (May 25, 1993), https://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf [hereinafter ICTY Statute].

10. Prosecutor v. Tadić, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 140 (Int’l. Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

11. Article 3 of ICTR Statute defines crimes against humanity as follows:

The [ICTR] shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds: (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; (i) other inhumane acts.

S.C. Res. 955 (Nov. 8, 1994), https://unictr.irmct.org/sites/unictr.org/files/legal-library/941108_res955_en.pdf [hereinafter ICTR Statute].

12. Prosecutor v. Akayes, Case No. ICTR-96-4-A, Appeals Chamber Judgment, ¶ 464, (June 1, 2001).

13. Rome Statute, *supra* note 1, art. 7.

knowledge of the attack . . . For the purpose of paragraph 1: (a) “Attack directed against any civilian population” means a course of 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 attack¹⁴

These context elements reflect the collective nature of crimes against humanity, and they seek to exclude isolated or random acts from the scope of this category of international crimes. The term “attack” refers to the event 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 emphasized “[t]he requirement that the acts form part of a ‘course of conduct’ shows that the provision is not designed to capture single isolated acts,¹⁶ but ‘describes a series or overall flow of events as opposed to a mere aggregate of random acts.’”¹⁷ The term “population” also conveys the idea of mass crimes. Crimes against humanity are directed against populations, not to one individual or a group of randomly selected individuals. As Werle and Jassberger point out, “this criterion emphasizes the collective nature of the crime, thus ruling out attacks against individuals and isolated acts of violence.”¹⁸

Furthermore, attacks are characterized as widespread or systematic. “Widespread” refers to the attack’s “large-scale nature” and “the number of targeted persons.”¹⁹ Unlike “systematic,” which “reflects the organised nature of the acts of violence and the improbability of their random occurrence.”²⁰ These terms are directed to exclude ordinary criminality. As Margaret McAuliffe deGuzman explains, “[i]t is this element that turns these crimes 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 Gbagbo (June 12, 2014), https://www.icc-cpi.int/CourtRecords/CR2015_04777.PDF).

18. GERHARD WERLE & FLORIAN JESSBERGER, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW 380 (4th ed. 2020).

19. *Bemba*, Case No. ICC-01/05-01/08-3343, ¶ 163 (citing *Katanga*, Case No. ICC-01/04-01/07-3436, ¶ 1123).

20. *Katanga*, Case No. ICC-01/04-01/07-3343, ¶ 1123 (citing Prosecutor v. Harun, Case No. ICC-02/05-01/07-1-Corr, Decision on the Prosecution Application under Article 58(7) of the Statute, ¶ 62 (Apr. 27, 2007), https://www.icc-cpi.int/CourtRecords/CR2007_02899.PDF).

particular individuals.”²¹ The ICC in *Katanga* expressed that “the attack must be widespread or systematic, implying that the acts of violence are not spontaneous or isolated.”²²

In addition, the attack must be carried out in pursuance of a policy of a state or an organization. The policy element is controversial and has motivated intense debates in international tribunals case law²³ and among scholars.²⁴ Nevertheless, this requirement has entered positive law under Article 7(2)(a) of the Rome Statute. As the drafting history of the Rome Statute shows, this element was included as a complement to the disjunctive characterization of the attack as generalized or systematic to prevent isolated events from falling into the category’s scope.²⁵ The requirement of systematicity excludes common and random crimes since it requires the acts to be connected and organized. However, this is not the same case with the widespread requirement, which is satisfied with the mere accumulation of a significant number of cases. Without any additional requirement, this characterization would allow an isolated act, such as a murder, committed in a context of high crime rates to be considered a crime against humanity.²⁶ However, some early ICC decisions practically assimilated the policy requirement to the concept of systematicity by demanding the demonstration of a “regular pattern” between the different acts.²⁷ In *Katanga*, the ICC Trial Chamber expressly revised that assertion. It established that “[p]olicy,” within the meaning of Article 7(2)(a) of the Statute, refers essentially to the fact that a State or organization intends to carry out an

21. Margaret McAuliffe deGuzman, *The Road from Rome: The Developing Law of Crimes Against Humanity*, 22 HUM. RIGHTS Q. 335, 375 (2000).

22. See *Katanga*, Case No. ICC-01/04-01/07-3436, ¶ 1123.

23. See generally *Tadić*, Case No. IT-94-1-AR72, ¶ 653 (expressing crimes against humanity warrant intervention by international community). *But cf.* Prosecutor v. Kunarac, Case No. IT-96-23-T& IT-96-23/1-T, Judgment, ¶ 104 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001) (rejecting the assertion that a policy element is required under customary law).

24. See generally deGuzman, *supra* note 21; Guénaël Mattraux, *The Definition of Crimes Against Humanity and the Question of a “Policy” Element*, in FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY (Leyla Nadia Sadat, ed. 2011) (opposing the policy element). *Cf.* William A. Shabas, *State Policy as an Element of International Crimes*, 98 J. CRIM. L. & CRIMINOLOGY 958 (1978); Darryl Robinson, *Crimes Against Humanity: A Better Policy on ‘Policy,’* in THE LAW AND PRACTICE OF THE INTERNATIONAL CRIMINAL COURT (Carlsen Stahn, ed. 2014); Kai Ambos & Steffen Wirth, *The Current Case Law of Crimes Against Humanity: An Analysis of UNTAET Regulation 15/2000*, 13 CRIM. L. F. 1 (2002) (supporting the policy element).

25. See deGuzman, *supra* note 21, at 372.

26. See generally Robinson, *supra* note 24; Ambos & Wirth, *supra* note 24, at 30.

27. Prosecutor v. Gbagbo, Case No. ICC-02/11-01/11-9-Red, Decision on the Prosecutor’s Application Pursuant to Article 58 for a Warrant of Arrest Against Laurent Koudou Gbagbo, ¶ 37 (Nov. 30, 2011).

attack against a civilian population, whether through action or deliberate failure to take action.”²⁸ In this way, the ICC made it clear that this requirement establishes a low threshold and simply implies that the acts that make up the attack must be in some way connected to the designs of a state or organizational entity.

As noted above, the *chapeau* elements describe the broader context within which a specific act must take place to constitute a crime against humanity. These elements reflect the collective dimension of this type of international crime. However, a court may hold a person liable for a crime against humanity for committing a single act against a single victim, if act is part of a widespread or systematic attack against a civilian population.²⁹ Thus, it is the attack, not the individual act, which has a necessary collective dimension. Certainly, in most cases, the link between the individual act and the attack will be apparent and will not require much examination. However, in borderline cases, the question of how to establish that the individual act genuinely forms part of an attack becomes crucial.

The statutory definitions of crimes against humanity offer little guidance on interpreting the nexus element. The IMT Charter is silent on this issue because it was aimed to hold accountable the highest leaders of the Nazi regime.³⁰ The ICTY Statute requires the crimes be “committed in armed conflict . . . and directed against any civilian population.”³¹ The ICTR³² and Rome Statutes³³ only require the punishable act to be committed “as part of” the attack.

The *ad hoc* tribunals jurisprudence on the nexus element is scarce compared to other elements of the definition of crimes against humanity. The early ICTY decisions focused on the analysis of the nexus with the armed conflict and the characterization of the attack as generalized or systematic.³⁴ The Appeals Chamber in *Tadic* briefly mentioned that “the crimes must be committed in the context of widespread or systematic crimes directed against a civilian population,”³⁵ seemingly establishing a low threshold for the

28. *Kantanga*, Case No. ICC-01/04-01/07-3436, ¶ 1108.

29. *See Kumarac*, Case No. IT-96-23-T& IT-96-23/1-T, ¶ 418; Prosecutor v. Kayishema, Case No. ICTR-95-1-T, Judgment, ¶ 147 (May 21, 1999); ROBERT CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 243-244 (2014).

30. *See* IMT Charter, *supra* note 7.

31. ICTY Statute, *supra* note 9.

32. ICTR Statute, *supra* note 11.

33. *See* Rome Statute, *supra* note 1.

34. Göran Sluiter, “*Chapeau Elements*” of Crimes Against Humanity in the Jurisprudence of the UN Ad Hoc Tribunals, in FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY 139 (Leila Nadya Sadat ed., 2011).

35. *Tadić*, Case No. IT-94-1-AR72, ¶ 255; *accord* Sluiter, *supra* note 34.

required connection between the act and the attack. It was not until *Kunarac* when the Trial Chamber seriously examined the nexus requirement and held:

There must exist a nexus between the acts of the accused and the attack, which consists of: (i) the commission of an act which, by its nature or consequences, is objectively part of the attack; coupled with (ii) knowledge on the part of the accused that there is an attack on the civilian population and that his act is part of the attack.³⁶

This two-pronged test has the merit of recognizing that the nexus element requires the verification of an objective connection between the act and the attack in terms of *actus reus*. However, it fell short in elaborating the criteria to establish this objective connection. In particular, the expression “by its nature and consequences” is too vague to serve as a proper guideline in difficult cases. For its part, the ICTR Trial Chamber in *Semaza*³⁷ advanced a few more criteria to determine the link between the act and the attack, holding: “[a]lthough the act need not be committed at the same time and place as the attack or share all of the features of the attack, it must, by its characteristics, aims, nature, or consequence objectively form part of the . . . attack.”³⁸

The ICC case law on the nexus element is slightly more precise. In the *Katanga* judgment, the ICC Trial Chamber provided further guidance to establish the nexus between a punishable act and the attack:

[T]he individual act must be committed as part of a widespread or systematic attack. In determining whether an act within the ambit of article 7(1) of the Statute forms part of a widespread or systematic attack, the bench must, with due regard for the nature of the act at issue, the aims it pursues and the consequences it occasions, inquire as to whether it is part of the widespread or systematic attack, considered as a whole, and in respect of the various components of the attack (i.e. not only the policy but also, where relevant, the pattern of crimes, the type of victims, etc.). Isolated acts that clearly differ in their nature, aims and consequences from other acts that form part of an attack, fall out with article 7(1) of the Statute.³⁹

Rather than strict criteria, these are general guidelines to examine the nexus on a case-by-case basis. According to the ICC, no one element determines whether an act is part of the attack. However, courts must consider, on the one hand, the nature, objectives, and consequences of the

36. *Kunarac*, Case No. IT-96-23-T& IT-96-23/1-T, ¶ 418 (footnote omitted).

37. Prosecutor v. Semanza, Case No. ICTR-97-20-T, Judgement and Sentence (May 15, 2003), <https://unictr.irmct.org/sites/unictr.org/files/case-documents/ict-97-20/trial-judgements/en/030515.pdf>.

38. *Id.* ¶ 326.

39. *Katanga*, Case No. ICC-01/04-01/07, ¶ 1124.

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 applicable law, which has been described as a process of “double classification.”⁴⁴ On the one hand, 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'L CRIM. L. REV. 491 (2010).

41. See Jose Sebastian Elias, *Constitutional Changes, Transitional Justice, and Legitimacy: The Life and Death of Argentina's "Amnesty" Laws*, 31 HASTINGS INT'L & COMP. L. REV. 587, 627 (2008).

42. Francesca Lessa, *Beyond Transitional Justice: Exploring Continuities in Human Rights Abuses in Argentina Between 1976 and 2010*, 3 J. HUM. RTS. PRAC. 25, 34-35 (2011).

43. Crimes against humanity entered Argentine positive law in January 2007. Law No. 26.200, Jan. 9, 2007, [31.069] B.O., <https://www.boletinoficial.gov.ar/detalleAviso/primera/9108731/20070109?busqueda=1> (last visited Aug. 4, 2021) (implementing the Rome Statute).

44. Parenti, *supra* note 40, at 503.

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, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.).

46. CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 144 (Arg.).

47. *Id.* art. 80.

48. Parenti, *supra* note 40, at 501 (explaining that Argentine case law “has generally stressed the existence of legal crime definitions that already prohibited certain conducts at the moments of the crimes” and arguing that “the legal principle established in Article 18 of the National Constitution is undoubtedly satisfied in its more noticeable spheres: the *legal crime definitions* and the *penalty*”).

49. *See generally*, SEBASTIAN BRETT, HUM. RTS. WATCH, VOL. 13, ARGENTINA: RELUCTANT PARTNER: THE ARGENTINE GOVERNMENT’S FAILURE TO BACK TRIALS OF HUMAN RIGHTS VIOLATORS (2001).

50. Cámara Nacional de Apelaciones en lo Criminal y Correccional Federal de la Capital Federal [CNCrim. y Corr.] [National Court of Criminal and Correctional Appeal of the Federal Capital], sala 2, 9/12/1985, “Videla, Jorge Rafael / homicidio, privación ilegal de la libertad y tormentos,” Fallos, (1985-309-33), <https://www.mpf.gov.ar/Institucional/UnidadesFE/Tomo309-005-completo.pdf>.

51. *Id.*

defendants were acquitted on some counts by application of statutory limitations.⁵²

Furthermore, Argentine courts initially upheld the Full Stop Law and the Due Obedience Law⁵³ passed during President Raúl Alfonsín's administration and under pardons⁵⁴ granted by President Carlos Menem. These laws foreclosed the prosecution of the dictatorship's crimes. The Supreme Court upheld the constitutionality of the Due Obedience law in the *Camps* case.⁵⁵ It affirmed that Congress was authorized to enact amnesty laws without considering whether it was admissible under international law to pass an amnesty law for such crimes as those committed during the dictatorship. In the *Hagelin* case,⁵⁶ the Supreme Court again confirmed the validity of the Due Obedience law. It expressly rejected the claim for the application of the Convention on the Non-Applicability of War Crimes and Crimes Against Humanity because Argentina had not ratified that treaty. In the same way, in the *ESMA* case,⁵⁷ the Supreme Court affirmed that the Convention against Torture did not affect the constitutionality of the Due Obedience law since it was an *ex post facto* norm with more burdensome consequences. Finally, in the *Riveros*⁵⁸ and *Aquino*⁵⁹ cases, the Supreme Court upheld pardon decrees and expressly rejected the claim that they granted impunity to "those responsible for crimes against humanity [in

52. CARLOS SANTIAGO NINO, RADICAL EVIL ON TRIAL 90-93 (1998).

53. See Law No. 23.492, Dec. 23, 1986, [26.058] B.O. (precluding any prosecution after a short period from the entry into force of the law); Law No. 23.521, June 8, 1987 [Suplemento Especial] B.O. (barring the prosecution of low and medium ranked members of armed and security forces who committed abuses during the dictatorship under the assumption that they acted in compliance of superior orders).

54. Decreto No. 1002/1989, Oct. 6, 1989, [26.736] B.O.

55. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 22/06/1987, "Camps, Ramón Juan Alberto / Causa incoada en virtud del decreto 280/84 del Poder Ejecutivo Nacional," Fallos (1987-310-1162) (Arg.).

56. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 25/02/1988, "Hagelin, Ragnar c. teniente de navío Alfredo Ignacio Astiz / Recurso de hecho deducido por Ragnar Erland Hagelin en la causa Hagelin, Ragnar / denuncia c. Tte. de Navío Alfredo Ignacio Astiz," Fallos (1988-311-175) (Arg.).

57. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 29/03/1988, "Escuela De Mecanica de la Armada / ESMA – Hechos que se denunciaron como ocurridos," Fallos (1988-311-401) (Arg.).

58. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 11/12/1990, "Riveros, Santiago Omar / privación ilegal de la libertad, tormentos, homicidios, etc.," Fallos (1990-313-1392) (Arg.).

59. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 14/10/1992, "Aquino, Mercedes / plantea inconstitucionalidad del decreto 1002/89," Fallos (1992-315-2421) (Arg.).

violation] of the norms and principles of contemporary international criminal law.”⁶⁰

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 *Schwamberger* 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], 30/8/1989, “Schwamberger, Josef / extradición,” J.A. (1989-XII-27) (Arg.).

62. *Id.*

63. Judge Schiffrin states:

“In sum, I believe that the National Constitution submits the Argentine state to the 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 crimes.”

Id. at 3.

64. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 2/11/1995, “Priebke, Erich / solicitud de extradición – causa nro. 16.063/94,” Fallos (1995-318-2148) (Arg.).

65. *Id.*

of international criminal law was the *Arancibia Clavel* case,⁶⁶ decided in 2004. The case was about the extradition of a member of the Chilean intelligence accused of conspiracy and the murder of two political dissenters to General Augusto Pinochet's regime who were granted asylum in Argentina in 1974.⁶⁷ Departing from previous precedents, the majority of the Supreme Court classified the acts as crimes against humanity under international criminal law and applied the Convention on the Non-Applicability of War Crimes and Crimes Against Humanity.⁶⁸ Justices Zaffaroni and Highton, in the leading opinion, stated that this convention only affirmed the non-applicability of statutory limitations, which was a rule already in force under international customary law.⁶⁹

Argentine courts finally applied the category of crimes against humanity to human rights violations committed during the dictatorship in the *Simón* case.⁷⁰ This case constitutes a milestone in the process of truth and justice in Argentina. Julio Simón was a member of the Federal Police responsible for the illegal detention and torture of José Poblete and Gertrudis Hlaczik, two members of the Peronist Youth. Both members were held captive in the clandestine detention center known as "El Olimpo" [the Olympus] and remain *desaparecidos* [disappeared]. Abuelas de Plaza de Mayo and the Center for Legal and Social Studies (CELS), two leading human rights organizations in Argentina, chose this case to challenge amnesty laws' constitutionality and reopen the path for the prosecution of human rights violations. In 2001, a federal judge in Buenos Aires declared, for the first time, the Full Stop law and the Due Obedience law to be unconstitutional.⁷¹ In 2005, the Supreme Court confirmed this ruling. It held that these laws violated the Inter-American Convention on Human Rights and the Argentine Constitution because they prevented the prosecution of gross violations of human rights committed during the military regime.⁷² Most justices relied on the Inter-American Court of Human Rights (IACHR) ruling in the *Barrios*

66. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 23/8/2004, "*Arancibia Clavel*, Enrique Lautaro / homicidio calificado y asociación ilícita," Fallos (2004-327-3312) (Arg.).

67. Lisl Brunner, *Leaning on International Law to Prosecute the Past: The Arancibia Clavel Decision of the Argentine Supreme Court*, 10 OR. REV. INT'L L. 243, 249 (2008).

68. CSJN, 23/8/2005, "*Arancibia Clavel*," Fallos (2004-327-3350).

69. *Id.* at 3355.

70. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 14/6/2005, "*Simón, Julio Héctor / privación ilegal de la libertad, etc. causa no. 17.768*," Fallos (2005-328-2056) (Arg.).

71. *Id.* at 2153.

72. *Id.*

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 analysis of the elements of crimes against humanity or explain why the acts fell into this category. Seemingly, most justices assumed that this conclusion was obvious since the facts referred to gross human rights violations committed by a state agent against political dissenters as part of the plan of illegal repression implemented by the military government. Only two justices provided some foundation for the classification of the acts as crimes against humanity. Justice Lorenzetti stated that illegal detentions, tortures, and forced disappearances fall into the category of crimes against humanity because these crimes contain the following elements: (1) they affect the person as a member of “humanity,” and (2) they are committed by a state agent in the execution of a governmental action, or by a group with the capacity to exercise state-like dominion over a territory.⁷⁵ Likewise, Justice Argibay stated:

[T]he criterion most compatible with the development and current state of international law characterizes a crime against humanity as an action committed by a state agent in the execution of a government action or program. The description of the conduct attributed to the defendant Julio Simón includes the circumstances of having acted in his capacity as a member of the Argentine Federal Police and within the framework of a systematic plan aimed at the persecution of people for political reasons.⁷⁶

In the *Mazzeo* case,⁷⁷ the Supreme Court reversed its rulings in *Riveros* and *Aquino* and struck down the pardons that have benefited hundreds of perpetrators of human rights abuses. Again, the Court relied on the IACHR’s jurisprudence and international criminal law arguments to conclude that pardons were unconstitutional because they barred the investigation of crimes against humanity and the prosecution and punishment of those

73. *Barrios Altos v. Peru*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 75, (Mar. 14, 2001), https://www.corteidh.or.cr/docs/casos/articulos/seriec_75_ing.pdf.

74. CSJN, 14/6/2005, “Simón,” Fallos (2005-328-2153).

75. *Id.* at 2296 (Lorenzetti, R., concurring).

76. *Id.* at 2318 (Argibay, C., concurring) (citation omitted).

77. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 13/7/2007, “Mazzeo, Julio Lilo / recurso de casación e inconstitucionalidad,” Fallos (2007-330-3248) (Arg.).

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 Attorney General's opinion, the Supreme Court refused to characterize the events as crimes against humanity. The decision is built on two main arguments. First, it analyzes the foundation of the international community's interest in prosecuting this type of crime. Relying on David Luban's theory of crimes against humanity,⁸⁰ it argues that the distinctive feature of these crimes is that they injure the universal characteristic of humans as "political animals" because the political organizations that should allow human beings to coexist in society become perverse machineries against them.⁸¹ From there, the Court posits that a general test to determine whether an atrocious act is a crime against humanity could be to ask if it "can be considered the product of a despotic and depraved exercise of governmental power."⁸² 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 "become a perverse machine of systematic and organized persecution of a group of citizens."⁸³ Second, the sentence analyzes the requirements of 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;
- (2) that were carried out as part of "a widespread or systematic attack;"
- (3) that this attack was directed against a civilian population;
- 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], 11/7/2007, "Derecho, René Jesús / incidente de prescripción de la acción penal causa No. 24.079," Fallos (2007-330-3074) (Arg.).

79. *Id.*

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

81. CSJN, 11/7/2007, "Derecho," Fallos (2007-330-3083).

82. *Id.*

83. *Id.*

84. *Id.* at 3084-85.

85. *Id.* at 3086.

The *Simón* and *Mazzeo* cases concerned paradigmatic acts of state terrorism: illegal deprivations of liberty, tortures, murders, and forced disappearances committed by state agents against political dissidents, in conformity with the policy of illegal repression implemented by the military government. These events were at the core of the widespread and systematic attack deployed against a portion of the civilian population in the '70s. For this reason, the Supreme Court classified them as crimes against humanity without an in-depth analysis of the elements of this category, and without examining the required nexus between the specific acts and the broad context of the attack. Conversely, in *Derecho*, it was clear that the event was an isolated act of torture committed during the democratic regime, outside the context of a widespread or systematic attack on civilians. Nor in this case did the Court need to consider the nexus element because it had previously concluded that there was no attack of which the single event could form part.

IV. THE NEXUS ELEMENT OF CRIMES AGAINST HUMANITY IN ARGENTINE CASE LAW

As the process of truth and justice for the dictatorship's crimes deepened, Argentine courts were confronted with cases situated in a grey area between *Simón/Mazzeo* and *Derecho*. They shared features with cases that formed part of the attack but, at the same time, they differed in some relevant respects. In these cases, the events presented one or more of the following distinctive characteristics: (a) they injured victims that did not belong to the targeted population of the attack; (b) they did not follow the same pattern of the attack or were beyond the plan; (c) they were committed on the particular grounds of the perpetrators and not pursuant to the repressive policy that inspired the attack; (d) they were perpetrated by individuals who did not belong to the criminal apparatus created by the regime to carry out the attack; and (e) they were committed out of the apparent temporal scope of the attack.

In these borderline situations, courts had to thoroughly analyze the nexus element and develop different criteria to determine when an individual inhumane act was part of the widespread and systematic attack against civilians deployed by the military government. The dominant criterion applied by the Federal Cassation Chamber, and arguably by the Supreme Court, focuses on the correspondence between the specific act and the policy element of the attack. It gives decisive weight to the fact that the victim belongs to the targeted population of the attack. The leading cases establishing this criterion are discussed below.

A. *The Federal Chamber of Cassation and the Supreme Court Rulings in the Levín Case*

The leading case on the nexus element is *Levín*,⁸⁶ and it is so far the only case in which the Supreme Court has seriously examined the issue. In this case, the Supreme Court highlighted the importance of an act's conformity with the policy behind the attack to determine the nexus yet set a low evidentiary requirement to prove this fact.⁸⁷ The case concerned the illegal imprisonment and torture of sixteen workers of the transportation company La Veloz del Norte in the province of Salta, committed by agents of the local police between December 1976 and January 1977.⁸⁸ The victims were held captive in inhumane conditions in a police station, tortured with *picana eléctrica* [electric shocks], and severely beaten.⁸⁹ This case was peculiar because these events occurred in the context of a criminal investigation where the owner of the company, Marcos Levín, filed a complaint accusing his employees of fraud.⁹⁰ Thus, the issue was whether these crimes were part of the attack carried out by the military government, at that time or whether they were isolated abuses committed in the exercise of police duties.⁹¹

The procedural history of the *Levín* case is complex and shows the struggle of Argentine courts in discerning when an act is part of the attack. In 2012, Federal Judge No. 1 of Salta indicted Levin and two policemen for the crimes committed against only one of the victims, Víctor Cobos.⁹² The court understood that this case could only be classified as a crime against humanity because Cobos was a union representative, and his family was persecuted on political grounds during the military regime.⁹³ Regarding the torture of the remaining victims, the judge concluded that they were not crimes against humanity because they had been carried out “on occasion and as a consequence of the fulfillment by the police forces of tasks related to the repression of common crimes, without a pattern or a widespread or systematic attack against a certain group of citizens.”⁹⁴ Therefore, the federal

86. Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 18/9/2018, “Levín, Marcos Jacobo / imposición de tortura,” Fallos (2018-341-1207) (Arg.).

87. *See, e.g., id.* at 1215.

88. *Id.* at 1217.

89. *Id.* at 1218.

90. *Id.*

91. *Id.* at 1210-11.

92. Juzgado Federal de Salta N° 1 [Juzg. Fed. Sta. N° 1] [Federal Court of Salta No. 1], 15/10/2012, “Cobos, Victor Hugo / su denuncia / apremios ilegales,” <http://www.cij.gov.ar/http://www.cij.gov.ar/d/doc-5600.pdf>.

93. *Id.* at 28.

94. *Id.* at 82.

court referred the proceedings to an ordinary court of the province of Salta.⁹⁵ From that moment on, the case split into two parts and, eventually, both reached the Federal Chamber of Cassation. First, the prosecutor's appeal of the referral of the investigation of torture against the remaining victims to an ordinary court; and second, the defendants' appeal of their conviction for torture against only one victim (V́ctor Cobos). In two separate decisions, Chamber III held that neither of those events constituted crimes against humanity and confirmed the lower court's finding that it lacked federal jurisdiction.⁹⁶ The court reversed the conviction of Levin and the other defendants.⁹⁷

The jurisdictional decision in the *Levín* case was handed down in 2014.⁹⁸ In his leading opinion, Judge Riggi relied on the Supreme Court precedent in *Derecho* to establish an "objective and general criterion"⁹⁹ to distinguish common crimes from crimes against humanity. He recalled that the Supreme Court highlighted the distinctive characteristics of crimes against humanity as such: (a) they are serious crimes listed in Article 7(1) of the Rome Statute, (b) committed as part of a widespread or systematic attack, (c) directed against a civilian population, and (d) carried out in accordance with a state policy.¹⁰⁰ Applying these guidelines to the case, Judge Riggi concluded that "the sole motive of the arrests suffered by the employees of *La Veloz del Norte* was the investigation of an [ordinary] crime"¹⁰¹ and that the torture of the detainees "aimed to obtain information on the people involved in a fraud."¹⁰² For this reason, "[these crimes] do not have the characteristics of a generalized or systematic attack, nor are they in conformity with a state policy,"¹⁰³ but rather "constituted isolated events guided by the executors' personal interest, and unrelated to the policy of repression carried out during the last military government."¹⁰⁴ In her dissenting opinion, Judge Figueroa pointed out how the detainees were interrogated for their political and union activity, one of the defining characteristics of the repressive activity of that

95. CSJN, 18/9/2018, "Levín," Fallos (2018-341-1225).

96. *Id.* at 1217.

97. Cámara Federal de Casación Penal [CFPC] [Federal Court of Appeal on Criminal Matters], 20/11/2014, "Levín / recurso de casación," sala III, No. 2495/14 (Arg.); Cámara Federal de Casación Penal [CFPC] [Federal Court of Appeal on Criminal Matters], 4/10/2017, "Levín / recurso de casación," sala III, No. 1112/17 (Arg.).

98. CFPC, 4/10/2017, "Levín," sala III, No. 1112/17.

99. *Id.* at 11.

100. *Id.* at 11-12.

101. *Id.* at 14.

102. *Id.*

103. *Id.* at 13.

104. *Id.* at 14.

time.¹⁰⁵ She concluded that the acts of torture were committed through the systematic and generalized attack against workers suspected of having any trade union activity and using the repressive apparatus (the Police of the Province of Salta) set up for those purposes.¹⁰⁶

In 2017, the Federal Chamber of Cassation III issued the Decision on the Merits of Levin's conviction for the Cobos' case.¹⁰⁷ Judge Riggi also wrote the leading opinion. He once again relied on the Supreme Court precedent in *Derecho* and concluded that the events suffered by Cobos were not committed in the context of a widespread or systematic attack, nor in accordance with the policy of the last military government.¹⁰⁸ He reiterated that the crimes were motivated by the personal interest of the perpetrators in investigating an alleged fraud against the company.¹⁰⁹ He added that although Cobos was a union representative, that fact was insufficient to contradict the conclusion since the prosecution did not prove that the actual reason for his arrest had to do with his political activity.¹¹⁰ Then, Judge Riggi highlighted that Cobos' arrest was not handled clandestinely, but on the contrary, the detention was reported to a court and a proceeding was initiated.¹¹¹ The Chamber regarded this feature as a significant difference with regard to other acts classified as crimes against humanity. In those typical cases, the events included "plural and successive criminal behaviors . . . carried out by members of the armed and security forces, among them, breaking and entering, kidnapping people from their homes or on public areas, torturing detainees, committing homicides and disappearances of massive numbers of human beings."¹¹² In short, Judge Riggi advanced two arguments for which he considered that the acts were not part of the attack. First, the perpetrators acted out of motivations linked to the investigation of a common crime, and not pursuant to the repressive policy promoted by the military government.¹¹³ Second, the *modus operandi* of the acts significantly differed from other cases considered part of the attack, particularly because they were not

105. *Id.* at 17-18 (Figuerola, J. dissenting).

106. *Id.* at 18 (Figuerola, J. dissenting).

107. Cámara Federal de Casación Penal [CFPC] [Federal Court of Appeal on Criminal Matters], 4/10/2017, "Levin / recurso de casación," sala III, No. 1112/17 (Arg.).

108. *Id.* at 23.

109. *Id.*

110. *Id.* at 18.

111. *Id.* at 25.

112. *Id.* at 27.

113. *Id.* at 23.

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 commission of a fraud. It cited a precedent stating that “the denunciation of crimes against property was a way of concealing other real motivations” of some arrests during the military regime.¹¹⁸ Then the Court admonished the Federal Chamber of Cassation for having conducted an overly-formalistic assessment of the evidence, ignoring “the specific circumstances” of the case, particularly that the victims also alleged they were interrogated for their political and union activities.¹¹⁹ According to the Supreme Court, the repression of trade unions was precisely one of the objectives pursued by state terrorism. The Court conducted its own analysis of various elements of proof to conclude that the policy behind the attack was not directed exclusively against subversive organizations but also included workers organized in unions.¹²⁰ The Court then held:

[W]hat is decisive is that, starting from the premise that the policy of state terrorism motivated a systematic attack that included all kinds of violations of the human rights of those who were linked to political and union activities . . . and considering that in this particular case some victims reported having been tortured to obtain information regarding their connection and that of their

114. *Id.* at 27.

115. *Causa Marcos Levín: siguen los procesamientos por torturas en la dictadura*, EL TRIBUNO (Dec. 17, 2020, 4:53 PM), <https://www.tribuno.com/salta/nota/2020-12-17-10-49-0-siguen-los-procesamientos-por-torturas-en-la-veloz-en-la-dictadura>.

116. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 18/9/2018, “Levin, Marcos Jacobo / imposición de tortura,” Fallos (2018-341-1207) (Arg.).

117. *Id.* at 1224-25. (The majority was confirmed by Justices Lorenzetti, Highton, and Maqueda. Justices Rozenkratz and Rosatti were absent and did not issue an opinion).

118. *Id.* at 1220-21.

119. *Id.*

120. *Id.* at 1221-22. (The Court looked at the “Plan del Ejército” [Military Plan], a secret plan set out by dictator General Videla prior to the coup of 1976, which identified the actions to be carried out in the following month, and specifically listed some political and union organizations as priority “opponents.” The Court also relied on different regulations of the military government against unions. Finally, it cited the sentence in the Trial of the Juntas, where it was proven that through internal orders, the military directed its attack on the workers of the companies, among other objectives).

acquaintances with these activities, it cannot but be concluded that these facts could constitute concrete executive acts of the attack deployed by the last military government.¹²¹

In the Supreme Court's view, if the act is directed against a person who belongs to the population selected as the target of the repressive policy, then it constitutes "an executive act of the attack," so it is undoubtedly part of it. Executive acts of the attack directly aim to comply with or advance the policy that inspires the attack. To determine the correspondence between the act and the political objectives of the attack, the Court regarded the "specific circumstances" and the "real nature of the facts."¹²² In the case, the Court considered decisive victims' testimony that they were questioned for their political and union activities during torture.¹²³ In this way, the Supreme Court intended to establish an objective test that does not depend on the motivations of individual perpetrators.

Regarding the torture of the remaining victims who did not claim to have been questioned about their union or political affiliation, the Court briefly affirmed that the investigation should also continue before the same federal court for a "more effective and efficient administration of justice."¹²⁴ In other words, the Court did not analyze whether these events were also part of the attack. This omission is striking because if it were concluded that acts not "concrete executive acts of the attack" do not form part of such attack, then they would be ordinary crimes and any criminal prosecution would be precluded by the statute of limitations. One possible interpretation is that the Court ordered the investigation to continue to determine whether in those cases the victims were also arrested and tortured because of their union or political activities. Yet another possibility is that the Court did not feel the need to address the difficult question of whether those cases still could be sufficiently connected to the attack as to be considered crimes against humanity, because it could dispose of the case in a simpler way by means of a legal *cliché* ("more effective and efficient administration of justice"). In this last scenario, the connection of these events to the attack despite their not being executive acts of it would still need to be discussed and analyzed on other grounds. In Section IV, I will advance some arguments in that direction.

The Federal Chamber of Cassation and the Supreme Court's interpretations of the relevant legal standard in the *Levin* case are not as far apart as they may appear. The difference lies more in their assessment of the

121. *Id.* at 1224.

122. *Id.* at 1221.

123. *Id.*

124. *Id.* at 1224.

evidence than in their interpretation of the nexus element of crimes against humanity. Both courts agreed that the events must follow the pattern of other acts that form the attack, but they disagreed on the extent of this coincidence and on the required showing of evidence to prove this fact. The Chamber regarded as a distinctive feature that the events were not committed clandestinely but in the context of a criminal investigation, whereas the Supreme Court pointed out that the illegal detentions under the repressive plan could be masked as arrests for common crimes. Certainly, the Supreme Court established a lower threshold regarding the *modus operandi*. It was satisfied with detentions disguised as legal proceedings for victims in other cases, but it did not deepen the analysis of other characteristics of the events to determine whether they fit the pattern of the attack.

Furthermore, the Chamber of Cassation and the Supreme Court also agreed on the need for the acts to be carried out in accordance with the state policy behind the attack. But they disagreed on two relevant points. First, in assessing the correspondence between the act and the policy, the Chamber focused on the motivations of the perpetrators and concluded that they were related to the investigation of a common crime and not to the regime's repressive plan.¹²⁵ The Chamber established a high threshold by requiring the Prosecution to prove that the actual reason for the arrest was the victim's union activity.¹²⁶ In contrast, the Supreme Court highlighted the specific circumstances reported by the victims; they had also been questioned about their political and union activities. Second, the Chamber adopted a narrow view of the scope of the repressive policy, limiting it to the persecution of subversive organizations, while the Supreme Court held that the scope of the repressive policy was broader and included the persecution of workers organized in trade unions. However, as I will later argue, the reasoning of the Supreme Court can also be criticized for being too narrow, since it is not easy to establish the precise scope of the repressive policy.

125. Cámara Federal de Casación Penal [CFPC] [National Court of Appeal on Criminal Matters], 20/11/2014, "Levin / recurso de casación," sala III, No. 2495/14 at 14 (stating "the arrests suffered by the employees of 'La Veloz del Norte' had as their sole motive the investigation of a crime of a patrimonial nature for which they had been denounced; the constraints and torture inflicted on the police station were guided to the collection of information on the people involved in the fraud maneuver, as well as to obtain confessions").

126. Cámara Federal de Casación Penal [CFPC] [National Court of Appeal on Criminal Matters], 4/10/2017, "Levin / recurso de casación," sala III, No. 1112/17 (Arg.), at 23 (stating "the mere character of a trade union representative of Cobos is not enough to frame the events . . . as crimes against humanity").

B. *The Federal Chamber of Cassation Rulings in the Saravia Case*

The Federal Chamber of Cassation has consistently refused to consider acts that injured people who were not persecuted on political grounds as part of the attack.¹²⁷ The most recent case holding this criterion is *Saravia*,¹²⁸ decided in 2019. The facts are as follows: José Salvatierra and Oscar Rodríguez were shot to death on the night of May 9, 1977, while they were driving a truck in a rural area in the province of Salta.¹²⁹ Their bodies were removed and placed side by side on a public road with a sign reading “because of thief and rustler.”¹³⁰ Andrés Del Valle Soraire and Fortunato Saravia were pointed as the authors of the crime. They were members of the “*Guardia del Monte*,” a Salta police unit formed primarily to combat cattle rustling.¹³¹ During the military regime, members of this police unit were actively engaged in the persecution of political opponents. In fact, Del Valle Soraire had been indicted for crimes against humanity in other proceedings.¹³² In this case, however, there was no evidence suggesting that the victims belonged to the targeted population of the attack, but the crime seemed to have been committed for motives unconnected to the regime’s repressive policy.

In a jurisdictional decision issued in 2009, the Supreme Court perfunctorily addressed the issue of the nexus of these acts with the attack.¹³³ Endorsing the Attorney General’s opinion, the Supreme Court held that a federal court should continue the investigation because the acts could be

127. Cámara Federal de Casación Penal [Federal Chamber of Criminal Cassation], 13/11/2009, “Taranto, Jorge Eduardo,” L.L. (2009-30) (In the *Taranto* case ruled in 2009, Federal Chamber of Cassation I analyzed whether the inhumane treatments inflicted on conscripts by commanding officers during the Islas Malvinas [Falklands] War in 1982 were part of the widespread and systematic attack against the civilian population carried out by the military government. A total of seventy-four cases were reported in which conscripts had hands and feet tied to stakes in the frozen ground for several hours; standing buried in pits that the victims themselves had to dig; severely beaten; or deliberately deprived of food. Jorge Taranto was a second lieutenant accused of five of these cases. The Chamber found that these crimes did not constitute crimes against humanity because they were not “the consequence of a specific policy or plan of attack against a population or group in the war scenario.” Judge Fégoli, in a concurring opinion, added that the victims “did not possess special characteristics nor were they subject to said suffering by virtue of any political or ideological tendency.”).

128. Cámara Federal de Casación Penal [CFCP] [Federal Court of Appeals on Criminal Matters], 14/2/2019, “Mulhall, Carlos Alberto / recurso de casación,” sala I, No. 84/19 (Arg.).

129. *Id.* at 146-47.

130. *Id.* at 147.

131. *Id.*

132. *Id.* at 149.

133. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice] 5/5/2009, “Saravia, Fortunato / homicidio calificado y amenazas,” Fallos (2009-332-1029) (Arg.).

classified *prima facie* as crimes against humanity.¹³⁴ The Court affirmed that “[t]he act under investigation took place during the military dictatorship and that the accused was a member of a police group suspected of crimes against humanity, acting in a context of impunity that allowed him to ‘execute one and others.’”¹³⁵ The expression “execute one and others” apparently refers to political enemies and people who had no ties to political organizations targeted by the regime. This reasoning seems to be in tension with *Levin’s* 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 held that the act was part of the “extermination” of individuals considered “undesirable” or “inconvenient” for the national reorganization process 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 To the court, the events were characterized by “abuse of power, secrecy, concealment of evidences, [and] obstruction of the investigation by the military and police authorities.”¹⁴⁰ Based on that, the trial court concluded that the victims were persecuted by the police not on political grounds but because “the police had complete freedom to act with impunity against people who for any reason disturbed the “imposed order.”¹⁴¹

134. *Id.* at 1030-32.

135. *Id.* at 1031.

136. Tribunal Oral en lo Criminal Federal de Salta [Federal District Criminal Court of Salta], 29/9/2014, “Soraire, Andres Del Valle / coautor del delito de homicidio agravado por haberse cometido con alevosía y con el concurso premeditado de dos o mas personas, does ehcones en concurso real, en perjuicio de José Lino Salvatierra y Oscar Ramón Rodríguez,” 3921/13 (Arg.); *see also*, *Condenaron a prisión perpetua a los seis acusados en un juicio oral en Salta por crímenes de lesa humaniad*, CENTRO DE INFORMACIÓN JUDICIAL (Sept. 29, 2014), <https://www.cij.gov.ar/nota-14139-Condernaron-a-prisi-n-perpetua-a-los-seis-acusados-en-un-juicio-oral-en-Salta-por-cr-menes-de-lesa-humanidad.html>.

137. *See* 14/2/2019, “Mulhall,” CFCP, No. 84/19 at 195-96.

138. *Id.* at 198.

139. *Id.*

140. *Id.*

141. *Id.* at 199.

The Federal Chamber of Cassation I, in a 2-1 decision, reversed Del Valle Soraire's conviction for the murders of Salvatierra and Rodríguez.¹⁴² The majority opinion by Judges Petrone and Barrotaveña establishes a restrictive criterion on the nexus element, which resembles Judge Riggi's opinion in *Levin*. It relies on two main arguments: (1) the acts do not fit in the pattern of the attack and (2) the victims were not killed for political reasons. First, the Chamber cited the famous ruling in the *Trial of the Juntas*¹⁴³ to describe the common features of the crimes committed during the military regime. In short, it affirmed the victims were kidnapped at night in their homes, immediately taken to clandestine detention centers where they were tortured and questioned about their political activities, murdered and disappeared.¹⁴⁴ Then, the Chamber concluded that "none of this occurred in the event that concern us"¹⁴⁵ in which "the victims were murdered while they were traveling in a truck"¹⁴⁶ and abandoned on the side of the road with a sign reading "because of thief and rustler."¹⁴⁷ It added that "the death of the victims was not handled clandestinely."¹⁴⁸ This conclusion deserves criticism. The majority's narrow description of the attack is ill grounded. It relies on one precedent from 1985 and does not take into account the evidence showing that the attack included several cases of murders in public areas.¹⁴⁹ Besides, the quote from the *Trial of the Juntas* judgment is misleading because it does not actually describe the attack but the "systematic practice of kidnapping of people with common characteristics"¹⁵⁰ found at that particular trial.¹⁵¹ Finally, the majority disregarded the characteristics of the crimes that did fit into the pattern of the attack, in particular, that they were committed under a cloak of impunity by

142. Cámara Federal de Casación Penal [CFCP] [Federal Court of Appeals on Criminal Matters], 14/2/2019, "Mulhall, Carlos Alberto / recurso de casación," sala I, No. 84/19 (Arg.).

143. Cámara Federal de Casación Penal [CFCP] [Federal Court of Appeals on Criminal Matters], 9/12/1985, "Videla, Jorge Rafael / homicidio, privación ilegal de la libertad y tormentos," (1985-13) (Arg.).

144. 14/2/2019, "Mulhall," CFCP, No. 84/19 at 350.

145. *Id.* at 351.

146. *Id.*

147. *Id.*

148. *Id.* at 352.

149. Secretaría de Derechos Humanos de la Nación [Human Rights Secretariat], Registro unificado de víctimas del terrorismo de Estado, *Anexo IV: Cuadros estadísticos sobre víctimas y hechos del accionar represivo ilegal del Estado* (2015), https://www.argentina.gob.ar/sites/default/files/5_anexo_iv_cuadros_estad_sticos-investigacion_ruvte-ilid.pdf (showing that 18.4% of victims of state terrorism were murdered and of these cases, 62.2% were committed in public spaces.).

150. CFCP, 9/12/1985, "Videla," (1985-13).

151. *Id.* In the *Trial of the Juntas* the Prosecution filed 709 cases and the Court examined only 280. *Id.*

members of security forces who formed part of the criminal apparatus that carried out the attack.

The majority's second argument is straightforward:

Nor was any element mentioned that would make it possible to affirm that the victims were politically persecuted either for partisan, union, religious, student or related reasons. On the contrary, the evidence gathered points to a particular motive held by the authors, linked to an assignment to two policemen who served in the so-called "Guardia del Monte" to repress behaviors linked to cattle rustling and, therefore, detached from the purpose of the systematic attack.¹⁵²

Judges Petrone and Barrotaveña openly required that the victims be persecuted on political grounds to consider that their murders formed part of the attack.¹⁵³ In support of this assertion, they narrowly read the Supreme Court's holding in *Levin* as requiring that victims "were linked to political, trade union and guild activities."¹⁵⁴ Next, they presented a sort of parade of the horrible arguing that the criterion followed by the Trial Court "would imply expanding the category of crimes against humanity to any act committed by a member of the security forces during the last military dictatorship, that is, between 1976 and 1983, regardless of the reasons that guided their actions."¹⁵⁵ In this way, the majority turned to the perpetrators' motivations to determine the link between the act and the attack.¹⁵⁶

C. *The Federal Chamber of Cassation ruling in the Molina Case*

The discussion about the nexus also arose regarding acts that exceeded the repressive plan, such as sexual assaults against people held captive in clandestine detention centers. Since the repressive plan did not include raping, the question was whether those sexual assaults committed at the initiative of the perpetrators could still be considered as part of the attack. The Federal Chamber of Cassation IV addressed this issue in the *Molina* case decided in 2012.¹⁵⁷ Gregorio Molina was an air force member in charge of the clandestine detention center known as "La Cueva" [the cave], in the province of Buenos Aires.¹⁵⁸ In 2010 he was sentenced to life imprisonment

152. 14/2/2019, "Mulhall," CFCP, No. 84/19 at 352.

153. *Id.* at 353.

154. *Id.* (citing CSJN, 18/9/2019, "Levin," Fallos (2018-341-1207)).

155. *Id.* at 354.

156. The Prosecution filed an extraordinary appeal against this ruling which is pending at the Supreme Court (CSJN, 18/9/2019, "Levin," Fallos (2018-341-1207)).

157. Cámara Federal de Casación Penal [CFCP] [Federal Court of Appeals on Criminal Matters], 17/2/2012, "Molina Gregorio Rafael / recurso de Casación," sala IV, No. 162/12 (Arg.).

158. *Id.* at 33.

on multiple charges of illegal deprivation of liberty, torture, murder, and rape.¹⁵⁹ This was the first conviction for sexual aggressions during the dictatorship. The Defense argued that the rapes were not crimes against humanity because they were not part of the widespread and systematic attack but a “spontaneous and autonomous action by the aggressor.”¹⁶⁰

The Chamber rejected this claim and confirmed the rapes did form part of the attack. However, the members of the Chamber presented notably different grounds to reach this conclusion. Judge Borinsky’s leading opinion recalled that, according to the repressive plan, military commanders had a wide discretion to execute the attack in the geographical areas under their control. Thus, the key was to determine “whether in the clandestine detention center known as ‘La Cueva’ . . . sexual assaults were a common practice in order to be considered a component of the widespread attack on the population.”¹⁶¹ However, inasmuch as this test requires that the rapes attributed to Molina were themselves widespread, it confuses the attributes of the attack with the attributes of the specific punishable acts. It is only the attack that must be widespread or systematic; individual acts need only be part of that broader context, and there is no requirement that they share those characteristics as well.¹⁶²

Judge Hornos’ concurrent opinion followed a different approach. First, he rejected the claim that the defendant’s individual conduct must be widespread, habitual or large in scale to constitute a crime against humanity.¹⁶³ He correctly noted that the widespread or systematic nature corresponds only to the element “attack on the civilian population” and not to individual acts.¹⁶⁴ Therefore, it was irrelevant whether the sexual assaults attributed to the accused were widespread even within the detention center he ran.¹⁶⁵ Then, Judge Hornos articulated the following set of criteria or “conditions” to establish when an individual act is part of an attack:

159. *Id.* at 34.

160. *See id.* at 1-2.

161. *Id.* at 21.

162. *Kunarac*, Case No. IT-96-23-T& IT-96-23/1-T, ¶ 417; CRYER, *supra* note 29, at 199 (“The rigorous requirements relating to the attack must be distinguished from the requirements relating to the accused’s conduct. With respect to the individual accused, all that is required is that the accused committed a prohibited act, that the act objectively falls within the broader attack, and that the accused was aware of this broader context. Only the attack, not the acts of the individual accused, needs to be widespread or systematic. A single act by the accused may constitute a crime against humanity if it forms part of the attack.”); CFCP, 17/2/2012, “Molina Gregorio Rafael,” sala IV, No. 162/12 (Hornos, J. concurring).

163. *Id.* at 66-67 (Hornos, J. concurring).

164. *Id.* (Hornos, J. concurring).

165. *Id.* at 73 (Hornos, J. concurring) (stating “whether or not [the facts attributed to Molina] have been carried out ‘on a large scale,’ ‘in a generalized or systematic way,’ ‘regularly,’ or any

(i) The act, at the time of its commission, was recognized by the international community as one of those which could form part of a widespread or systematic attack against civilians. (ii) The act occurred concomitantly in space and time to the attack. (iii) The aggressor was a member or acted under the acquiescence of the organized apparatus of power which collectively perpetrated the attack. (iv) The agent carried out the act, at least in part, motivated by the guarantee of impunity that being part (or having the acquiescence) of the apparatus of power responsible for the attack. Conversely, it would be unreasonable to assume that the aggressor acted as he did, had it not been for that guarantee of impunity. (v) The victim (or victims) of the misconduct belongs to the set of victims against whom the attack was directed (a set whose definition must be sensitive to the discretion available to the agent to select the victims: at greater discretion, the more difficult it will be to object that a particular victim was not part of that set).¹⁶⁶

The first criterion aims to exclude acts of insufficient entity to be crimes against humanity. However, the inclusion of this criterion for the assessment of the nexus element is misleading. As explained above, the structure of crimes against humanity consists of two distinguishable parts: a catalog of inhumane acts, such as murder, torture, or enslavement, and a broader context of an attack on civilians. The nexus element is what connects individual behaviors with that context. Then, if an act is not included in the catalog of possible crimes against humanity, the analysis of the nexus would be redundant because the act would have already fallen outside the category.

The second criterion focuses on space and time coincidence between the act and the attack, but it is rather loose and provides little guidance in borderline cases. The act is not required to be committed during the attack, and events that occurred before or after the main attack or in a different location may still form part of the attack if they are sufficiently connected.¹⁶⁷ Therefore, this criterion only excludes acts that occur in such a remote time or place that it would be unreasonable to conclude that they were part of the attack.

The third and fourth criteria are so closely related that they converge into one—because the first is a condition of the second. They both focus on whether the attack increased the dangerousness of the aggressor's conduct. In Judge Hornos' view, the perpetrator does not need to share the objectives or purpose of the global attack but must know that their acts are committed

other equivalent expression, does not constitute any obstacle to their classification as crimes against humanity").

166. *Id.* at 75-76 (Hornos, J. concurring).

167. *Kunarac*, Case No. IT-96-23-T& IT-96-23/1-T, ¶ 100.

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 objectively as a part of the attack. . . . Thus, an adequate test to determine whether a certain act was part of the attack is to ask whether the act would have been less dangerous for the victim if the attack and the policy had not existed.¹⁶⁸

But while Ambos and Wirth present this test as the only criterion to determine the nexus between the act and the attack, Judge Hornos includes it in a set of five cumulative conditions.

Finally, the fifth criterion requires the victim of the specific act to be part of the civilian population against whom the attack was directed. In other words, it excludes acts that were directed against people who did not belong to the attacked population and those committed for purely random reasons. Judge Hornos carefully avoids relating this criterion with the repressive policy behind the attack. Indeed, based on the ICTY case law, he expressly rejects the existence of the policy element.¹⁶⁹ However, without resorting to the policy, it is impossible to determine the scope of the attack and against whom it was directed. The policy element connects a multiplicity of acts with the designs of a higher entity, be it a State or an organization, and turns them into an attack.¹⁷⁰ This situation is particularly true in Argentina, where human rights violations were committed over almost a decade and against a wide variety of victims. Despite Judge Hornos' refusal, this criterion ultimately requires determining if the victim was targeted for the same political reasons that inspired the attack.

Applying these criteria to the case, Judge Hornos readily concluded that the acts were part of the attack.¹⁷¹ In particular, he considered that "Molina benefited from the total impunity he enjoyed as manager of 'La Cueva' to commit the sexual abuses."¹⁷² Further, he concluded that it would be "unreasonable to maintain that Molina would have acted as he did if he had not been in that situation and [took] advantage of the position of power he held."¹⁷³ Regarding the characteristic of the victims as members of the attacked population, he affirmed that it was clear because "they were first abducted and held in a detention center for the same reasons that, more

168. Ambos & Wirth, *supra* note 24, at 36.

169. CFCP, 17/2/2012, "Molina," No. 162/12, at 66-67 (Hornos, J. concurring).

170. Robinson, *supra* note 24, at 3-4.

171. CFCP, 17/2/2012, "Molina," No. 162/12, at 78-84 (Hornos, J. concurring).

172. *Id.*

173. *Id.*

generally, the perpetrators of the attack selected their victims.”¹⁷⁴ Although Judge Hornos avoided mentioning it, his reasoning was related to the policy of illegal repression promoted by the military regime.¹⁷⁵

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 extermination of “subversives” (those that inspired the attack carried out by 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 necessarily be committed to advance the policy. This has been clearly established by ICTY Appeals Chamber in *Kunarac*:

174. *Id.*

175. Judge Hornos applied the criteria developed in *Molina* in the *Liendo Roca* case decided in 2012. Arturo Liendo Roca was a judge in the province of Santiago del Estero between 1975 and 1976, accused of having neglected the investigation of tortures and inhumane treatment of political prisoners. Judge Hornos concluded that these acts formed part of the attack. In particular, he considered that the victims belonged to the group of victims targeted for the attack because they were illegally detained in inhumane conditions for the same motives that the perpetrators of the attack selected their victims, that is, for being considered “subversives.” Cámara Federal de Casación Penal [CFCP] [Federal Court of Appeals on Criminal Matters], 1/8/2012, “Liendo Roca, Arturo / recurso de casación,” sala IV No. 1242/12 (Arg.).

[T]he accused need not share the purpose or goal behind the attack. It is also irrelevant whether the accused intended his acts to be directed against the targeted population or merely against his victim. It is the attack, not the acts of the accused, which must be directed against the target population and the accused need only know that his acts are part thereof.¹⁷⁶

Furthermore, the dominant criterion ends up demanding that the punishable act be committed on political grounds, which is a discriminatory element not required by the definition of crimes against humanity. As explained above, in assessing the nexus, most courts identify the targeted population based on the regime's policy of illegal repression and check if the victim of the act belongs to that population. This equates to requiring that the victims be persecuted on political grounds. This is evident in the *Saravia*¹⁷⁷ and the *Taranto* cases.¹⁷⁸ In those cases, the Federal Chamber of Cassation expressly considered that the victims did not have any connection with subversive groups and that they were not killed or tortured for political reasons.¹⁷⁹ Currently, it is beyond doubt that crimes against humanity are not required to be committed on discriminatory grounds or with a discriminatory intent, except for the crimes of persecution.¹⁸⁰ This is not to say that these crimes are directed against randomly selected groups of people. The policy that ties the different acts and turns them into an attack can be inspired by different political, religious, ethnic, or other discriminatory motives. Identifying these motives may serve to prove the policy of committing an attack. Moreover, proving that a particular act was committed to further that policy will be useful to show that the act was part of the attack, but that does not mean that this showing of proof is a necessary requirement. Argentine courts have gone too far in demanding that individual acts be committed against political enemies to consider them part of the attack.

Second, although Argentine courts have used this criterion as a bright-line rule, its application is not straightforward. Determining the precise scope of the policy on which the attack was based is a burdensome task and, in many circumstances, maybe impossible. As noted by the ICC Trial Court in *Katanga*, it is rare that "a State or organization seeking to encourage an attack against a civilian population might adopt and disseminate a pre-established

176. Prosecutor v. Kunarac, Case No. IT-96-23-T& IT-96-23/1-A, Appeals Judgement, ¶ 103 (June 12, 2002) (footnote omitted), <https://www.icty.org/x/cases/kunarac/acjug/en/kun-aj020612e.pdf>.

177. See *supra* Section B.

178. See *supra* note 127.

179. *Id.*; CSJN, 5/5/2009, "Saravia," Fallos (2009-332-1033).

180. Rome Statute, *supra* note 1; deGuzman, *supra* note 21, at 353; Robinson, *supra* note at 12. 24,

design or plan to that effect.”¹⁸¹ Particularly in cases such as those 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 understood that the attack was directed against “subversives,” whereas the Supreme Court affirmed that it also targeted unionized workers.¹⁸³ However, even the concept of “subversive” is too loose to delimit a population. As the *Saravia* trial court did, it may be interpreted to include any person “inconvenient” or “undesirable” to the regime.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 depends on the perpetrators’ grounds, motives, or intents is problematic because it 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. Gen. Ibérico Saint Jean’s infamous quote, pronounced in a speech as Governor of Buenos Aires on May 26, 1997, illustrates this point: “First we will kill all the subversives; then we will kill their collaborators; then . . . their sympathizers; then . . . those who remain indifferent; and finally we will kill the timid.” See Jerry W. Knudson, *Veil of Silence: The Argentine Press and the Dirty War, 1976-1983*, 24 *LATIN AM. PERSP.* 93, 93 (1997).

183. CFPC, 4/10/2017, “Levin,” No. 1112/17.

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 affiliated with the “Fuerzas Armadas Peronistas” [Peronist Armed Forces]. Tribunal Oral en lo Criminal Federal Nro. 1 de San Martín [Federal District Court No. 1 for San Martín], 18/05/2010, “Riveros, Santiago Omar / privación ilegal de la libertad, tormento, etc.” (Arg.).

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 authorities' unwillingness to conduct a serious 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. This is satisfied where a perpetrator deliberately acts to further the policy but *may also be satisfied by a perpetrator engaging in conduct envisaged by the policy*, and with knowledge thereof.¹⁹¹

Thus, the dominant criterion fails when it excludes from the attack those acts tolerated although not directly intended. For instance, in the *Saravia*

187. *See supra* Section B.

188. *Katanga*, Case No. ICC-01/04-01/07.

189. This criterion is in line with the increased risk test developed by Ambos and Wirth, but in my opinion, it may be more precise and easier to apply in concrete cases. *See* Ambos & Wirth, *supra* note 24.

190. This was the case in *Saravia* as correctly noted by the Trial Chamber. *See* Procuración General de la Nación [National Prosecutor's Office], 10/6/2008, "Saravia, Fortunato / homicidio calificado," <http://www.cij.gov.ar/http://www.cij.gov.ar/d/doc-526.pdf>.

191. *Bemba*, Case No. ICC-01/05-01/08-3343, ¶ 161 (emphasis added) (footnotes omitted).

case,¹⁹² it is likely that the perpetrators did not kill the victims to advance the regime's repressive policy. It is more likely that they were linked to 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 *raison d'être* of crimes against humanity. As Dubler and Kalyk explain, "the concept of 'crimes against humanity' . . . is not just about describing evil conduct, it is equally about piercing the veil of state sovereignty and invoking an international criminal jurisdiction because the perpetrators enjoy impunity due to state complicity, impotence or indifference."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 "actions which are ordered and approved by the holders of hegemony" but 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 accused after his action was 'rebuked' and that even the Gestapo 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.

192. See CSJN, 5/5/2009, "Saravia," Fallos (2009-332-1029).

193. ROBERT DUBLER SC & MATTHEW KALYK, CRIMES AGAINST HUMANITY IN THE 21ST CENTURY: LAW, PRACTICE, AND THREATS TO INTERNATIONAL PEACE AND SECURITY 34 (2018).

¹⁹⁴ See 1 ENTSCHEIDUNGEN DES OBERSTEN GERICHTSHOFES FÜR DIE BRITISCHE ZONE IN STRAFSACHEN [Judgements of the Supreme Court for the British Zone] 206-07 (1948-1949), translated in Prosecutor v. Kupreškić, Case No. IT-95-16-T, Judgement, ¶ 555 (Int'l. Crim. Trib. for the Former Yugoslavia Jan. 14, 2000), <https://www.icty.org/x/cases/kupreskic/tjug/en/kup-tj000114e.pdf>.

195. *Id.* n. 816 (emphasis added).

VI. CONCLUSION

The most evident conclusion about the nexus element is its significance. The Argentine cases analyzed show that, in certain situations, the discussion about whether an act constitutes a crime against humanity, or a common crime is reduced to determining whether it was indeed committed as part of an attack. Depending on what is decided on this issue, a defendant may be considered a criminal against humanity and sentenced to severe penalties, or a common offender and may go unpunished due to the application of statutory limitations.

The importance of the nexus element has not been completely noted in international jurisprudence, probably due to the type of cases dealt with in international tribunals. However, in the last decades, more and more decisions for this type of crime have been carried out in domestic courts, particularly in Latin America. In these contexts, discussions about the nexus element of crimes against humanity will likely become more frequent.

This discussion is relevant for the interests at stake and the implications of the possible outcomes. In processes before international courts, states have a stake in their sovereignty, while in trials before domestic courts, other interests take center stage. On the one hand, the principle of *nullum crime nulla poena sine lege*, which mandates a strict interpretation of criminal norms, prevents an overinclusive construction of the category of crimes against humanity. On the other hand, the interest of the victims and humanity, that criminals against humanity be held accountable, is a form of rehabilitation for the victims and a guarantee that atrocities will not be repeated. An underinclusive construction of crimes against humanity could curtail this interest. Thus, a proper definition of the nexus and the elaboration of clear criteria to establish when an individual act forms part of an attack is both crucial and urgent.

Argentine courts have done a good job at identifying this problem, but less so in developing the criteria to assess the link between the act and the attack. Although the cases analyzed have nuances, they all give decisive weight to the correspondence between the act and the policy that inspired the attack. In the end, this implies checking whether the victim belonged to the political group persecuted by the regime. Not only is this criterion contrary to the current law of crimes against humanity, but it also leads to undesirable results. It rules out of the scope of the attack, and from the category of crimes against humanity, acts committed under the protection of the state.

Undoubtedly, the act was committed pursuant to or in furtherance of the policy underlying the attack and is a clear sign that it was part thereof. However, this does not mean it is the only relevant circumstance. An adequate analysis of the nexus should also consider whether the perpetrator

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.