

MINDING THE IMPUNITY GAP IN DOMESTIC PROSECUTIONS OF CRIMES AGAINST HUMANITY UNDER CUSTOMARY INTERNATIONAL LAW: REFLECTIONS ON MARIANO GAITÁN'S ANALYSIS OF ARGENTINE JURISPRUDENCE

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Professor Gaitán's paper provides an excellent contribution from the Argentine legal perspective to existing scholarship on the definition of "crimes against humanity."¹ The Argentine example demonstrates some of the difficulties encountered during the truth and justice process when domestic prosecutions of serious human rights violations apply yet-to-be codified standards of international criminal law. In particular, Gaitán highlights the lack of uniform criteria used by Argentine courts in "crimes against humanity" prosecutions involving atypical links between the criminal conduct and the underlying widespread or systematic attack.² Gaitán argues that the Argentine courts place too much emphasis on analyzing the nexus between the underlying act and the state or organizational policy, and notes that the victim's membership in the targeted population should not be the sole factor used to determine whether the act constitutes a crime against humanity.³ Rather, Gaitán suggests that courts take a flexible approach and

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1. Mariano Gaitán, *The Nexus Element in the Definition of Crimes Against Humanity: An Analysis of Argentine Jurisprudence*, 27 SW. J. INT'L L. 265 (2021).

2. *Id.*

3. *Id.* at 30.

consider multiple factors, some of which may be more relevant to the analysis depending on the facts of the case.⁴ Through his own experience and knowledge of how this international crime is adjudicated in the Argentine courts, Gaitán echoes the sentiments of eminent scholars who advocate for a liberal interpretation of the crime's relevant provisions,⁵ so as to lend credence to "the overall trend in international humanitarian law toward expanding the scope of protection of the basic values of human dignity."⁶

Professor Gaitán's article highlights a tendency by legal practitioners, jurists, and scholars, both in the United States and abroad, to confine themselves to the elements of the crimes set forth in the Rome Statute, based on the misperception that the Statute constitutes customary international law. This tendency understandably occurs, in part, as a celebration of what the Rome Statute represents. But limiting how a sovereign state applies a principle of international criminal law in its own domestic courts to the verbatim definition of the crime as set forth in the Rome Statute is bound to yield unintended consequences and it may even limit that state's ability to adjudicate international human rights violations. Professor Gaitán depicts some of those problems in the Argentine experience.

In this short comment, I hope to explain why domestic courts should not consider themselves bound by customary international law to apply the specific language of the definitions of the crimes in the Rome Statute, particularly when doing so fails to meet the needs or fit the facts and circumstances of human rights violations that would otherwise go unpunished. I also hope to provide further support for Professor Gaitán's criticism that the application of a more flexible and multi-factored analysis of the elements of "crimes against humanity" will better bridge the impunity gap and further the rule of law.⁷ The prohibition of crimes against humanity is a complex and multi-layered subject and I purposefully focus on the policy element set forth in Article 7(2)(a) of the Rome Statute,⁸ since this element is also the focus of Professor Gaitán's remarks.

I appreciate why practitioners and courts look to the Rome Statute as a source of customary international law. Emerging principles of customary international law are hard to identify. Unless an international consensus as to the status of a norm is already memorialized by way of judicial opinion,

4. *Id.*

5. ANTONIO CASSESE, *Crimes Against Humanity: Comments on Some Problematic Aspects*, in *THE HUMAN DIMENSION OF INTERNATIONAL LAW: SELECTED PAPERS* 463, 471 (2008).

6. *Id.* at 470.

7. Gaitán, *supra* note 1.

8. Rome Statute of the International Criminal Court, art. 7(2)(a), July 17, 1988, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

scholarly writing, multilateral treaty, or otherwise,⁹ identifying a principle of customary international law typically involves surveying the practices of a sufficient number of states, identifying a pattern of consistent and uniform conduct,¹⁰ and proving that the conduct occurs under the *opinio juris* obligation.¹¹ Given the number of states in the international community, the varying forms of legal systems, the number of judiciaries that are politicized, corrupt, or that lack independence, and the lack of access to national records, this is a daunting task. Identifying a true principle of customary international law is even more difficult considering that international consensus has historically excluded the jurisprudential principles and practices of Muslim, African, Asian, and other regimes outside Western Europe and the United States, as well as those nation-states who persistently object to the liberal international legal order.

Also, it typically takes time before a principle of customary international law becomes “settled practice.”¹² The twentieth century saw grave events that significantly impacted the sovereignty and conscience of a handful of the then most economically developed states, such as the abuses of force and violations of human dignity committed by nation-states during, among others, the First and Second World Wars, and the Bosnian and Rwandan genocides. Events such as these prompted a proliferation of multilateral efforts to codify rules that hoped to prevent such abuses of power in the future. However, in the absence of an event that successfully sparks a call to action by those few states who are privileged to act with strong influence over the international community, the natural progression of a legal principle to the customary international law status is generally considered a slow one.¹³

I acknowledge the above difficulties in identifying emerging principles of customary international law to establish that these attributes serve a purpose. They reflect the desire to preserve an important balance between supranational legal institutions and state sovereignty. It is important to remember that a successfully negotiated multilateral treaty, even a law-

9. IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 8-10 (6th ed. 2003) (discussing International Court of Justice jurisprudence in which the Court has accepted varying forms of proof of general state practice under the *opinio juris* obligation).

10. MALCOLM N. SHAW, *INTERNATIONAL LAW* 75-76 (6th ed. 2008).

11. *See id.* at 75 (tracing the origin of *opinio juris sive necessitatis* to “the French writer François Géný as an attempt to differentiate legal custom from mere social usage.”); BROWNLIE, *supra* note 7, at 8 (noting the minority of scholars who do not consider *opinio juris* a required element when identifying a principle of customary international law).

12. *See* *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. 14, ¶ 207 (June 27).

13. *But see* *North Sea Continental Shelf Cases, (Ger. v. Den.)*, Judgment, 1969 I.C.J. 3, ¶ 74 (Feb. 20); SHAW, *supra* note 10, at 76-78 (providing cases that show that “[d]uration is . . . not the most important component of state practice.”).

making treaty such as the Rome Statute,¹⁴ constitutes a source of international law that is distinct from customary international law,¹⁵ particularly when the treaty is not widely ratified. In addition, it is important to note that some states, scholars, and jurists take the position that customary international law is distinct from international humanitarian law and human rights law. The distinction is that customary international law serves as a reference for assessing the content and applicability of international humanitarian law and human rights instruments.¹⁶

In the context of the definition of crimes against humanity as set forth in the Rome Statute, the potential to conflate its terms with principles of customary international law is understandable. Western states made accelerated efforts over the last century to codify normative humanitarian principles into law,¹⁷ discussions of which date back to early centuries B.C.¹⁸ One result is that “crimes against humanity” as an offense has reached *jus cogens* status and its prevention and punishment is an obligation *erga omnes*.¹⁹ Moreover, the proposition that the general prohibition against acts that constitute “crimes against humanity” is a principle of customary international law is beyond reproach.²⁰ Furthermore, the adoption of the Rome Statute was an extraordinary accomplishment by state delegations, civil society, and international law scholars, that was decades in the making.²¹ Referring generally to the Rome Statute as customary international law avoids the weighty endeavor of identifying an emerging principle of customary international law by more traditional means. However, the desire

14. See generally, BROWNLIE, *supra* note 9, at 13-14 (discussing the attributes and obligations created by law-making treaties and the relationship with customary international law).

15. Vienna Convention on the Law of Treaties art. 38, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331; BROWNLIE, *supra* note 9, at 14 (“even if norms of treaty origin crystallize as new principles or rules of customary law, the customary norms retain a separate identity even if the two norms appear identical in content”).

16. BROWNLIE, *supra* note 9 (citing Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 86 (July 9)).

17. See SHAW, *supra* note 10, at 265-67; HERSCH LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 68-72 (1968).

18. See Prosecutor v. Tadić, Case No. IT-94-1-A, Separate Opinion of Judge Shahabuddeen, ¶ 1 (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999).

19. Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain), Judgment, 1970 I.C.J. 32, ¶ 2 (Feb. 5) (referring to obligations *erga omnes* in contemporary international law). See generally Michael P. Sharf, *The ICC’s Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. Position*, 64 LAW & CONTEMP. PROBS. 68, 80 n.67 (2001).

20. Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgment, ¶ 623 (Int’l Crim. Trib. for the Former Yugoslavia May 7, 1997); see also Prosecutor v. Sesay, Case No. SCSL-04-15-T, Judgment, ¶ 58 (Mar. 2, 2009).

21. Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L. J. 381, 391 n.37, 395 (2000) (commenting on Richard Falk’s reference to the creation of the ICC as a “Grotian moment”).

to identify *the precise elements* that comprise the definition of “crimes against humanity” is a fairly recent development.²² Thus, I hesitate to conclude unequivocally that the version of the definition that exists in the Rome Statute necessarily constitutes customary international law.

Therefore, I echo my concern that judges and practitioners both in the United States and abroad continue to refer generally to the Rome Statute as a source of codified customary international law. First, as states undertake the process of drafting any multilateral treaty, even a law-making treaty, such as the statute of the International Criminal Court (ICC), the negotiations over language that occur often reflect efforts to reach a political compromise.²³ Thus, during the Rome Conference and subsequent sessions of the Assembly of States Parties, the process by which a consensus was reached over what constituted the elements of a crime was likely less indicative of *opinio juris* and more indicative of concessions that were required in order to reach the agreement necessary to finalize the statute.

Second, as Professor Sadat recalls, while the criminality of the conduct enumerated in Articles 6 (genocide), 7 (crimes against humanity), and 8 (war crimes) of the Rome Statute reflects customary international law,²⁴ the specific elements set forth in the Rome Statute for each crime do not necessarily reflect customary international law.²⁵ The elements of the crimes were determined by a legislative process that only required a two-thirds majority of the Assembly members for adoption.²⁶ Further, “amendments to the Elements of Crimes may be proposed by [a]ny State Party, the judges acting by absolute majority, or the Prosecutor,”²⁷ irrespective of whether the proposed amendment reflects customary international law.

Third, the plain language of the Rome Statute itself states that its statutory provisions are distinct from customary international law and are not intended to alter existing principles of international law.²⁸ “[E]ach crime is defined ‘[f]or the purpose of th[e] Statute’”²⁹ only. “[T]he Statute does not, by its terms, purport to be a codification of international criminal or international humanitarian law.”³⁰ As Professor Sadat recalls, “the intent was

22. *Id.* at 422 (noting that “crimes against humanity, [are] not yet precisely defined in international law”).

23. *See id.* at 425.

24. Philippe Kirsch & John T. Holmes, *The Rome Conference on an International Criminal Court: The Negotiating Process*, 93 AM. J. INT’L L. 2, 7 n.19 (1999).

25. Sadat & Carden, *supra* note 21, at 406–07.

26. Rome Statute, *supra* note 8, art. 9; *id.* at 406–09.

27. Rome Statute, *supra* note 8, art. 9.

28. *See id.* art. 10.

29. Sadat & Carden, *supra* note 21, at 422.

30. *Id.*

to prevent the Statute's restrictive definitions from creeping into customary international law."³¹

To be clear, this is not to say that the Rome Statute and ICC jurisprudence should be ignored as a reference or source of international criminal law, that there are no principles of customary international law interwoven among its articles, or that domestic courts should refrain from looking to the Rome Statute for guidance when enacting laws that bridge the impunity gap³² or provide domestic remedies for human rights violations.³³ The Rome Statute's contribution to international criminal law cannot be understated. However, the practical reality is that ending impunity for *jus cogens* violations requires national jurisdictions to prosecute offenders where the ICC cannot.³⁴ It would therefore be counterproductive to this endeavor were the Rome Statute to impose a restrictive definition of international crimes that prevented domestic courts from effectively applying principles of international criminal law.

Turning now to the definition of "crimes against humanity" in the Rome Statute, Professor Sadat beautifully summarizes the challenges presented at Rome to reaching a consensus on the elements,

Defining crimes against humanity presented one of the most difficult challenges at Rome, for no accepted definition existed, either as a matter of treaty or customary international law. Indeed, of the several definitions that have been "promulgated," no two are alike. The Tokyo Charter and Control Council Law No. 10 differed slightly from the Nuremberg version; the ICTY provision on crimes against humanity differs from all of its predecessors; and the ICTR version is different from the ICTY version. Municipal law applications of the crime have also varied from State to State. Finally, the International Law Commission has adopted various formulations, none of which has been particularly well-received.³⁵

31. *Id.* at 423.

32. See Int'l Crim. Ct., Off. of the Prosecutor, *Paper on Some Policy Issues Before the Office of the Prosecutor*, at 7 (Sept. 2003), https://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905_policy_paper.pdf [hereinafter ICC-OTP].

33. Alien Tort Statute, 28 U.S.C. § 1350 (2011); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 718-20 (2004) (finding that while the Alien Tort Statute does not create a cause of action under international law, courts may exercise common-law authority under the Statute to create jurisdiction under very limited circumstances, when the acts committed are universally accepted as crimes in international common law, also known as the law of nations). See also *Filartiga v. Pena-Irala*, 630 F.2d 876, 885 (1980) (reasoning that the law of nations is part of federal common law, and among the rights that are universally supported by the international community is the right to be free from brutal violence and torture).

34. See ICC-OTP, *supra* note 32.

35. Sadat & Carden, *supra* note 21, at 426-27; Int'l Law Comm'n, Rep. on the Work of Its Seventy-First Session, Apr. 29-June 7, July 8-Aug. 9, U.N. Doc. A/74/10, at 10-140 (2019).

The resulting definition of crimes against humanity in the Rome Statute is a hodgepodge; “it differs from its predecessors significantly, although it borrows from each.”³⁶ As to the state policy requirement, which is the focus of Professor Gaitán’s article, Professor Sadat explains that the Rome Statute’s version of crimes against humanity includes an iteration of this element that reflects a compromise between case law and international law scholars’ reasoning.³⁷ At present, the state or organizational policy element is not a component of a definition of crimes against humanity that is required by customary international law.

The International Law Commission’s (ILC) mandate is to codify existing principles of customary international law.³⁸ It has included “crimes against humanity” in its program of work for just under a decade. The Commission ultimately intends to introduce a Convention on the Prevention and Punishment of Crimes Against Humanity, to “help promote the investigation and prosecution of such crimes at the national level.”³⁹ In its 2015 First Report, the Commission’s Special Rapporteur on Crimes Against Humanity summarized the current lack of uniformity among the legislation in national jurisdictions concerning the definition of the crime.⁴⁰ Citing a 2013 study,⁴¹ the report notes that only fifty-four percent of UN member states and sixty-six percent, at best, of state parties to the Rome Statute have some national legislation *relating* to crimes against humanity.⁴² The 2013 study also sampled eighty-three states, only thirty-four of whom had a national law *specifically* on “crimes against humanity,” and of those thirty-four states, only ten adopted the verbatim text of Article 7 of the Rome Statute when defining the crime.⁴³ The remaining twenty-four states deviated from the Rome Statute’s version of the crime by omitting components,⁴⁴

36. *Id.*; Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 5, May 25, 1993, S.C. Res. 827, U.N. Doc. S/RES/827; Statute of the International Criminal Tribunal for Rwanda, art. 3, Nov. 8, 1994, S.C. Res. 955, annex, U.N. Doc. S/RES/955.

37. Sadat & Carden, *supra* note 21, at 432.

38. BROWNLIE, *supra* note 9, at 28-29 (noting the ILC’s codification efforts).

39. See Sean D. Murphy (Special Rapporteur), Int’l Law Comm’n, *First Rep. on Crimes Against Humanity*, ¶¶ 4, 10-15, U.N. Doc. A/CN.4/680 (Feb. 17, 2015) [hereinafter Special Rapporteur].

40. See generally *id.*

41. Arturo J. Carrillo & Annalise K. Nelson, Int’l Hum. Rts. L. Clinic, George Washington Univ. L. Sch., *Comparative Law Study and Analysis of National Legislation Relating to Crimes Against Humanity and Extraterritorial Jurisdiction* (2013), https://www.law.gwu.edu/sites/g/files/zaxdzs2351/f/downloads/CAH_Final_Web.pdf [hereinafter GWU Clinic Study].

42. Special Rapporteur, *supra* note 39, ¶ 58 (citing *id.* at 3).

43. GWU Clinic Study, *supra* note 41, at 12.

44. *Id.*

“including the component relating to . . . ‘a State or organizational policy.’”⁴⁵ The Special Rapporteur conceded that Article 7 of the Rome Statute “might be improved” and acknowledged “disagreements . . . regarding whether it reflects customary international law.”⁴⁶

Notwithstanding the “wide range of minor to major substantive differences”⁴⁷ found among the relatively small number of national laws with provisions specific to “crimes against humanity,”⁴⁸ the Special Rapporteur’s first report recommends that the Convention adopt the verbatim definition of the crime as set forth in the Rome Statute.⁴⁹ In support of his proposal, the Special Rapporteur cited a number of concerns, including fragmentation in the field of international criminal law, and he echoed the view of six states that work on the topic must avoid the unintended consequence of interfering with the ICC’s system of complementarity.⁵⁰

In what may potentially serve as a counterbalance to the Special Rapporteur’s argument to adopt the language that he concedes does not represent customary international law, he seems to suggest that ICC jurisprudence interpreting the definition of crimes against humanity establishes a low threshold.⁵¹ As to the policy element that is the subject of Professor Gaitán’s article,⁵² the Special Rapporteur’s first report extracts a series of factors from which a court can choose when determining whether the policy element is met.⁵³ These factors are additional examples of what could be listed in the alternative and could, similarly to what Professor Gaitán proposes, aid Argentine and other national courts in a more flexible application of the elements of the crime.⁵⁴ According to the Special Rapporteur, the policy element might be satisfied by deliberate actions as

45. Special Rapporteur, *supra* note 39, ¶ 60.

46. *Id.* ¶ 122.

47. *Id.* ¶ 60.

48. *Id.*

49. *Id.* ¶ 122.

50. *Id.* ¶ 19. The Special Rapporteur highlighted the positions of Chile, Italy, Mongolia, Romania, Trinidad and Tobago, and the United Kingdom, which can be found respectively in U.N. GAOR, 69th Sess., 24th mtg. ¶¶ 52-53, 94-95, 147, 119, 160, U.N. Doc. A/C.6/69/SR.24 (Dec. 3, 2014).

51. *See id.* ¶¶ 20-26.

52. *See* Gaitán, *supra* note 1, at 296-300.

53. *See* Special Rapporteur, *supra* note 39, ¶¶ 141-44.

54. *Id.*

well as a failure to act,⁵⁵ a showing of policy at the municipal level,⁵⁶ and a showing of motive, common features, and links between acts.⁵⁷ The element does not need to be formally established in advance of the attack;⁵⁸ it can be deduced from the repetition of acts, preparatory activities, or from a collective mobilization.⁵⁹ It can be established by showing a pattern,⁶⁰ does not need to be accurate or precise,⁶¹ may evolve over time,⁶² and need not be carried out by a State actor.⁶³ Also, the prosecutor must prove the individual defendant's *mens rea* as "knowledge," but need not prove that the individual defendant "had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization."⁶⁴

By this comment, there are four points with which I hope to have succeeded in persuading practitioners and jurists to find comfort, without feeling like they are somehow betraying the nature and purpose of the ICC or the general progression of human rights and international criminal law. First, the entirety of the Rome Statute is not a general codification of customary international law (and so stating does not undermine its capacity for or contribution to ending impunity for the crimes enumerated in the Statute). Second, the lack of international consensus on the elements of the crime, "crimes against humanity," precludes, at present, the existence of any customary definition of the crime that states and tribunals are obligated to apply under international law. Third, conceding that there is a lack of international consensus on the elements of an act that constitutes "crimes against humanity," does not dilute the customary international law or *jus*

55. *Id.* ¶ 141 (citing International Criminal Court, *Elements of Crimes*, U.N. Doc. PCNICC/2000/1/Add.2 at 5 (2000)).

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

57. *Id.* ¶ 144 (citing Prosecutor v. Gbagbo, Case No. ICC-02/11-01/11, Decision on the Confirmation of Charges against Laurent Gbagbo, ¶¶ 211-12, 215 (June 12, 2014)).

58. *Id.* ¶ 143 (citing Prosecutor v. Katanga, ICC-01/04-01/07, Pre-Trial Chamber Decision on the Confirmation of Charges, ¶ 394 (Sept. 30, 2008)).

59. *Id.* (citing Katanga, ICC-01/04-01/07, ¶ 1109).

60. *Id.* (citing Prosecutor v. Jean-Pierre Bemba Gombo, U.N. Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ¶ 115 (June 15, 2009)).

61. *Id.* (citing Katanga, ICC-01/04-01/07, ¶ 1109).

62. *Id.*

63. *Id.* ¶¶ 147-48 (citing Katanga, ICC-01/04-01/07, ¶ 396; Situation in the Republic of Kenya, Case No. ICC-01/09, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic, ICC-01/09, ¶ 90 (Mar. 31, 2010)).

64. *Id.* ¶ 144 (citing Prosecutor v. Gbagbo, Case No. ICC-02/11-01/11, Decision on the Confirmation of Charges against Laurent Gbagbo, ¶ 214 (June 12, 2014)).

cogens status (or the *ergo omnes* obligations of states to prevent and punish) of the crime. Fourth, the definition of “crimes against humanity” can be flexible, yet firm. It can preserve the core elements of the crime so as to avoid fragmentation and conflict with the complementarity regime of the ICC, while fostering national laws that enable effective prosecution of cases with unique factual circumstances that would otherwise land beyond the scope of the ICC’s jurisdiction. After all, empowering states to apply the law in a way that responds to their relative needs and avoids marginalizing minority communities, while yielding effective prosecutions in their respective jurisdictions, is what will bridge the impunity gap. This is equally, if not more, important to the work of the ICC than pursuing what may be an unrealistic expectation that a majority of states will or should adopt the word-for-word definition of “crimes against humanity” set forth in the Rome Statute.⁶⁵

When unshackled by the perception that a state is bound by customary international law to apply the particular definition⁶⁶ of crimes against humanity that was negotiated into the Rome Statute, states would be free to legislate and their courts free to apply a definition that retains the core elements of the crime, yet includes a series of factors to apply when relevant to the factual circumstances of the widespread and systematic attack that is the backdrop against which the individual crimes were perpetrated. Such an approach would both preserve the rule of law in customary international law and promote the effective adoption and implementation of customary international law principles by domestic legal systems. As a civil rights litigator in American courts, it has been my experience, when civilly prosecuting abuses of force under color of law in violation of the United States Constitution, that a core set of elements defining the violation, accompanied by a series of factors to consider when probative to the particular circumstances of the case, is a useful methodology that promotes uniformity and predictability among judicial decisions. At the same time, it

65. In his first report, the ILC Special Rapporteur reasons that “the unevenness in the adoption of national laws relating to crimes against humanity has collateral consequences with respect to inter-State cooperation in seeking to sanction offenses” such as the creation of sanctuary states where perpetrators might go to avoid prosecution or extradition. *See id.* ¶ 64. Cooperation in this regard among states is integral to the functioning of the ICC and required given the limitations of complementarity. It is my opinion that a multi-factor approach to the definition of the crime at the domestic level does not necessarily implicate the important risks about which the Special Rapporteur warns.

66. *See* Sadat & Carden, *supra* note 21, at 427 (noting that “the definition adopted in Rome . . . is quite restrictive in overall character”).

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

Lawmakers and jurists at the national level should, therefore, incorporate a degree of flexibility to how the elements of “crimes against humanity” will be applied domestically, given its applicability to a broad scope of factual scenarios, in light of the composition and context of the crime. Distinct from genocide, which is characterized by the requisite *mens rea* element of specific intent, and from war crimes, which require a nexus to an armed conflict, crimes against humanity are defined by their commission “in connection with other crimes,”⁶⁸ and cover a broad range of conduct “often where the elements of genocide prove lacking.”⁶⁹ It is well-established that at the core of the definition of crimes against humanity—that which imputes criminality beyond what would ordinarily be punishable under domestic criminal law—is the requirement that the conduct be committed in the context of a widespread or systematic attack and the *mens rea* requirement. The latter links the defendant’s state of mind to the underlying attack so as to “ensure[] that acts contemporaneous with, though unrelated to, the underlying attack are not the basis for prosecution.”⁷⁰ Whether the prosecution needs to prove that the underlying attack was pursuant to or in furtherance of a State or organizational policy is a factor that may be useful in limited and less-than-obvious cases. Other factors that the courts might consider when analyzing whether conduct constitutes a crime against humanity could include the status of the victim, the mental intent of the perpetrator, and whether the act of the defendant was accomplished as part of a larger plan.⁷¹

Impunity for crimes against humanity cannot not prevail simply because there is a lack of international consensus on the elements of the crime. This would indeed yield an absurd result. However, fulfilling a state’s obligation to prevent and punish the crime need not and should not necessarily rely on stretching the definition of customary international law to encompass principles that have not yet reached that status. Nor should a state adhere to a definition that does not suit the courts in which the crime will be prosecuted or does not fit the factual circumstances of the underlying widespread and systematic attack. As Professor Gaitán demonstrates through his account of

67. *See generally*, Ninth Circuit Jury Instructions Committee, Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit § 9.25 (2017 ed., 2021) [hereinafter Civil Jury Instructions].

68. STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 47 (2d ed. 2001).

69. *Id.* at 49.

70. *Id.* at 62; Sadat & Carden, *supra* note 21, at 429.

71. Sadat & Carden, *supra* note 21, at 431-32.

the Argentine approach, the test of whether a crime was committed “pursuant to or in furtherance of a State or organizational policy”⁷² may not be “capable of precise definition or mechanical application.”⁷³ Therefore, a flexible approach to the definition that combines certain core elements with a number of additional factors to consider, as, for example, those enumerated by the Special Rapporteur concerning the policy element, would also enable courts to apply the core elements of the crime with uniformity, while effectively adjudicating the unique factual circumstances of each particular case.

72. Rome Statute, *supra* note 8.

73. Civil Jury Instructions, *supra* note 67, §9.25 cmt. 195.