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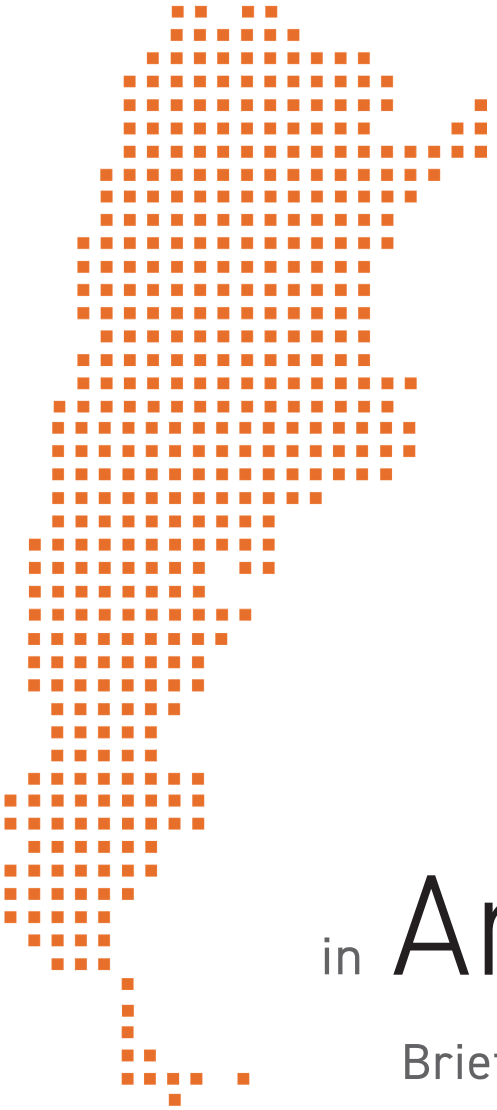

in Argentina

Briefing Paper | April 2025

LAW AND PRACTICE

TRIAL International

UNIVERSAL JURISDICTION LAW AND PRACTICE in Argentina

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TRIAL International

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TRIAL International is a non-governmental organization fighting impunity for international crimes and supporting victims in their quest for justice. TRIAL International takes an innovative approach to the law, paving the way to justice for survivors of unspeakable suffering. The organization provides legal assistance, litigates cases, develops local capacity and pushes the human rights agenda forward.

PETER MOREAU

This briefing paper has been prepared by legal consultants specialised in Argentinian law, working for or contracted by Peter & Moreau.

Translated from Spanish by:

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Glossary

CCP	Code of Criminal Procedure of the Argentine Nation (Código Procesal Penal de la Nación- CPPN)
CENAVID	Crime Victims' Support Center (Centro de Asistencia a las Víctimas de Delitos)
CFCP	Higher Federal Court of Criminal Cassation (Cámara Federal de Casación Penal)
CONICET	National Scientific and Technical Research Council (Consejo Nacional de Investigaciones Científicas y Técnicas)
CPPF	Federal Code of Criminal Procedure (Código de Procedimiento Penal Federal)
CPPN	Code of Criminal Procedure of the Argentine Nation (Código Procesal Penal de la Nación)
CSJN	Supreme Court of Justice of the Argentine Nation (Corte Suprema de Justicia de la Nación)
DAJIN	Directorate of International Legal Assistance (Dirección de Asistencia Jurídica Internacional)
DOVIC	Directorate-General of Victim Support, Guidance and Protection (Dirección General de Acompañamiento, Orientación y Protección a Víctimas)
ICC	International Criminal Court
ICFDP	Inter-American Convention on Forced Disappearance of Persons
ICRC	International Committee of the Red Cross
NGO	Non-governmental organization
PPO	Public Prosecutor's Office

Introduction

This briefing paper has been prepared by legal consultants Bénédict De Moerloose[1] and Máximo Castex[2] for TRIAL International.

It provides an overview of Argentina's national legal framework relating to universal jurisdiction over international crimes and also reviews its practical application.

Universal jurisdiction in this briefing paper is understood to encompass the investigation and prosecution of crimes committed on a foreign territory by persons who are not nationals of the jurisdiction in question.

This briefing paper focuses on the international crimes of genocide, war crimes, crimes against humanity, torture, and enforced disappearance.

The paper is part of a series of briefing papers by TRIAL International and Open Society Justice Initiative on selected countries. [3] This series intends to contribute to a better understanding of domestic justice systems among legal practitioners to support the development of litigation strategies.

The content is based on desk research and interviews with Argentinian practitioners.[4]

The authors would like to thank Julieta Mira, investigator at the National Scientific and Technical Research Council (CONICET) and assistant professor of human rights at the Universidad Nacional de Lanús (Argentina), and Mariano Lanziano, lawyer, consultant for the National Committee for the Prevention of Torture and professor of criminal procedural law at the Universidad Nacional de Avellaneda, for reviewing this briefing paper and providing their valuable advice.

This briefing paper was finalized in January 2025. Any subsequent developments have not been taken into account.

Crimes invoking universal jurisdiction

Universal jurisdiction in Argentina is not governed by a specific law, but is instead recognized in the case law[5] as a principle derived from Article 118[6] of the Constitution (Article 99 when

1 Swiss lawyer specializing in international law, Peter & Moreau, Geneva-Paris.

2 Argentinian criminal lawyer and professor at the Universidad de José C. Paz.

3 The briefing papers can all be found at: https://trialinternational.org/universal-jurisdiction-tools/universal-jurisdiction-law-and-practice-briefing-papers/

4 The interviewees include: Máximo Langer, professor at the University of California, Los Angeles (UCLA), interviewed on 2 October 2024; federal prosecutor A (who prefers to remain anonymous), interviewed on 7 October 2024; Josefina Nacif, former coordinator of the remembrance, truth and justice team of the Directorate of Human Rights of the Ministry of Foreign Affairs, International Trade and Worship of Argentina, interviewed on 7 October 2024; Pablo Salinas, federal judge of the Second Higher Federal Oral Criminal Court of Mendoza (Cámara del Tribunal Oral en lo Criminal Federal) and full professor at the Universidad Nacional de Cuyo, interviewed on 28 October 2024; federal prosecutor B (who prefers to remain anonymous), interviewed on 29 October 2024; Javier De Luca, federal prosecutor-general of the Higher Federal Court of Criminal Cassation (*Cámara Federal de Casación Penal*) and professor of criminal law and criminal procedure in the Faculty of Law of the Universidad de Buenos Aires (UBA), interviewed on 5 November 2024; Mariano N. Lanziano, lawyer and consultant for the National Committee for the Prevention of Torture and professor of criminal procedural law at the *Universidad Nacional de Avellaneda*, interviewed on 20 November 2024.

5 Corte Suprema de Justicia de la Nación (Supreme Court of Justice), Argentina, *Simón, Julio Héctor y otros s/ privación ilegítima de la Libertad*, judgment 1767 of 14 June 2005, para. 32, p. 143.

6 Constitution of Argentina, Article 118: "All ordinary criminal trials that do not arise from the right to prosecute granted to the Chamber of Deputies shall be decided by the judiciary, as soon as this institution is established

enacted in 1853), which establishes the possibility of exercising extraterritorial jurisdiction for international crimes. This provision is interpreted in conjunction with Article 75(22) of the Constitution, which incorporates international treaties into Argentine law.

The crimes that can be prosecuted under universal jurisdiction in Argentina include those listed in the Law Implementing the Rome Statute of the International Criminal Court (Law 26.200 of 2007). This law classifies international crimes by reference to the Rome Statute, reflecting its original wording and adding a maximum and minimum sentence for each crime.

Nevertheless, Article 2 of the law establishes that, "[t]he criminal justice system provided for in the Rome Statute and in this law only applies to crimes and offences over which the International Criminal Court (ICC) has jurisdiction". This has been interpreted to apply only to crimes committed since 1 July 2002 (when the Rome Statute entered into force), thus, excluding crimes that occurred prior to this.[7] In such cases, it is likely that the Argentinian justice system will take an approach similar to that applied in prosecuting the crimes committed by the last military dictatorship (1976-1983). Despite being recognized as crimes against humanity, those cases were classified as crimes under the Criminal Code that applied at the time of commission of the crimes, for example, torture, enforced disappearances, murder, rape and arbitrary detention.

Other international crimes not legally defined in Law 26.200 of 2007, in particular torture and enforced disappearances, are included in the Criminal Code of Argentina as independent crimes when they are not classified as war crimes or crimes against humanity.

However, universal jurisdiction in Argentina is not limited to the crimes described in Law 26.200 and the Criminal Code, but also covers other international crimes defined by ratified treaties or customary law.[8] In such cases, the courts apply the Criminal Code of Argentina to determine the criminal liability for the underlying offences and determine the corresponding sentences.

1. Genocide

Argentina acceded to the Convention on the Prevention and Punishment of the Crime of Genocide on 9 April 1956. In 1994, when the Constitution was reformed, Article 75(22) gave constitutional status to certain international treaties, including this Convention. This grants it supremacy over other laws within the Argentinian legal system.

However, genocide was not defined in Argentinian domestic law until the enactment of Law 26.200. This law defines the crime of genocide by referring to Article 6 of the Rome Statute and, in Article 8, establishes a sentence of five to 25 years' imprisonment. If the genocidal act results in the death of the victim, the sentence is life imprisonment.

This definition of the crime was first applied in Argentina in trials for crimes committed during the last military dictatorship (1976–1983). Some experts maintained that it equated to genocide, arguing that the dictatorship sought to destroy a group within Argentinian society

in the Republic. Such trials shall be held in the same province where the crime was committed; but **when it is committed outside the national borders against the law of nations**, Congress shall determine where the trial is to be held by means of a special law" (bold added).

7 Santiago Felgueras, Leonardo Filippini and Rosario Muñoz, *La tortura en la jurisprudencia argentina por crímenes del terrorismo de Estado* (Torture in Argentinian Case Law for Crimes of State Terrorism), 2016, available at: https://www.cels.org.ar/web/wp-content/uploads/2016/05/Filippini-Felgueras.pdf

8 This derives from the text of Article 118 of the Argentinian Constitution ("law of nations"), from Article 3(d) of Law 26.200, and from the case-law of the Supreme Court (*Simón, Julio Héctor y otros s/ privación ilegítima de la Libertad*, op. cit.)

in order to restructure the society. This stance was endorsed by several judgments, such as those of the *Tribunal Federal* (Higher Federal Court) of La Plata, in which the judges considered that the crimes that had been committed constituted crimes against humanity perpetrated "in the context of a genocide" between 1976 and 1983.[9]

Several cases of alleged genocides have been brought in Argentina under the principle of universal jurisdiction.

For example, in 2005, a *querella* (private criminal complaint) was brought, under the principle of universal jurisdiction, for crimes against humanity and genocide regarding the persecution of Falun Gong practitioners in the People's Republic of China (hereinafter, "the Falun Gong case").[10]

In 2019, a private criminal complaint was brought before the Argentinian authorities for alleged genocide and crimes against humanity committed against the Rohingya people in Myanmar in 2017 (hereinafter, "the Rohingya case").[11]

In 2022, Argentina received another criminal complaint of genocide in China for the persecution of the Uyghur minority (hereinafter, "the Uyghur case").[12]

2. Crimes against humanity

The Argentinian legislature has defined crimes against humanity in accordance with the original wording of Article 7 of the Rome Statute and by incorporating the applicable sentence, which is three to 25 years' imprisonment, into Article 9 of Law 26.200. However, if the crime results in death of a victim, the applicable sentence is life imprisonment.

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9 *Tribunal Oral Federal nº 1* (First Higher Federal Oral Court) of La Plata, judgment of 19 September 2006, in case 2251/06; First Higher Federal Oral Court of La Plata, judgment of 2 November 2007, in case 2506/07.

10 Following a four-year investigation, the *Juzgado Federal nº 9* (Ninth Lower Federal Court) issued an international arrest warrant for the former Chinese leader Jiang Zemin in 2009. However, one month later, the warrant was cancelled, and the case closed almost immediately. This decision was upheld by the *Cámara Federal de Apelaciones* (Higher Federal Court of Appeals), since similar crimes were being investigated in Spain. The decision of December 2010 was appealed and, on 17 April 2013, the *Cámara de Casación Penal* (Court of Criminal Cassation) of Argentina ordered the case to be reopened, indicating a failure to analyze the criteria for applying the invoked guarantee (Case no 17.885/2005, *LUO GAN s/ imposición de torturas y genocidio*).

11 The private criminal complaint was brought by the chair of the Burmese Rohingya Organization UK (Maug Tun Khin) and six female Rohingya survivors living in the refugee camp in Bangladesh. The complainants are represented by Tomás Quintana, a lawyer and former Special Rapporteur on the situation of human rights in Myanmar. In July 2021, a court of first instance dismissed the case on the grounds that there was already an International Criminal Court (ICC) investigation. The decision was appealed by the complainants on the basis that the ICC investigation did not have the jurisdiction to investigate the genocide of the Rohingya people since Myanmar is not party to the Rome Statute. In November 2021, the Higher Federal Court reversed the decision of the lower court and ordered an investigation to be opened. In December 2023, the complainants requested that the Commander-in-Chief of the armed forces of Myanmar, Min Aung Hlaing, and his subordinates be summoned for questioning and that an international arrest warrant be issued. In June 2024, the federal prosecutor in charge made a similar request. In February 2025, the court in charge issued arrest warrants for 22 Burmese military officers and three civilians.

12 Case no CFP 2774/2022 was heard in the Seventh Lower Federal Court, which, following the federal prosecutor's intervention, decided to archive the case on the grounds that similar investigations were ongoing in Turkey and France which, in its opinion, prevented the Argentinian legal system from having competence. The complainants appealed this decision and, in July 2024, the Third Chamber of the *Cámara Federal de Casación Penal* (Higher Federal Court of Criminal Cassation) reversed the decision to archive the case and ordered a new assessment. However, in August 2024, the Second Chamber of the Federal Court of Criminal Appeals upheld its initial stance, confirming that it was not possible to proceed with the investigation in Argentina since proceedings were under way in other jurisdictions. This decision was appealed again before the Higher Federal Court of Criminal Cassation.

Before this law was enacted, the Supreme Court of Justice of Argentina recognized crimes against humanity as part of domestic law. This is because prohibition of such crimes was a compulsory rule of general international law (*jus cogens*), and therefore was deemed to exist in the Argentinian legal system even before being explicitly recognized.[13]

The Argentinian criminal courts have, on numerous occasions, ruled on cases of crimes against humanity within the context of the trials concerning the last military dictatorship in Argentina.[14]

Various cases of alleged crimes against humanity have been brought in Argentina under the principle of universal jurisdiction. As such, in addition to the cases mentioned earlier (particularly, the Uyghur case and the Rohingya case), which also concerned crimes against humanity, there are other relevant cases based on this same allegation.

In particular, in 2010, victims and human rights organizations in Spain and Argentina filed a criminal complaint against crimes against humanity committed in Spain during the Francoist dictatorship (hereinafter, "the Francoism case").[15]

In September 2022, a private criminal complaint was brought against the Nicaraguan president, Daniel Ortega, and other senior Nicaraguan officials for crimes against humanity, including enforced disappearances, torture, murder, and deprivation of liberty, among other crimes committed since 2018.[16]

In 2023, a criminal complaint was lodged with the Argentinian federal courts on behalf of the families of two victims alleging crimes against humanity committed by members of the Venezuelan government (hereinafter, "the Venezuela case").[17]

In 2023, 11 victims and three NGOs from Colombia[18] filed a private criminal complaint for

13 Supreme Court of Justice of the Argentine Nation, case no 17.768, *Simón, Julio Héctor y otros s/ privación ilegítima de la Libertad*, judgment 1767 of 14 June 2005, para. 36, p. 53 (Decision: 328:2056).

14 For example, Operation Condor: case no 1.504, *VIDELA, Jorge Rafael y otros s/privación ilegal de la libertad personal*; case no 1.951, *LOBAIZA, Humberto José Román y otros s/privación ilegal de libertad* (art. 144 bis inc. 1° del C.P.), case no 2.054, *FALCÓN, Néstor Horacio y otros s/asociación ilícita y privación ilegal de la libertad*, and case no 1.976, *FURCI, Miguel Ángel s/privación ilegal de la libertad agravada e imposición de tormentos* of the registry of the First Higher Federal Oral Criminal Court of Buenos Aires. ESMA Unificada case: case 1.282 and others, of the registry of the Fifth Higher Federal Oral Criminal Court of Buenos Aires.

15 In 2013, the judge María Servini issued an arrest warrant and requested the extradition of four former officials of the Francoist dictatorship for crimes against humanity, but in 2014 the *Audiencia Nacional de España* (National High Court of Spain) dismissed the request. In 2016, an investigation was opened into the death of Federico García Lorca and in 2017 an arrest warrant was issued against Martín Villa for the death of five workers in 1976. New victims were added to the case in 2018, which included reports of abuse against women. In 2021, Martín Villa was tried for crimes against humanity, but the Higher Federal Court of Appeals terminated the proceedings and issued a ruling of a lack of merit to acquit or try Martín Villa, without prejudice to the investigation continuing.

16 The investigation was opened in October 2022. As an initial measure, the Argentinian authorities sent letters rogatory to Nicaragua to ask whether they were already investigating and prosecuting these crimes. On 24 November 2023, the Third Federal Prosecutor's Office formally requested statements from Daniel Ortega and Rosario Murillo. The judge, Ariel Lijo, issued an arrest warrant against the Nicaraguan president, Daniel Ortega, and his wife, the vice president Rosario Murillo, and other members of the government on 30 December 2024.

17 The criminal complaint was lodged by the NGO Clooney Foundation for Justice. In 2024, the Second Lower Federal Court archived the case, on the grounds that it was already under the jurisdiction of the Prosecutor's Office and the ICC. However, the Higher Federal Court of Appeals reversed this decision. In September 2024, the same court ordered the arrest of Nicolás Maduro and other suspects, with the federal judge in charge submitting a request to Interpol in November 2024 for Red Notices to be issued.

18 The *Colectivo de Abogados José Alvear Restrepo* (CAJAR), the *Corporación Jurídica Libertad* (CJL) and the *Comité de Solidaridad con los Presos Políticos* (CSPP).

crimes against humanity and war crimes against the former Colombian president Álvaro Uribe Vélez (hereinafter, "the Colombia case").[19]

3. War crimes

In Argentinian legislation, war crimes are defined by reference to the original wording of Article 8 of the Rome Statute. Additionally, the content/elements of Article 85(3)(c)[20] and (d)[21] and Article 85 (4)(b)[22] of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1) are also included in Article 10 of Law 26.200. Consequently, certain grave breaches of that Protocol that are not covered by the Rome Statute - notably the prohibition on launching an attack against works or installations containing dangerous forces, as well as an unjustifiable delay in the repatriation of prisoners of war or civilians – are also included in Argentinian domestic law. [23]

The applicable sentence is three to 25 years' imprisonment. If death occurs due to such offense, the sentence is life imprisonment.

Article 10 of Law 26.200 also clarifies that when the Rome Statute refers to "conscripting or enlisting children under the age of fifteen years", the Argentine Republic understands this to mean under the age of 18. This is consistent with Argentina's traditional position on child protection.

Likewise, Argentina applies the provision of the Rome Statute referring to "intentionally using starvation of civilians as a method of warfare" not only to international armed conflicts, but to armed conflicts of any kind.

The concept of war crimes has also featured in universal jurisdiction cases, primarily in the private criminal complaint brought in the Colombia case, in which it was alleged that war crimes had been committed in that country between 2002 and 2008.[24]

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19 The case was assigned to the Second Lower Federal Court of Buenos Aires and to the Fourth Federal Prosecutor's Office, which proceeded with the case. In 2024, following a request from the judge, the ICC reported that there were active investigations into Uribe. In July of the same year, the judge granted the victims and organizations from Colombia the right to join the case as civil parties, authorizing them to request evidence and bring the case.

20 "the following acts shall be regarded as grave breaches [...] causing death or serious injury to body or health [...] launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 a) iii)".

21 "making non-defended localities and demilitarized zones the object of attack".

22 "the following shall be regarded as grave breaches of this Protocol, when committed wilfully and in violation of the Conventions or the Protocol [...] (b) unjustifiable delay in the repatriation of prisoners of war or civilians".

23 The inclusion of the prohibition on attacking non-defended localities and demilitarized zones is less understandable because they appear to be covered by Article 8(2)(b)(v) of the Rome Statute ("Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives"). See also International Committee of the Red Cross (ICRC), War Crimes under the Rome Statute of the International Criminal Court and their source in International Humanitarian Law.

24 Rojas Castro, Silvia and Mira, Julieta, "South-South justice for Colombian victims? Shedding light on the (limited) potential of universal jurisdiction in Argentina", *Opinio Juris*, 2024, pp. 1–4, available at: https://opiniojuris.org/2024/09/23/south-south-justice-for-colombian-victims-shedding-light-on-the-limited-potential-of-universal-jurisdiction-in-argentina/

4. Enforced disappearance

The Inter-American Convention on Forced Disappearance of Persons (ICFDP) was approved by Law 24.556 in 1995 and was granted constitutional hierarchy through Law 24.820 in 1997.

Nevertheless, it was incorporated into the Argentinian Criminal Code only through Law 26.679 of 2011. Article 142 *ter*, of this law provides:

> "TEN (10) to TWENTY-FIVE (25) years' imprisonment and a permanent and absolute prohibition on holding any public office or acting as a private security agent shall be imposed on: the public official or person or member of a group of people who, acting with the authorization, support or acquiescence of the State, in any way, deprives one or more people of their liberty, when this action is followed by a lack of information or a refusal to acknowledge the deprivation of liberty or to report the whereabouts of the person".

The definition of Article 142 *ter* of the Argentinian Criminal Code covers enforced disappearances when they are not committed as a part of a generalized or systematic attack on the civilian population. In those cases, Law 26.200 (see above) applies instead of Article 142 *ter*.

This definition is similar to that of international conventions to which Argentina is a State Party - the ICFDP (Article 2) and the International Convention for the Protection of All Persons from Enforced Disappearance (Article 2).

The legal definition of the crime contains one aggravating and one mitigating circumstance:

> "The sentence shall be life imprisonment if death occurs or if the victim was a pregnant woman, a person under the age of EIGHTEEN (18) years, a person over the age of SEVENTY (70) years or a person with a disability. The same sentence shall be imposed when the victim is a person born during the enforced disappearance of their mother. The sentencing range provided for in this article may be reduced by one third of the maximum and half of the minimum in the case of perpetrators or accomplices who release the victim alive or provide information that enables them to emerge alive".

Likewise, Article 215 *bis* of the Code of Criminal Procedure of the Argentine Nation prohibits that cases of enforced disappearance are archived until the facts become clear:

> "The judge may not archive cases in which the crime provided for under Article 142 *ter* of the Criminal Code is being investigated until the person is found or their identity restored. The Public Prosecutor's Office is bound by the same impediment".

Law 26.679 provides the federal judiciary to be competent to investigate this crime by incorporating it into the list in Article 33(e) of the Code of Criminal Procedure of the Argentine Nation.

5. Torture

Article 144 *ter* (1) of the Argentinian Criminal Code punishes the public official who imposes any form of torture on persons who are legally or illegally deprived of their liberty with a sentence of "eight to 25 years of detention or imprisonment and a permanent and absolute prohibition on holding any public office".

Since this definition establishes no motivational limit for torture, it provides a broader framework than the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Article 1(I)) - ratified by Argentina in 1986 - and the Inter-American

Convention to Prevent and Punish Torture (Article 2). In other words, the intent of the perpetrator is irrelevant when determining whether the conduct meets the legal definition of the crime.

In addition, Article 144 *quater* provides punishments for officials who fail to prevent torture, where they have the competence to do so, or who fail to report it, where they do not have authority to prevent it. Judges who do not launch a preliminary criminal investigation or who fail to report an act of torture to the competent judge within 24 hours are also penalised. Similarly, Article 144 *quinto* provides sanctions for the lack of due diligence in preventing torture.

In 2018, a criminal complaint was filed against the prince, deputy prime minister and defense minister of Saudi Arabia, Mohammed Bin Salman, for, among other crimes, torture committed against Saudi citizens and against the journalist Khashoggi (hereinafter, "the Bin Salman case").[25]

6. Aggression

Argentina does not currently have a domestic law defining the crime of aggression. However, through Law 27.318, published on 21 November 2016, the country ratified the Kampala Amendments (2010), which incorporated the definition of this crime into Article 8 *bis* of the Rome Statute. Therefore, this crime may be prosecuted under Argentinian law, as confirmed by the Public Prosecutor's Office (PPO) in its General Guidelines for Action on Universal Jurisdiction.[26]

Modes of liability

1. Principal responsibility and command responsibility

According to Article 45 of the Argentinian Criminal Code, a person may participate in a crime as an *autor* (perpetrator) or as a *partícipes* (accomplices). Liability as a perpetrator is defined as *dominio del hecho* (control over the crime) - that is, the ultimate control and the final decision concerning the criminal act. The perpetrator is the person who directs the course of events and can influence what happens.[27] On the other hand, the *partícipes* (accomplices), in general, do not have such control.

Control over the crime occurs when the perpetrator has control over the criminal action. This can be either by directly acting as provided for in the law, or by controlling the will of

25 The criminal complaint was filed by the NGO Human Rights Watch. In November 2018, the Argentinian authorities investigated whether the allegations were being examined elsewhere, in addition to the diplomatic status of Bin Salman, requesting information from Saudi Arabia, Yemen and the ICC. In 2021, letters rogatory were sent to Turkey. Human Rights Watch, "G20: Saudi Crown Prince Faces Legal Scrutiny. Human Rights Watch Files with Argentine Federal Prosecutor", 26 November 2024, available at: https://www.hrw.org/news/2018/11/26/g20-saudi-crown-prince-faces-legal-scrutiny

26 *Pautas Generales de Actuación del Ministerio Público Fiscal de la Nación sobre Jurisdicción Universal* (General Guidelines for Action of the Public Prosecutor's Office of the Argentine Nation on Universal Jurisdiction), December 2024.

27 As an exception, in so-called *delitos de propia mano* and *delicta propria* (single-handed crimes), when the person who acts together with another person to commit the criminal action does not personally carry out the criminal conduct or lacks the specific quality to be the perpetrator, despite having actual control over the crime, they cannot be considered the perpetrator (see Zaffaroni, Eugenio A., Alagia, Alejandro and Slokar, Alejandro, *Derecho Penal – Parte General* (Criminal Law – General Part), Ed. Ediar, Buenos Aires, 2000, pp. 756-757, for whom it is a case of primary aiding).

the other person, even when the latter is acting without malice or justifiably, when all those involved carry out the same criminal action by dividing the tasks in order to commit the crime.

Until now, there have been no convictions based on the "command responsibility" category arising from international criminal law (Article 28 of the Rome Statute). The Argentinian courts have opted to rather apply the provisions of domestic law regarding perpetrators and accomplices as provided in Article 45 of the Criminal Code. Consequently, regarding the responsibility of superiors for crimes committed by their subordinates, the case law has mostly considered them as indirect perpetrators by applying the theory of control over the will within an organized power structure, as defined by Claus Roxin.[28] As such, the person who does not directly commit the crime but supervises and exercises control over it, is also deemed a perpetrator. This control involves coordinating the individual acts needed to cause the damage, even though such acts are performed by different people when the tasks are divided.

This theory of indirect perpetrator who acts by controlling an organized power structure was adopted by Judge Servini when trying one of the accused in the Francoism case,[29] and has also been applied in a significant number of cases concerning the Argentinian dictatorship.[30]

2. Aiding and abetting

Persons who maliciously intervene in a crime, without being the direct perpetrator, are considered accomplices, in the form of aiding, which can be primary or secondary, or abetting.

The concept of primary aiding arises from the text of Article 45 of the Criminal Code and refers to providing such assistance without which the commission of the crime would not have been possible. This assistance must be an essential contribution to committing the unlawful act and may be provided either during the preliminary stage or during the commission of the crime.

Abetting, which also derives from Article 45 of the Criminal Code, consists of encouraging the perpetrator to commit the unlawful act or offense, which is equivalent to deciding to carry out the crime. In this context, the principle that the perpetrator carries out the crime – owing to the accessory nature of the involvement – is essential.

The accomplice, whether a primary accomplice or an instigator, receives the same sentence as the perpetrator.

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28 Roxin, Claus, *Autoría y dominio del hecho en Derecho Penal* (Criminal Liability and Control Over the Crime in Criminal Law), Marcial Pons *Ediciones Jurídicas y Sociales*, 1998, pp. 267-276.

29 Charges of 15 October 2021 issued in case no 4.591/2.010, *GALVAN ABASCAL, Celso y otros s/imposición de tortura* (art. 144 *ter* inc. 1), of the First Secretariat of the *Juzgado Nacional en lo Criminal y Correccional Federal* (First Lower National Federal Criminal and Correctional Court).

30 "Camps" case, *Cámara Nacional de Apelaciones en lo Criminal y Correccional Federal* (Higher National Federal Criminal and Correctional Court of Appeal), case no 44, *Causa incoada en virtud del decreto 280/84 del Poder Ejecutivo Nacional*, ruling issued on 2 December 1986; Higher Federal Court of Criminal Cassation (CFCP), Fourth Chamber, case no 14.537, *CABANILLAS, Eduardo Rodolfo y otros s/recurso de casación*, reg. 1.928/13, ruling issued on 7 October 2013: "Having found the crimes being prosecuted in this case to be part of the systematic, clandestine and criminal plan orchestrated from the highest levels of the de facto authorities of the last military dictatorship, the case meets the requirements that must be present in order to apply Roxin's theory concerning indirect perpetrators acting through organized power structures"; Higher Federal Court of Criminal Cassation, Fourth Chamber, case no 5530/2012/TO1/CFC22, ruling issued on 7 November 2023: "In this case, it has been duly established that there was a repressive structure that carried out criminal actions for the purpose of implementing a comprehensive systematic plan whose main aim was to destroy any political opponent, with the power to act secretly and freely under the protection, in this case, of the upper ranks of the Army".

Secondary accomplices are those who participate in any other way in carrying out the crime or who assist after the crime has been committed in order to fulfil promises they made beforehand (Article 46 of the Criminal Code). The sentence for secondary accomplices is between two-thirds and half of the perpetrator's sentence. If the perpetrator's sentence is *reclusión perpetua*, the more serious form of life imprisonment, the accomplice's sentence is 15 to 20 years of imprisonment, and if the perpetrator's sentence is *prisión perpetua*, the lesser form of life imprisonment, the accomplice's sentence is 10 to 15 years of imprisonment.

3. Conspiracy

The legal concept of *asociación ilícita* (conspiracy) in Argentinian criminal law is a *sui generis* crime that penalises the formation of an organized group with the intention to commit crimes. Article 210 of the Argentinian Criminal Code punishes conspiracies consisting of three or more people who come together to commit crimes with a sentence of three to 10 years of imprisonment. Similarly, Article 210 *bis* provides five to 20 years of imprisonment for conspiracies involving at least two people that have at least two of the following characteristics:

a) consisting of 10 or more individuals;

b) having a military or military-style organization;

c) having a cellular structure;

d) having weapons or explosives of great offensive power;

e) operating in more than one political jurisdiction of the country;

f) being composed of one or more officers or non-commissioned officers from the armed forces or security forces;

g) having clear connections with other similar organizations within or outside the country; or

h) receiving any help, support or instruction from public officials.

This type of aggravated conspiracy has been applied in Argentina in various cases of international crimes, particularly in trials of former soldiers and officials responsible for human rights violations during the military dictatorship. One noteworthy example is the Arancibia Clavel case, in which the Supreme Court sentenced the defendant to life imprisonment for being the perpetrator of an aggravated conspiracy to persecute political opponents. The Court held that the conspiracy, as a *sui generis* crime, amounted to a crime against humanity, and was therefore not subject to a statute of limitation.[31]

4. Joint criminal enterprise

Argentinian courts have used the concept of joint criminal enterprise as grounds for their judicial decisions in cases of crimes against humanity, especially when dealing with collective responsibility in the context of the military dictatorship.[32] This approach has made it possible to prosecute members of organized repressive structures, even when those persons did not

31 Supreme Court of Justice of the Argentine Nation, case no 259, *Arancibia Clavel, Enrique Lautaro s/ homicidio calificado y asociación ilícita*, judgment of 24 August 2004, Decision: 327:3294.

32 In the "Acosta-ESMA II" decision (Higher Federal Court of Criminal Cassation, Second Chamber, case no 15496, 23/04/2014), the Higher Federal Court of Criminal Cassation applied the doctrine of joint criminal enterprise. This doctrine made it possible to prosecute cases of civilian complicity during the dictatorship and the sentence was upheld by the Supreme Court. In the "Olivera Róvere" decision (case no 12.038), the Higher Federal Court of Cassation described the elements of the joint criminal enterprise: multiple persons, the existence of a common plan to commit an international crime and the involvement of the accused in this plan, although not necessarily in a specific crime, but rather contributing to achieving the common purpose.

themselves directly commit any crime.

However, the defendants were convicted based on traditional modes of criminal participation under Argentinian law, that is either as indirect perpetrators, primary accomplices or secondary accomplices, without explicitly incorporating the concept of joint criminal enterprise.

5. Corporate liability

Companies cannot be convicted of international crimes, but their directors can be held liable. The Argentinian courts have tried civilians, including businesspeople, for collaborating with the dictatorship, especially for illegally persecuting workers and trade unionists. Such collaboration could either be through a direct intervention or by providing resources and information to the armed and security forces.[33]

Nevertheless, if Argentina ratifies the Ljubljana – The Hague Convention on International Cooperation in the Investigation and Prosecution of Genocide, Crimes against Humanity, War Crimes and other International Crimes, Argentina must ensure that its legislation is compatible with Article 15, which requires States Parties to adopt measures establishing the liability of legal persons for participating in international crimes.

Temporal jurisdiction

1. Start of temporal jurisdiction

The Argentinian Supreme Court has upheld that the laws that penalise crimes against humanity have been applicable since "time immemorial".[34] It has also confirmed that "the universal principle in criminal matters has been known for more than two centuries, in particular with reference to the slave trade, having been a part of our Constitution since 1853, and binds the Republic not only under customary international law but also by virtue of various international treaties ratified by our country".[35]

Likewise, it has taken the view that in the case of conflict between the principle of non-retroactivity of criminal law and the non-applicability of statutory limitations, the non-applicability of statutory limitations must take precedence if it appears in the text of conventions enacted after the crimes were committed. According to the Court, this is derived from the imperative peremptory norms.[36]

It is, therefore, likely that the Argentinian courts will be open to prosecuting international

33 A prime example of the trial of a businessperson for crimes against humanity in Argentina is that of Marcos Jacobo Levin, owner of La Veloz del Norte. Levin was convicted in March 2016 to 12 years imprisonment for his involvement in the illegal detention and torture of a trade union representative in his company, during Cobos' repression. In 2018, former executives of Ford Motor were declared guilty of crimes against humanity for their involvement in the enforced disappearance and torture of trade union activists during the Argentinian military dictatorship.

34 Supreme Court of Justice of the Argentine Nation, case no 17.768, *Simón, Julio Héctor y otros s/ privación ilegítima de la libertad*, judgment 1767 of 14 June 2005, para. 43 (Decision: 328:2056).

35 Ibid., para. 32.

36 Ibid., para. 43; Supreme Court of Justice of the Argentine Nation, case no 259, Arancibia Clavel, judgment of 24 August 2004, opinion of judge Boggiano, point 39, Decision: 327:3294; see also: Zafaroni, Eugenio Raúl and Bailone, Matías, *La Jurisdicción Universal en el Juicio al Franquismo. La Querella Argentina Contra el Genocidio en España* (Universal Jurisdiction in the Francoism Trial. Argentina's Criminal Complaint Against Genocide in Spain), *Biblioteca de Derecho Penal y Política Criminal, Colección* Dr. Eugenio Raúl Zaffaroni, Olejnik, October 2021 and Gelli, María Angélica, *Constitución de la Nación Argentina, Comentada y Concordada* (Constitution of the Argentine Nation, with Commentary), Buenos Aires: *La Ley*, 2004.

crimes without applying any limitation period, provided that they are considered part of customary international law.

One example of this progressive interpretation is the Francoism case, in which the fact that the alleged crimes were committed between 1936 and 1978 has not been an obstacle to opening an investigation.

2. Limitation period

The Argentinian domestic legislation (Article 11 of Law 26.200 Implementing the Rome Statute), international treaties ratified by the country that have constitutional status - particularly, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity[37] - and Argentinian case law consider that limitation period does not apply to international crimes. The case law is based on customary international law, as included in domestic law, and the regional case law, as can be seen in the 2004 Arancibia Clavel case and the Simón decision of the Supreme Court, which establish the non-applicability of statutory limitations to these crimes.

However, in cases in which torture (Article 144 *ter* of the Criminal Code) or enforced disappearances (Article 142 *ter* of the Criminal Code) are not considered crimes against humanity or war crimes, the general limitation periods provided for in the Argentinian Criminal Code apply. According to Article 62 of the Criminal Code, the limitation period is equivalent to the maximum custodial sentence applicable to the crime. As such, the limitation period varies depending on the sentence laid down for that crime, which can be up to 25 years for these crimes.

In the case of enforced disappearance, which is considered a continuous crime, the limitation period begins only when the criminal conduct ceases - that is, when the victim is found or when their death has been confirmed.

Requirements for universal jurisdiction

1. Absolute universal jurisdiction

Until now, Argentina has applied the principle of absolute universal jurisdiction. Accordingly, prosecution is not conditioned upon the perpetrators or the victims being present in its territory when the legal action is launched, or on them being Argentinian nationals or residents. The case law of the national courts has asserted that this principle means:

> "[...] [A]ny State investigates, prosecutes and punishes those who appear to be responsible for those crimes, even when the crimes have been committed outside its territorial jurisdiction or are unrelated to the nationality of the accused or the victims, by virtue of those crimes affecting the entire of humanity and violating the public order of the global community".[38]

The Permanent Representative of Argentina to the United Nations confirmed this interpretation in a letter presented to the United Nations in October 2018, in which he stated:

> "In practice, the Argentinian legal system has accepted the principle of universal jurisdiction on various occasions by opening investigations in the Republic when

37 Law 24.584, and Decree 579/2003, which acquired constitutional hierarchy through Law 25.778.

38 Supreme Court of Justice of the Argentine Nation, case no 17.768, *Simón, Julio Héctor y otros s/ privación ilegítima de la libertad*, judgment 1767 of 14 June 2005, para. 47, p. 220, (Decision: 328:2056).

> the crimes being investigated are considered to be crimes against the law of nations, even when these crimes were committed outside the territory of the Republic and neither the principle of nationality nor the principle of the defense of interests were applicable. This is pursuant to the provisions of Article 118 of our National Constitution and the obligations assumed internationally in the applicable Human Rights Treaties transposed into our National Constitution by Article 75(22) and the universal right of access to justice".[39]

An example of this interpretation of the principle of universal jurisdiction in Argentina is the case concerning the potential crimes against humanity and genocide committed in Myanmar against the Rohingya population. This case involves crimes committed outside Argentinian territory, with no direct link to the country, carried out by foreign perpetrators, and committed against foreign victims.[40]

Similarly, the case concerning the Francoist dictatorship has enabled the Argentinian criminal justice system to investigate international crimes committed in Spain by Spanish officials. According to the data obtained from the PPO, universal jurisdiction investigations have been opened in Argentina regarding the crimes committed in Azerbaijan, Bolivia, China, Colombia, Cuba, the Gaza Strip, Israel, Myanmar, Nicaragua, Russia, Spain, Turkey, Venezuela and Yemen.[41]

However, recent decisions suggest that a development in the case law that restricts universal jurisdiction cannot be ruled out. For instance, on 8 August 2024, in a case concerning the persecution against the Uyghurs, the Higher Federal Court of Appeals invoked a *regla de conexión* ("rule of connection") for the first time. The court ordered that the proceedings should be closed because the victims did not live in Argentina.[42]

Similarly, in its General Guidelines on Universal Jurisdiction issued on December 2024, the PPO, recognizing on the one hand the existence of universal jurisdiction based on the Constitution, international treaties and Argentinian case-law, proposed the following jurisdictional criteria:

a) that the alleged criminal is an Argentinian national;

b) that the alleged perpetrator is on Argentinian territory or is a stateless person living on Argentinian territory; or

c) that the victim or victims are Argentinian nationals.

This position contradicts the earlier case law and the official stance of Argentina. It may be tested soon - first, in the actions of prosecutors whose reactions to these guidelines are not yet known, and subsequently in the courts.

However, some change may be on the horizon, especially when the Federal Code of Criminal Procedure (CPPF) enters into force and the PPO takes on a central role in proceedings.[43]

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39 Permanent Mission of the Argentine Republic to the United Nations in New York, letter to the Office of Legal Affairs of the United Nations, ENAUN no 408/2018, New York, 31 May 2018.

40 *Cámara Criminal y Correccional Federal* (Higher Federal Criminal and Correctional Court), First Chamber, case CFP 8419/2019/7/CA2, Burmese Rohingya Organisation.

41 General Guidelines for Action of the Public Prosecutor's Office of the Argentine Nation on Universal Jurisdiction, December 2024, p. 3.

42 Higher Federal Criminal and Correctional Court, Second Chamber, case CFP 2774/22/1/CA1, *Dolkun Isa y otros s/ archivo y ser querellante*.

43 General Guidelines for Action of the Public Prosecutor's Office of the Argentine Nation on Universal Jurisdiction, December 2024, p. 29.

2. *Non bis in idem*

Argentina must apply the principle of *non bis in idem*, since Article 3(c) of Law 26.200 on the ICC limits the jurisdiction of the Argentinian courts to those cases in which the suspect(s) has(have) not been acquitted or convicted abroad or, if convicted, has(have) not served their sentence. Despite this, according to the General Guidelines of the PPO issued in December 2024, it is also necessary to ensure that proceedings to punish serious underlying crimes have been carried out in good faith and in accordance with international norms and standards. According to the PPO, "these provisions seek to avoid an invalid judgment handed down abroad impeding the effective prosecution of the alleged perpetrator(s) of these crimes".[44]

3. *Aut dedere aut judicare*

According to Article 4 of Law 26.200 on the ICC, when a person suspected of having committed an international crime is in Argentinian territory and is not extradited to a third State or surrendered to the ICC, the Argentinian authorities are obliged to take all the necessary measures to exercise their jurisdiction over said crime.[45]

4. Subsidiarity

Argentina exercises universal jurisdiction in a subsidiary manner. This means that the Argentinian courts apply it only after analyzing whether the alleged crimes have been or are being investigated by other competent courts.[46] Subsidiarity is a key consideration for the judicial authorities[47] and aligns with Argentina's stance at the international level.[48]

To determine whether the case is being investigated elsewhere, the Argentinian courts hearing the case generally begin by sending out letters requisitorial to find out whether the ICC or another State is investigating similar crimes. They also enquire about the scope of the said investigation, including which crimes are being investigated, the details of the case, whether it has the "same factual basis", and whether "active suspects" and "specific occurrences" have been identified.[49] The judges seek specific information as to whether: "[...]the elements defined by jurists as *eadem persona* [identity of the person being prosecuted], *eadem res* [identity of the object of the case] and *eadem causa petendi* [identity of the cause of action] all exist. These three identities must coexist in order for the existence of a total identity to be confirmed".[50]

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44 General Guidelines for Action of the Public Prosecutor's Office of the Argentine Nation on Universal Jurisdiction, December 2024.

45 Similarly, the Ljubljana – The Hague Convention, in Articles 8(3) and 14, lays down the obligation to establish conditional universal jurisdiction based on the presence of the suspect in the State's territory, in the event that they are not extradited.

46 Permanent Mission of the Argentine Republic to the United Nations in New York, letter to the Office of Legal Affairs of the United Nations, ENAUN no 408/2018, New York, 31 May 2018; Supreme Court of Justice of the Argentine Nation, *Simón, Julio Héctor y otros s/ privación ilegítima de la libertad*, judgment 1767 of 14 June 2005, para. 32, p. 143.

47 The Public Prosecutor's Office highlights this in particular in its General Guidelines for Action on Universal Jurisdiction, December 2024, p. 27, holding that, "when members of the Public Prosecutor's Office bring criminal proceedings in the country, it should first be verified whether the States with primary responsibility cannot or do not wish to exercise their jurisdiction, or whether other States with any other link to the crime could fill this void to prevent impunity", adding that universal jurisdiction should be employed "with great care, very much as a one-off".

48 Interview with Federal Prosecutor A.

49 Higher Federal Criminal and Correctional Court, First Chamber, case CFP 8419/2019/7/CA2, Burmese Rohingya Organisation, p. 7 (the Rohingya case); Higher Federal Criminal and Correctional Court, Second Chamber, case no 29.275, *NN s/ desestimación de denuncia y archivo*, of 3 September 2010 (the Francoism case).

50 Higher Federal Criminal and Correctional Court, First Chamber, case no 44.196, *Luo Gan s/archivo*, Court

In several universal jurisdiction cases in Argentina, the investigating judge and the PPO found that there were similar cases elsewhere, before national courts or the ICC, and therefore decided to archive the cases based on the principle of subsidiarity which is sometimes referred to as *ne bis in idem* by Argentinian courts. However, these decisions were later reversed by higher courts, as they held that the two investigations were not similar. This for instance occurred in the Francoism, Rohingya, Venezuela and Uyghur cases.[51]

Key steps in criminal proceedings

1. Two current procedural codes

The crimes provided for under the Rome Statute and Law 26.200, which implements Rome Statute in Argentina, fall under the jurisdiction of the higher federal courts that have competence over criminal matters[52].

At the procedural level, two federal criminal codes currently coexist in Argentina: the Code of Criminal Procedure of the Argentine Nation (CPPN) and the Federal Code of Criminal Procedure (CPPF).

The key difference between these two codes lies in their procedural model: the new CPPF adopts an adversarial system, where the prosecutor leads the investigation (Article 25 CPPF), in contrast to the traditional mixed system of the CPPN, in which the judge handles the investigation and can delegate part of it to the prosecutor.

The CPPF was approved by Congress in 2014 and has been implemented gradually. It was first applied on 10 June 2019 in the Salta and Jujuy provinces. It was subsequently implemented on 6 May 2024 in the Higher Federal Court of Appeals of Rosario, which primarily covers the province of Santa Fe; on 5 August 2024 in the Mendoza jurisdiction; on 4 November 2024 in the General Roca district; and on 2 December 2024 in Comodoro Rivadavia. The code is yet to be implemented in 11 federal districts and the Federal Capital, Buenos Aires[53]. However, in 2019, it was decided that certain articles, particularly regarding victims' rights, would apply in all federal jurisdictions.[54]

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no 9 – Secretariat no 17 (case file no 17.885/05) (the Falun Gong case).

51 Higher Federal Criminal and Correctional Court, First Chamber, case CFP 8419/2019/7/CA2, Burmese Rohingya Organisation, p. 7 (the Rohingya case); Higher Federal Criminal and Correctional Court, Second Chamber, case no 29.275, *NN s/ desestimación de denuncia y archivo*, of 3 September 2010 (the Francoism case). Higher Federal Criminal and Correctional Court, First Chamber, case no 44.196, *Luo Gan s/archivo*, Court no 9 – Secretariat no 17 (case file no 17.885/05) (the Falun Gong case). In the Uyghur case, after the private criminal complaint was lodged, the judge requested the assistance of the Directorate of International Legal Assistance (DAJIN) in obtaining information from the diplomatic representation about potential criminal trials relating to these crimes in China and other countries. The DAJIN reported that, in Turkey, a criminal complaint had been brought against 112 people, including Chinese authorities, for genocide and torture. On the basis of this report, the court concluded that there was an ongoing local investigation and archived the case. The Higher Federal Court upheld this decision, but in July 2024, the Court of Criminal Cassation dismissed it, considering that there was not sufficient legal evidence to corroborate the subject of the investigation in Turkey. Nevertheless, the court of second instance maintained its position in August 2024, highlighting the subsidiarity of universal jurisdiction and the existence of a criminal complaint in Turkey. This decision has been appealed.

52 Article 5 of Law 26.200.

53 Public Prosecutor's Office, *¿Cómo es la implementación del sistema acusatorio?* (How is the adversarial system being implemented?), available at: https://www.mpf.gob.ar/unisa/como-sera-la-implementacion-del-sistema-acusatorio/

54 Resolution 2/2019 of the Bicameral Committee for Monitoring and Implementing the CPPF, of 13 November 2019.

This particular procedural situation will be analyzed below, bearing in mind that the majority of criminal complaints under universal jurisdiction have been lodged in Buenos Aires within the framework of the CPPN. Therefore, the practical experience to date has primarily been in accordance with this law. In the future, the universal jurisdiction cases currently governed by the CPPN will likely be moved over to the CPPF once the latter becomes applicable.

2. Investigation

2.1 Launching the investigation

Universal jurisdiction proceedings in Argentina are launched either by a *denuncia* (criminal complaint, which may be made by anybody who has knowledge of a crime) or by a *querella* (private criminal complaint**,** lodged by a victim or an organization with the power to act as a *querellante*, meaning complainant) (Articles 5-7, 174 CPPN; Article 235 CPPF) before the Argentinian federal courts.

When this occurs in Buenos Aires, both types of complaint can be filed virtually through the *Sistema Lex* of the Judiciary of the Argentine Nation. Upon receiving the complaint, the Higher Federal Court of Appeals conducts a draw to assign the lower federal court that will hear the case.[55]

Private criminal complaints must be lodged in writing, through a lawyer who has been authorized to represent the complainant. To be admissible, the written submission must include, among other things: the personal details and address of the complainant, a summary of the alleged crimes, the details of the accused, documentation proving the link with the victims and, in the case of an organization, a copy of its statutes and proof that it is legally constituted (Articles 83 CPPN and 83 CPPF).

If any official documents submitted by the complainant are in a foreign language, such as identity documents or bylaws of an organization, they must be accompanied by a sworn translation. This translation need not be done in Argentina or the country of issue. In addition, both these documents and the copies of identity documents, birth certificates, and medical reports require a notarial certification and an apostille from the country of origin. If it is not possible to obtain an apostille (for example, in countries where it would entail a risk), the Argentinian consular representations in the country of residence can be used for this purpose. Open-source materials, such as press reports or articles, must be translated into Spanish, since that is the language of the proceedings (Article 106 CPPF). However, the translation need not be official.[56]

55 The majority of universal jurisdiction cases are lodged in Buenos Aires, but they may be filed in any Argentinian federal court. One example is the case of Nebojsa Minic, a Serbian citizen accused of war crimes and crimes against humanity during the Yugoslav Wars in the 1990s. In 2006, he was arrested in Argentina under an arrest warrant issued by Serbia, though a group of lawyers attempted to turn the case into a universal jurisdiction case in the country. He would have been tried in Mendoza under the principle of universal jurisdiction, since the Prosecutor-General had endorsed this. However, he died before the trial could be held (interview with the federal judge Pablo Salinas). Another case occurred in 2014, when a criminal complaint was lodged against the authorities of the State of Israel for international crimes committed against the Palestinian population in the Gaza Strip.

56 In a case related to Turkey, the proceedings could not progress due to a lack of official public translators. This prevented the allegation from being analyzed, highlighting the need to translate into Spanish both complaints and the evidentiary material in universal jurisdiction cases (Julieta Mira, "*Jurisdicción universal en la Argentina. Desafíos y aprendizajes en la lucha contra la impunidad*" (Universal jurisdiction in Argentina. Challenges and lessons learned in the fight against impunity), 30 September 2024, available at: https://www.youtube.com/watch?v=I18ue4Gs1o0.

Private criminal complaints must be lodged by victims, since the foundation of universal jurisdiction lies in effective judicial protection of the rights of victims.[57] It is also important that victims precisely substantiate the facts, including dates and places.[58] This is also the opinion of the Higher Federal Court of Appeals, which has stated that "extra substantiation [...] based on contributions and concrete evidence" should be submitted with the filings.[59] Cultural/linguistic barriers are also assessed while considering the viability of a case, although this is not a formal condition.[60]

In order to prove facts constituting international crimes, all types of evidence are admitted, be they testimonial, expert, documentary or open-source (see the "Rules on evidence" section below).

In the jurisdictions that still apply the CPPN, the investigating judge must request the prosecutor's opinion before opening a case. This is done to determine whether the conditions for conducting an investigation have been met. This process is known as the *requerimiento de instrucción fiscal* (prosecutor's request for an investigation) (Articles 180 and 195 CPPN). The prosecutor decides whether to bring criminal proceedings on the basis of an initial assessment of the evidence and the circumstances described in the criminal complaint or private criminal complaint (Article 188 CPPN). The evidentiary threshold at this stage is very low: if the case is not implausible, the alleged crime constitutes an offence and there is no reason not to proceed (such as an investigation into similar crimes in another jurisdiction), the prosecutor must bring proceedings.[61]

However, in several universal jurisdiction cases in Argentina, prosecutors have been cautious about opening a case, generally suggesting that such cases be archived on the basis of the principle of subsidiarity. In these scenarios, the investigating judges usually follow the prosecutors' recommendations, as occurred with the archiving of the Rohingya, Francoism and Uyghur cases.

Although they must seek the prosecutor's opinion, the investigating judge is not obliged to comply with their request for an investigation (Article 195 CPPN). For example, in the Venezuela case, the judge decided to archive it and refer it to the ICC, despite the prosecutor's recommending that the case go ahead.

Alternatively, the judge may, from the start, delegate the case to the PPO, allowing the prosecutor to decide whether or not to open the investigation, to take the necessary measures and make the corresponding requests (Article 196 CPPN). In the majority of cases related to universal jurisdiction, a prosecutor is not appointed, and it is the investigating judge who conducts the investigation.

In the jurisdictions that apply the CPPF, the procedure is different since, in principle, the prosecutor files the charges. Upon receiving a criminal complaint of either kind, the representative of the PPO must conduct an initial assessment of the case (Articles 248–251 CPPF). Within 15 days, the PPO must make an initial decision regarding the case. The PPO may decide to dismiss the case if it considers there to be no crime or to archive it if either the perpetrator has not been identified or it is not possible to move forward with the

57 Interview with federal prosecutor A.

58 Ibid.

59 Higher Federal Criminal and Correctional Court, Second Chamber, case no 40.950, Castex, registry no 44.921, of 15 March 2018 (the Francoism case); Higher Federal Criminal and Correctional Court, Second Chamber, case CFP 2774/22/1/CA1, *Dolkun Isa y otros s/ archivo y ser querellante*, of 8 August 2024.

60 Interview with federal prosecutor A.

61 Interview with federal prosecutor B.

investigation. It is likely that the subsidiarity criterion will also be examined at this stage. Alternatively, the prosecutor may recommend non-trial resolutions if they decide not to proceed with a public criminal prosecution, informing the defense and the victim of their rights. Non-trial resolutions enable a case to be dismissed, for example, if the involvement of the accused in the crime is considered to be of little relevance (Article 31(b) CPPF). However, the CPPF establishes that the prosecutor may not decide against prosecuting, "in situations that are incompatible with the provisions of international instruments" (Article 30 CPPF). This provision may serve as grounds for the victims or organizations to challenge a dismissal in universal jurisdiction cases.

There is no specialist unit for investigating universal jurisdiction cases in Argentina. Furthermore, it should be pointed out that, although the Federal Police is formally competent to assist investigating bodies in universal jurisdiction cases, they have not played any relevant role to date, apart from Interpol liaison officers. It is the investigating judges and, when delegated, the prosecutors who conduct investigations.

2.2 Investigation

a. CPPN

If the investigating judge accepts the prosecutor's request or decides that there are sufficient grounds, the investigation phase begins. During this stage, evidence is collected, expert reports are requested, complainants and witnesses are subpoenaed, and the crimes are investigated to determine whether there is sufficient evidence to bring the case to trial. As explained above, the investigation is conducted by the investigating judge or by the prosecutor.

During this stage, the ability to produce evidence has been understood to be "discretionary" and is not subject to review. That means, the taking or production of the evidence offered during the investigation stage is at the discretion of the judge or the prosecutor, as provided for in Articles 199 and 212 of the CPPN.

Victims and witnesses may make a statement in various ways, as decided by the court responsible for the investigation and the specific circumstances of the case. For example, they may make a statement in person, either by the judge travelling to the place where the witness is or by the witness travelling to Argentina. In one case, the Ministry of Foreign Affairs, through its Directorate of Human Rights, arranged for witnesses who were living in refugee camps and who did not have identity documents to travel to Argentina, even though, in principle, the lack of identity documents should have prevented them from travelling. Similarly, witnesses and victims living abroad have made statements virtually, using platforms such as Zoom, through videoconferences hosted in Argentinian consulates, or through letters rogatory issued for such purposes.[62] Likewise, in the Francoism case, in April 2013, the private criminal complaint requested that the court presiding over the matter issue an order requiring the Argentinian Ministry of Foreign Affairs to instruct Argentinian consulates in all countries of the world to exempt complaints from victims of Francoism from consular fees and to refer them to the court. This request was granted, and from October 2013, complaints from victims began to be lodged. To date, hundreds of victims have joined the case as complainants.

If sufficient grounds arise from the investigation to suspect that a crime has been committed, the investigating judge may summon the accused to give a statement in court (Article 294 CPPN). This statement is a procedural act under Argentinian law in which the accused, in the presence of the judge, the prosecutor and their defense counsel, has their first formal

62 Interview with Josefina Nacif; Articles 250–250 *quater* of the CPPN.

opportunity to provide their version of events, answer any questions or remain silent, exercising their right against self-incrimination (Article 296 CPPN). It is compulsory for the accused to attend court to make their statement and, should they fail to appear in person, an arrest warrant may be issued against them (Articles 282 and 288 CPPN). Arrest warrants are issued by the judge handling the case, generally at the request of the prosecutor and/or the complainant. If the judge denies the request, the decision may be reviewed by a higher court at the request of the complainant, provided that it causes them irreparable harm (Article 449 CPPN). The standard of proof required at this stage can vary depending on the judge, since some consider the accused's statement in court to be for the purpose of collecting incriminating evidence. Nevertheless, the law requires there to be sufficient evidence to suggest that the accused has committed an *hecho delictuoso* (criminal act).[63]

In universal jurisdiction cases, it is during this phase of the proceedings that the judge may issue an international arrest warrant for suspects who are not on Argentinian territory, with the aim of extraditing them to the Argentine Republic and questioning them. The judge may ask Interpol to issue a "Red Notice", which is an international alert intending to locate and provisionally arrest a person, pending extradition.[64]

This is what Judge Servini did in the Francoism case.[65] As a result of the international arrest warrant, extradition proceedings were held in Spain. However, the requests were rejected as the Spanish authorities ruled that these cases were time-barred under Spanish law.[66] Nevertheless, Judge Servini was able to summon Rodolfo Martín Villa to make a statement via video link on Zoom, which took place in the Consulate General of Argentina in Madrid on 3 September 2020. During this hearing, Villa was questioned over his alleged involvement in various killings.

In the Venezuela case, the complainants requested an arrest warrant against the accused, but the investigating judge dismissed their request on the grounds that the proceedings ordered by the Higher Federal Court in opening the case had not yet been completed. The complainant appealed this decision and was backed by the prosecutor. On 23 September 2024, the First Chamber of the Higher Federal Court of Appeals in the Venezuela case ruled:

> "[...] II.- to inform the presiding judge of the second lower federal court that they should proceed, in view of the evidence that has been collected and as expeditiously as possible, to collect the defense statements of Nicolás Maduro Moros and Diosdado Cabello and all those officials and/or persons referred to in the second paragraph of point (3) of the conclusions of this decision.
>
> III.- to instruct the judge of first instance handling the case to immediately issue the arrest warrants for Nicolás Maduro Moros and Diosdado Cabello, arranging for their international arrest via Interpol in order that they may be extradited to the Argentine Republic". (Articles 294, 449 to 455, 476 and 478 CPPN).

63 Interview with federal prosecutor B.

64 Interview with federal prosecutor A.

65 Order of 18 September 2013 issued in case no 4.591/2010 by the *Juzgado Criminal y Correccional Federal 1* (First Lower Federal Criminal and Correctional Court) of Buenos Aires, Argentina.

66 See National High Court of Spain, Criminal Chamber, Section no 3, Case File no 62/13, Original Proceedings: Extradition 21/13, Order no 14, 24 April 2014 (rejecting the extradition of Jesús Muñecas Aguilar) and National High Court of Spain, Criminal Chamber, Section 002, 20107 N.I.G.: 28079 27 2 2013 0006553, Case File no: Extradition 0000045/2013, Order no 14/2014, 30 April 2014 (rejecting the extradition of Antonio González Pacheco).

It is not clear whether Interpol will follow up on a request for a Red Notice regarding a sitting president, which could limit the reach of Argentinian arrest warrants. Interpol has taken different positions depending on the case. For example, in the Francoism case, it refused to issue Red Notices against former members of the Spanish government. However, in the AMIA case, which investigated the 1994 bombing of the Argentine Israelite Mutual Association in Buenos Aires, Interpol issued Red Notices against various high-level officials in the Iranian government.

In practice, apart from the aforementioned case of Rodolfo Martín Villa, cases of universal jurisdiction in Argentina have not moved beyond the defense statement stage, since the accused have not been extradited and have not attended court voluntarily.

Within 10 days of collecting the accused's defense statement, the judge must prosecute if they consider there to be sufficient evidence of the accused's alleged involvement in the crime under investigation. The decision to prosecute formally declares that the judge believes that the accused may be responsible for the crime that they are alleged to have committed (Article 306 CPPN). To justify prosecution, it is enough that the evidence, when weighed according to the rules of sound judgment, leads the judge to deem it probable or possible that the accused committed the crime.

In the Francoism case, it was ordered that Martín Villa, who has been living in Spain since giving his statement, be prosecuted. His defense counsel appealed that prosecution, and the Second Chamber of the Higher Federal Court of Appeals, on 23 December 2021, dismissed the trial and ruled that there was a lack of merit to prosecute or acquit Rodolfo Martín Villa.

There is no time limit for the investigation, and the deadlines set by the CPPN are *ordenatorios* (they do not preclude the prosecution if exceeded), and therefore are not *perentorios* (they preclude the prosecution if exceeded) or mandatory for the courts.[67] The Francoism case is an example of these prolonged procedures, with an investigation lasting 14 years.[68]

b. CPPF

Unlike the CPPN, in which the investigation takes place primarily in writing and with no set deadlines, the CPPF establishes a structured process with oral stages and specific deadlines.

If there is sufficient evidence and the PPO does not archive or dismiss the case during the initial assessment phase (see above), it may decide to launch an *investigación preparatoria* (preliminary investigation), which is the first phase of the investigation, with the purpose of establishing whether there is sufficient merit to proceed to trial (Article 228 CPPF).

An investigation file will be created, which is not subject to any formalities, and which remains with the prosecutor and contains the evidence that has been collected (Article 230 CPPF).

It is important to note that, according to the CPPF, although the investigation aims to assess whether there is sufficient merit to proceed to trial, the results of the investigation must be considered from the point of view of the oral trial, which is known as the *centralidad del juicio* (centrality of the trial). This means that the evidence obtained at this stage is not considered

67 Juan Manuel Chiaradia, *La garantía del plazo razonable en el derecho Argentino* (Guaranteeing a reasonable time limit in Argentinian law), *Revista Pensamiento Penal* (ISSN 1853-4554), July 2024, no 511.

68 However, the principle of a reasonable period of time, enshrined in Article 8.1 of the American Convention on Human Rights, demands that undue delays in criminal proceedings be avoided. The Supreme Court of Justice of the Argentine Nation and the Inter-American Court of Human Rights have indicated that the complexity of the case, the conduct of the parties and the diligence of the authorities determine the reasonability of the time period. Supreme Court of Justice of the Argentine Nation, case no 11.642, *Mattei, Ángel c. Estado Nacional*, judgment of 5 July 1968 (Decision: 272:188).

to be "evidence" in the strict sense, that is, it cannot be weighed by the judge in order to deliver a judgment unless it has been presented at the oral hearing. Article 231 establishes this explicitly: "The actions of the preliminary investigation shall not be valid for justifying the conviction of the accused".[69]

Orality is another characteristic to emphasize. Unlike the CPPN, where the investigation is primarily in written form, in the CPPF, the proceedings take place through oral and public hearings. As such, all of the relevant decisions in the preliminary stage must be made during a hearing, hence the information required in order for the decision to be adopted must be provided verbally.[70]

The preliminary stage is divided into two sub-stages: the investigation prior to the charges being brought, and the investigation after they have been brought.

When the suspected perpetrator has been identified, the prosecutor must inform them of the investigation and of their rights, such as appointing a lawyer (Article 253 CPPF). Once the prosecutor has notified the suspect, they have 90 days to bring the charges, which may be extended by another 90 days if approved by the *juez/a de garantías* (judge supervising the investigation stage), at the request of the prosecutor. In universal jurisdiction cases, in which it is less likely than in ordinary cases that the accused will be on Argentinian territory, this situation may cause difficulties in bringing the case at this stage.

At the confirmation of the charges hearing, the prosecutor informs the accused of the crime that they are alleged to have committed, the legal definition of the crime, the accused's degree of participation and the available evidence (Article 254 CPPF). At this point, the accused is granted the right to speak to say whatever they deem useful, and the parties may put forward any proposals they deem appropriate. The charges are officially brought when the prosecutor considers there to be sufficient evidence of the crime and the identity of the perpetrators, and when the prosecutor has informed the accused of this in advance. This is the first hearing that the accused and their defense counsel must attend, as was the case for the defense statement provided for in Article 194 of the CPPN.

Once the charges have been brought, the prosecutor has a period of one year (Article 265 CPPF) to investigate and to gather evidence to prosecute the suspect or, failing that, to request the dismissal of the case. This period may be extended by court order at the request of the prosecutor, the accused or the complainant (Article 266 CPPF). But the extension may be no longer than 180 days from the date of the hearing. If the accused has not been prosecuted by the end of this period, the judge must/can impose upon the prosecutor a penalty of serious misconduct or failure to exercise their duties.

Rather than bringing charges, the prosecutor may choose other options such as archiving the case, dismissing it or applying a non-trial resolution.

Once the preliminary investigation is completed, the prosecutor declares it to be closed (Article 268 CPPF). From this point, they may request that the case be dismissed or they may prosecute.

If the prosecutor requests that the case be dismissed, the victim and the other parties have

69 This rule also exists in criminal proceedings under the CPPN, but is not so explicit (Articles 391-392 of the CPPN).

70 "Sistema acusatorio: las claves del nuevo régimen que entrará en vigencia en el distrito Rosario" (Adversarial system: key points of the new regime which will enter into force in the Rosario district), available at: https://www.fiscales.gob.ar/acusatorio/sistema-acusatorio-las-claves-del-nuevo-regimen-que-entrara-en-vigencia-en-el-distrito-rosario/

three days to appeal (Article 270 CPPF). If the complainant objects and the judge considers the dismissal to not be appropriate, the complainant may proceed alone with the prosecution. If there is no objection, the judge will dismiss the case, which closes it definitively and prevents the accused from being tried again for the same crime (Article 269 CPPF).

3. The trial

3.1 CPPN

When the investigating judge considers the investigation to be complete and has ordered the prosecution, they send the case file to the prosecutor and the complainant, who have six days to request more evidence (or to request the taking of evidence that was previously rejected) or to request that the case be dismissed or brought to trial (Articles 346-347 CPPN). If more evidence is requested, the judge will provide it if it is relevant (Article 348 CPPN).

The accused's defense counsel is informed if the prosecutor requests a trial, and has six days to object or to submit defense pleas (Article 349 CPPN). If they do not object, the judge will close the investigation and send the case to the court (Articles 350-351 CPPN). A dismissal can be appealed, but the order to bring the case to trial cannot be challenged (Article 352-353 CPPN).

The rules referring to this part of the process do not contain any express formula for the necessary threshold for the case to proceed to an oral trial or to be dismissed. The law only mentions that the judge will choose one of the two options, without specifying the criteria for this choice. Neither does it conclusively state what the case-law is. Each court has its own criteria, which is also noted in the principle laid down in Article 10 of the CPPN, which states that, "evidence shall be weighed by the judges at their own discretion, observing the rules of logic, scientific knowledge and the lessons of experience" (Article 10).[71]

However, some people argue that a case should not be brought to trial if there is not, as a minimum, a degree of knowledge such that there can be deemed to be a reasonable prospect of conviction.[72] The legal doctrine and the case-law have also developed the criterion of "negative certainty" for dismissing the case during the investigation. This criterion means that, to close an investigation in which there is evidence suggesting that a person has committed a crime, the judge must be certain that that person has not committed the crime. If they are not certain, the case must be brought to trial, which involves definitively dispelling any type of reasonable doubt when ruling on a possible conviction.[73] In addition, some authors have maintained that it would only be valid to dismiss a case based on doubts when it is factually impossible to proceed with the case on the basis of the evidence.[74]

When the case moves to the oral trial phase, the court handling the case subpoenas the parties in order for them to examine the proceedings and offer the evidence that they will use during the oral trial (Article 354 CPPN). Once the evidence has been submitted, the court rules on its admissibility and sets a date for the trial hearings. The trial starts with the presentation of the charges, after which the parties cross-examine the witnesses and present the evidence during the hearing. The trial concludes with the parties' statements (Article 393 CPPN). Once the statements have been heard, the court deliberates and passes

71 Interview with federal judge Pablo Salinas.

72 Interview with federal prosecutor B.

73 Higher Federal Court of Criminal Cassation, Case FMP 32005408/2008/4/1/CFC1, *CANO, Edgardo Fabián s/ recurso de casación.*

74 Interview with lawyer and professor Mariano Lanziano.

judgment (Articles 396 and 400 CPPN). During the deliberations, the court assesses all of the issues pertaining to the case, from incidental aspects through to the existence of the crime, the involvement of the accused, the applicable sentence and compensation (Article 398).

Each judge casts their vote and the judgment is issued by majority on the basis of the evidence weighed "according to the rules of sound judgment". The reasoning behind the ruling must be given in the decision.

Sound judgment means that the judge is completely free to decide as they see fit, but must base their decision on a reasoned analysis of the evidence. This system requires the judge to assess the probative effect of the evidence, taking an approach based on logic, scientific principles and common experience, and ensuring that the conclusions are coherent and well-reasoned.[75] This system of weighing the evidence grants the judges a high degree of flexibility and subjectivity, but requires them to reach a sufficient level of certainty. If there are still reasonable doubts, the principle of *in dubio pro reo* (when in doubt, in favor of the accused) is applied, which means that the accused should not be convicted (Article 3 CPPN).[76]

The court is free to select a different legally defined crime to that of the original charge and even to apply more serious sentences if the trial indicates that this would be appropriate, although the latter point is highly debated in the legal doctrine and the case-law (Article 401). In the case of acquittal, it is ordered that the accused be released and that all restrictions cease (Article 402). If they are convicted, the sentences, security measures and corresponding civil compensation are determined (Article 403).

It is important to point out that Article 290 of the CPPN prohibits trials in the absence of the accused. This has a significant impact on universal jurisdiction cases, since, if the accused is not extradited, the trial cannot go ahead.

However, on 11 July 2024, the Argentinian government, with the aim of trying the perpetrators in the AMIA case, introduced a bill to Congress to permit trials in absentia for serious crimes (including genocide, crimes against humanity, war crimes, torture and enforced disappearance). This bill, which was taken favorably by the Criminal Legislation and Legal Justice committees, is still being debated by the Chamber of Deputies.[77]

3.2 CPPF

When the investigation is completed and the prosecutor brings formal charges against the accused, the process moves on to the *control de la acusación* (checking the charges) stage (Article 274 CPPF), which is similar to the *requerimiento de elevación a juicio* (request to bring to trial) stage in the CPPN (Article 346 CPPN). This stage ensures that the case is suitable to proceed to trial, allowing a review to take place before the oral trial is held.

In the CPPF, the prosecutor submits a formal charge (Article 274 CPPF), together with the evidence proposed for the trial and the expected sentence, which is similar to the submission

75 Weighing the evidence, discretionary decision-making, sound rational judgment, summary of decision, 13 September 2002, SAIJ (Argentinian Legal Information System) ID: SUQ0014227, http://www.saij.gob.ar/apreciacion-prueba-libre-conviccion-sana-critica-racional-suq0014227/123456789-0abc-defg7224-100qsoiramus#, last accessed on 4 November 2024.

76 *Cámara Nacional de Casación en lo Criminal y Correccional* (Higher National Criminal and Correctional Court of Cassation), Second Chamber, case no 23072/2011, registry no 400/2015, Taborda, decision of 2 September 2015.

77 "*El Gobierno presentó la ley de juicio en ausencia: 'Nos va a permitir juzgar a los iraníes que volaron la AMIA*'" (Government introduces bill for trials in absentia: "It will allow us to try the Iranians who blew up the AMIA), Infobae, 10 July 2024; "*Diputados buscan aprobar una reforma del Código Penal para permitir el juicio en ausencia*" (Deputies seek to approve a reform of the Criminal Code to allow trials in absentia), *Noticias argentinas*, 22 November 2024.

of evidence of Article 354 of the CPPN. After this, the complainant is notified, and they may join the PPO's charges, or they may choose to present their own charges in accordance with the formal requirements (Article 276 CPPF). This process of incorporating the complainant is also found in the CPPN, although with some differences in the procedural details.

Next, the charges are sent to the *oficina judicial* (judicial office), which notifies the accused and their defense counsel, granting them 10 days to respond (Article 277 CPPF), which is the equivalent of the accused being subpoenaed in the CPPN. During this time, the defense may point out errors in the charges or request the dismissal of the case, among other things. At this hearing, it is also decided which evidence will be admitted to the trial, a step that is also provided for in the CPPN, though with less emphasis on the orality of the proceedings.

Lastly, the judge issues the *auto de apertura a juicio* (order to open a trial) (Article 280 CPPF), which formalizes the decision to take the case to trial. This document is similar to that issued under the CPPN, but for the CPPF, it cannot be appealed and becomes the key document for starting the oral trial. The order states the competent court, the evidence that has been admitted and the standing of the criminal complaint, officially marking the start of the trial phase.

The CPPF (Article 281) establishes that the judicial office must receive the order to open a trial and assign the judges, set the date and time for the hearing, subpoena the parties, and organize the documents and exhibits for the trial. To maintain their impartiality, the judges must have no prior knowledge of the facts of the case; as such, they may not read the order to open a trial or other investigation documents in the possession of the judicial office or the prosecutor.

According to the adversarial principle, the CPPF (Article 281) establishes that the parties must arrange for the witnesses to attend the trial. The principles that govern the trial are that it must be held orally, a judge must oversee all stages, there should be as few stages as possible and, distinctively in the adversarial system - wherein both parties must be heard. The trial takes place in two stages. In the first, the existence of the crime, its legal definition and the criminal responsibility of the accused are determined. If the accused is found guilty, the trial proceeds to the second stage, which determines the sentence to be imposed, and how and where it will be carried out (Article 283 CPPF). In the CPPN, the parties do not discuss what the sentence should be. The materiality of the crime and the consequent criminal responsibility are matters for discussion during the trial, after which the parties make their statements.

At the end of the hearing, the judges will immediately deliberate in chambers and will either acquit the accused or find them guilty (Article 303 CPPF).

To date, no universal jurisdiction trials have been held in Argentina under either the CPPF or the CPPN.

Rights of the victims and the complainant in criminal trials

Under Argentinian criminal law, there is a significant distinction between the legal concept of the *víctima* (victim) and the *querellante* (complainant). The victim is the person who is directly harmed by the crime or, in certain cases, it is their immediate family members (Law 27.372, Article 79 CPPN and CPPF).

1. Victims

The victim has certain rights during the trial, such as the right to be treated with dignity, to examine documents and proceedings, to be informed of the status of the trial and the situation of the accused, to submit information and evidence, to be heard before key decisions

and, in some cases, even to request the review of the decision to archive or dismiss a case (see below). During the trial, the victim exercises these rights from the first intervention, although their role revolves more around providing their version of events and receiving the protection of the legal system.

2. The complainant

On the other hand, the complainant is the party who takes an active role in the criminal trial, since they are one of the parties bringing the criminal prosecution. They have similar powers to the prosecutor in terms of prosecuting. They may request means of evidence, bring charges and appeal decisions that put an end to the criminal proceedings.

This party may be either the direct victim of the crime or an indirect victim. In principle, in the case of a crime that results in the death or disappearance of a person, the spouse, partner, parents, children or siblings of the deceased or disappeared may exercise this right. In such cases, they must be able to confirm the relationship with the victim that they are invoking (Article 82 CPPN). However, the Argentinian case-law has adopted a broader criterion regarding the standing of the victims to take on the role of complainants in cases of international crimes. In the universal jurisdiction case on Francoism, the Second Chamber of the Higher Federal Court of Appeals recognized that the victims of crimes against humanity have a "right to the truth" as part of their right to justice, considering it pertinent to make the degree of kinship for complainants more flexible, given how much time had passed and the possible absence of immediate family members[78]. Consequently, in the Colombia case, the aunt of a victim was permitted to act as a complainant[79].

Unlike the victim, the complainant has the power to prosecute, appeal decisions, request means of evidence and actively participate in the oral trial. In the majority of universal jurisdiction cases in Argentina, both victims and organizations have acted as complainants.

3. Civil society organizations as complainants

Associations and organizations that defend collective rights may also be complainants, such as in cases of crimes against humanity - understood in a broad sense, as in universal jurisdiction cases (Article 82 *bis* CPPN; Article 84(b) CPPF). Organizations that wish to be complainants must submit documents confirming that they have been legally constituted and registered, along with their by-laws and the scope of their full power of attorney or the limited power of attorney to act as complainant, in order to confirm that their statutory purpose is directly linked to defending the rights that they deem to have been violated. It is not necessary for them to be Argentinian. Once they have been admitted as complainants, NGOs have the same rights as any other complainant.

In situations where the victim wishes to participate, but not in the form in which the proceedings are conducted, the role of complainant may be taken on by an organization, thus providing collective representation for the victims.

4. Rights during the investigation phase

In accordance with the CPPN and the CPPF, complainants and victims, even if the latter have not been involved in the proceedings as complainants, have the right to submit an appeal for review of the decision to dismiss or archive the case (Article 80(h) CPPN, Article 80(j) CPPF,

78 *Cámara Nacional de Apelaciones* (Higher National Court of Appeals), Second Chamber, case no 29.331.

79 *Juzgado Criminal y Correccional Federal 2* (Second Lower Federal Criminal and Correctional Court), CFP 3937/2023, 1 July 2024.

Article 252 CPPF, Article 180 CPPN, CFP 1078/2024/CA1). As such, in several cases, including the Venezuela, Francoism and Rohingya cases, complainants have managed to reverse these decisions through appeals for review in higher courts, which led to the cases being reopened.

Articles 33 and 270 of the new CPPF also permit, at the request of the complainant, public proceedings to be turned into private proceedings in certain circumstances, such as when the PPO applies a non-trial resolution or requests the dismissal of the case at the end of the investigation. This grants the victim-complainant the power to continue with the proceedings autonomously if they believe that the prosecutor has not duly attended to their interests.

According to the CPPN, the complainant has the right to request that the judge subpoena the accused to give a statement in court. In the event that the judge rejects this request, the complainant may appeal the decision, if it causes irreparable harm (Article 449 CPPN). During the investigation stage, the complainant may also propose the production of evidence (Articles 199 and 348 CPPN). In principle, if the request is rejected, that decision can only be appealed in exceptional circumstances (Article 199 CPPN, see the "Rules on evidence" section).

The CPPF grants various relevant rights to the complainant during the investigation phase. For example, the complainant may request information from the prosecutor about the crimes under investigation and the proceedings that have taken place or that are pending. If the prosecutor refuses to provide the information, the complainant may petition the judge for it, who will hold a hearing to make their decision. The CPPF also allows the complainant to gather evidence (Article 135 CPPF) and propose urgent proceedings to the PPO at any point during the preliminary investigation. The PPO may reject the proposal if it considers it to not comply with the requirements or to be dilatory. This decision may be reviewed by the judge (Article 260 CPPF). The pre-trial disclosure of evidence also allows evidence to be obtained in advance in specific cases (such as acts that cannot be reproduced or statements that would be hard to obtain in court) (Article 262 CPPF). During the preliminary investigation, the judge may consider petitions by the complainant to set a deadline for the prosecutor to complete the investigation (Article 256 CPPF). This recourse allows victim-complainants to compel the prosecutor to prosecute or to close the case within a given time frame.

5. Rights during the trial

During the trial stage, the CPPN allows the complainant to submit evidence, present lists of witnesses and expert witnesses and, in exceptional circumstances, to ask to read the witness statements and expert witness statements taken during the investigation (Article 355 CPPN). The court will assess the admissibility of this evidence (Article 356 CPPN). If a piece of evidence offered by a party is rejected, they may lodge a *recurso de reposición* (request for the decision to be reviewed) and later, potentially, a *recurso de casación* (appeal). As regards the appeal, the most widespread criterion in the Higher National Criminal and Correctional Court of Cassation and in the Higher Federal Court of Criminal Cassation maintains that an appeal is inadmissible because the decision is not definitive (Article 457 CPPN) and is not comparable to a definitive decision (Article 465 *bis* CPPN). The Higher Federal Court of Criminal Cassation has admitted appeals on this matter only in exceptional cases.

The complainant may question the parties, witnesses, expert witnesses and interpreters (Article 384 CPPN). At the end of the taking of evidence, the complainant may make their statement (Article 393 CPPN). The complainant is entitled to appeal decisions that they deem unfavorable, such as an acquittal or a conviction that they do not agree with (Articles 458 and 460 CPPN).

The CPPF explicitly grants the complainant broad rights during the oral trial. These rights include:

- Participation in the oral trial: the complainant has the right to present the facts and grounds of the charges, including producing evidence in the form of witnesses, documents and requests for expert witness statements, under the same conditions as applicable to the prosecutor (Articles 294 and 295 CPPF). In addition, they may cross-examine the witnesses and present arguments backing up their position (Articles 294 and 297 CPPF).
- Statements: at the end of the oral trial, the complainant has the right to present a closing statement, in which they may interpret the facts, make their case for the criminal liability of the accused and request the conviction and sentence that they deem appropriate (Article 302 CPPF).
- Challenging decisions: the complainant is entitled to appeal decisions that they deem unfavorable, such as an acquittal or a judgement that does not reflect their proposals, through the means of the appeal mechanisms laid down in the CPPF (Article 353 CPPF).

Rules on evidence

Both the CPPN and the CPPF establish the principle of *libertad probatoria* (evidentiary freedom), allowing the admission of relevant facts and circumstances needed to settle the case by any means, provided that they are not expressly prohibited by the law (Articles 206 CPPN and 134 CPPF).

The evidence may be testimonial (Articles 239-252 CPPN and 158 CPPF), expert (Articles 253-267 CPPN and 167 CPPF) or of any other type, such as open-source evidence.[80] For example, in the Francoism and Venezuela cases, the complainants provided open-source information according to the procedure recommended by the Berkeley Protocol on Digital Open Source Investigations**.**

It is also important to note that the cases investigated in Argentina through the principle of universal jurisdiction rely to a large extent on information that can be provided through letters rogatory issued for this purpose, which usually take several months to be sent and processed. In this respect, Argentina has various departments within its Ministry of Foreign Affairs that deal with such procedures. Firstly, there is the Directorate of International Legal Assistance (DAJIN), which has the primary competence to handle requests for international legal cooperation. The National Directorate of Human Rights and the Legal Department may also be involved, depending on the specific case. However, there is no specific procedure for universal jurisdiction cases, which can make it hard for these entities to coordinate their actions and liaise on the matter.[81]

According to the CPPN, during the investigation stage, the parties are entitled to propose the taking of evidence, which the judge will perform when they deem it "pertinent and useful" (Articles 199 and 348 CPPN). The same rule is laid down for cases in which the investigation has been delegated to the prosecutor's office (Article 212 CPPN). The doctrine defines a piece of evidence as being pertinent if it provides information about an act at issue within the case and considers it useful if that information makes it more likely or less likely that

80 General Guidelines for Action of the Public Prosecutor's Office of the Argentine Nation on Universal Jurisdiction, December 2024, p. 31.

81 Interview with Josefina Nacif.

the act under investigation occurred.[82] This means that the production of evidence may be rejected if it is considered useless (when the information derived from the evidence does not make any act more likely or less likely) and/or irrelevant (when the statement that you are seeking to prove has no direct or indirect relation to the facts of the case). In principle, this rejection cannot be appealed by virtue of the CPPN (Article 199 CPPN). However, on certain occasions, the Higher Federal Court of Appeals has admitted such appeals, for example, when the refusal to admit the evidence was considered arbitrary and caused actual harm to the affected party.[83]

In the new CPPF, the situation changes significantly. Article 135, "Rules on evidence", establishes that the prosecutor is responsible for collecting the evidence, but allows the other parties to also gather the evidence that they consider necessary. If a party requests that the prosecutor take evidence and the prosecutor refuses, the party may petition the judge to intervene (Articles 260 and 262 CPPF). In addition, the complainant and the defense may keep their own register of evidence. The parties are also permitted to reach an agreement on certain facts, and these may be declared by the judge to have been proven.

As regards the evidence that may be brought, Article 135(d) states:

> "Only pieces of evidence that have a direct or indirect relationship with the subject matter of the trial, that are useful and pertinent to settling the case and that are not manifestly overabundant shall be admitted; no evidence shall be rejected if the parties agree to its production".

In Argentina, unlawful evidence is evidence obtained in violation of constitutional rights, such as the prohibition on forced self-incrimination established in Article 18 of the Argentinian Constitution. This evidence is inadmissible in the criminal trial, since the unlawful way in which it was obtained affects fundamental rights and puts the lawfulness of the judicial proceedings at risk. In such cases (for example, the Montenegro[84] and Fiorentino[85] cases), the evidence that is collected may be considered invalid if the way in which it was obtained lacked due authorization or if it violates the constitutional guarantees of the accused. In turn, the Supreme Court has recognized the doctrine of the "fruit of the poisonous tree", which establishes that evidence obtained unlawfully, as well as evidence derived from such unlawfully obtained evidence, cannot be used to convict somebody.[86] The Court also ruled that pieces of evidence obtained unlawfully, even if they reveal the truth, may not be weighed during the trial, since they undermine individual rights. Article 10 of the CPPF expressly reestablishes this principle, adding that pieces of evidence, "shall only be valid if they are obtained and added to the case file in accordance with the principles [...] of international instruments".

82 Varela, A. (2022). *Conceptos y discusiones sobre la admisibilidad de la prueba en el proceso penal* (Concepts and discussions on the admissibility of the evidence in criminal trials), Estudios sobre Jurisprudencia, 94-151.

83 First Chamber, case CFP 3002/2017/28/CA11, *C I A s/rechazo ofrecimiento de Prueba*, of Court no 12 – Secretariat no 24.

84 Supreme Court of Justice of the Argentine Nation, *Montenegro, Luciano Bernardino s/ Robo* – CSJN - 10/12/1981.

85 Supreme Court of Justice of the Argentine Nation, *Fiorentino, Diego Enrique s/ tenencia ilegítima de estupefacientes* – CSJN - 27/11/1984.

86 Supreme Court of Justice of the Argentine Nation, *Rayford, Reginald R. y Otros s/ Tenencia de estupefacientes* - CSJN - 13/05/1986.

Protection and support for victims and witnesses

In Argentina, there is a national witness and defendant protection program, established under Law 25.764 of 2003. This law provides, among other things, for temporary accommodation in undisclosed locations, a change of address and the provision of identity documentation under an assumed name (Article 5). It can apply to both witnesses and victims.

In the Venezuela case, witnesses have been granted protection and their identities have been kept secret.[87]

Article 298 of the CPPF also provides for statements to be made without revealing the identity of the witness:

> "Anonymous statements. If the witness statement could pose a real and serious risk to the integrity of the witness or their next of kin, the judge or the court, at the request of the representative of the Public Prosecutors Office, may, in exceptional circumstances, rule that the identity of the witness is to be kept secret and that the necessary technical means are to be employed to prevent them being identified by their voice or face".

However, it is important to note that the identity of a witness or victim is not completely protected throughout the proceedings. The accused, through their defense, may ask for the identity of the witness who made an anonymous statement to be revealed. This is founded on the guarantees of a defense in court and due process, according to which no evidence can be incriminating without the possibility of cross-examination. However, in 2012, within the context of the oral and public trial of the murderers of somebody who was killed at a protest, a court in the City of Buenos Aires permitted the identity of several protected witnesses to be kept secret during the hearing in accordance with the rules of the CPPN. To guarantee the right of the parties to question them, the judges permitted the witnesses to make their statements in disguise, so that they could not be recognized.[88]

On psychosocial matters, the PPO can also ask the Dr. Fernando Ulloa Support Center for Victims of Human Rights Violations to support the witnesses and/or victims. This center can also be contacted directly by victims, next of kin and families, and provides information, guidance and emotional support.

In its General Guidelines for Action on Universal Jurisdiction of December 2024, the PPO indicates that, in cases in which the principle of universal jurisdiction is applied in the country, prosecutors should contact the Directorate-General of Victim Support, Guidance and Protection (DOVIC) to provide assistance, support and advice to victims, since, "one of their roles is to guarantee the rights of victims of any crime and provide general information from the first contact with the institution and throughout the criminal proceedings".[89]

Similarly, Law 27.372 (Victims' Law) created the Crime Victims' Support Center (CENAVID) as part of the Secretariat of justice of the Ministry of Justice and Human Rights of the Argentine Nation. This center provides healthcare and legal support services.[90]

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87 Consequently, the Fourth Federal Prosecutor required the National Witness Protection Program of the Ministry of National Security to protect a witness who was making a statement in the prosecutor's office, along with their family. In this case, a witness who was also a victim was granted police protection.

88 Interview with lawyer and professor Mariano Lanziano on 18 November 2024; Case no 3772/3922. *Tribunal Oral en lo Criminal* (Higher Criminal Oral Court) no 21 of the Federal Capital.

89 General Guidelines for Action of the Public Prosecutor's Office of the Argentine Nation on Universal Jurisdiction, December 2024.

90 Law 27.372, Article 22.

Victim compensation

In Argentina, civil lawsuits allow crime victims to claim the return of property and compensation for damages. This right can be exercised within criminal proceedings or separately in the civil jurisdiction if the criminal trial does not proceed (Articles 14, 16 and 17 CPPN; Articles 40-42 CPPF). In both cases, the main objective is to ensure that victims receive adequate compensation for the harm they have suffered. Harm that can be claimed for includes material, moral and psychological damage, depending on what the victims succeed in proving during the proceedings.

In practice, the victims of international crimes usually opt for the separate civil route, since the civil courts tend to award more significant financial compensation than the criminal courts.

Nevertheless, this choice has encountered certain obstacles, namely, limitation periods. The Supreme Court of Justice of the Argentine Nation has upheld that civil lawsuits are subject to limitation periods.[91] This position may limit access to compensation in cases of crimes committed decades before.

Notwithstanding, this interpretation has been criticized by the Inter-American Court of Human Rights, which found it to not meet the international standard which prohibits the application of the statute of limitations on "civil, contentious-administrative, and other actions" undertaken to secure reparation for serious human rights violations[92].

As a result, some Argentinian courts have started distancing themselves from the traditional stance of the Supreme Court. For example, in 2022, the Higher Federal Court of La Plata ruled, in two cases of civil actions for damages relating to crimes against humanity committed during the last dictatorship, that these actions were not subject to a limitation period[93].

In addition, as a consequence of the reflected case law, Law 27.586 was passed in 2020 by virtue of which Article 2560 of the Civil and Commercial Code of the Argentine Nation was amended, which establishes that, "civil actions deriving from crimes against humanity are not subject to a limitation period".

In some instances, universal jurisdiction cases in Argentina, even when they do not reach the trial stage, can offer a form of compensation to victims. For example, in relation to the Francoism case, mass graves were discovered, which made it possible to exhume and identify the people buried there[94].

Immunity and amnesties

Argentina has tried and convicted former members of its own government, including high-ranking officials in the dictatorship and even former heads of state. As regards universal jurisdiction, Argentina has also launched investigations against former leaders (such as Jiang Zemi and Álvaro Uribe Vélez) as well as current leaders (such as Nicolás Maduro and Daniel

91 Supreme Court of Justice of the Argentine Nation, case no 17.863, *Villamil, Amelia Ana c/ Estado Nacional s/ daños y perjuicios*, judgment of 9 December 2007, para. 23, p. 67, (Decision: 330:4592); Supreme Court of Justice of the Argentine Nation, case no 17.864, *Larrabeiti Yáñez, Anatole Alejandro y otro c/ Estado Nacional s/ proceso de conocimiento*, judgment of 9 December 2007, para. 27, p. 72, (Decision: 330:4592).

92 Inter-American Court of Human Rights, Case of Julien Grisonas Family v. Argentina, Judgment of 23 September 2021, Preliminary Objections, Merits, Reparations and Costs, para. 233.

93 Higher Federal Court of La Plata – Second Chamber, La Plata, *Huergo, Carlos Alberto c/Estado Nacional s/ Daños y Perjuicios*, case file no FLP 3419/2021/CA1, 28 December 2022.

94 Langer, Máximo and Eason, Mackenzie, *La Silenciosa Expansión de la Jurisdicción Universal*, translation of "The Quiet Expansion of Universal Jurisdiction", *Lecciones y Ensayos*, no 105, 2020, p. 61.

Ortega). The Argentinian legal system even issued arrest warrants for Nicolás Maduro, the sitting president of Venezuela, for alleged crimes against humanity. However, it should be pointed out that, during these proceedings, the Argentinian courts did not address the issue of immunity.[95] Likewise, they did not address this issue in other cases relating to former leaders or ministers.[96] This seems to suggest that, in line with its "anti-impunity" approach, Argentina does not consider immunity to be an impediment to trying international crimes.

This stance is consistent with Argentina's approach regarding pardons and amnesties, reflected in Law 27.156 on the Prohibition of Pardons, Amnesties and the Commutation of Sentences in Crimes Against Humanity of 2015, in which Article 1 establishes:

> "Sentences or criminal proceedings concerning the crimes of genocide, crimes against humanity and war crimes provided for under Articles 6, 7 and 8 of the Rome Statute of the International Criminal Court and in international human rights treaties with constitutional hierarchy cannot be the subject of an amnesty, pardon or commutation of the sentence, under penalty of the absolute and irremediable invalidity of the act that provides for it".

The case-law of the Supreme Court has also been very clear that the following are prohibited:

> "[...] amnesty provisions, limitation period provisions and exclusions of liability that aim to impede the investigation and punishment of the perpetrators of serious human rights violations such as torture, summary, extralegal or arbitrary executions and enforced disappearances"[97].

95 Interview with Professor Máximo Langer.

96 In a rare exception, in the Bin Salman case, before deciding whether to launch an investigation, the investigating judge Ariel Lijo asked the Ministry of Foreign Affairs of Argentina to report, among other things, his diplomatic status. Prosecutor no 7, Opinion no 24.375, 28 November 2018; Langer, Máximo and Eason, Mackenzie, *La Silenciosa Expansión de la Jurisdicción Universal*, translation of "The Quiet Expansion of Universal Jurisdiction", *Lecciones y Ensayos*, no 105, 2020, p. 61.

97 Supreme Court of Justice of the Argentine Nation, *Arancibia Clavel, Enrique Lautaro s/ homicidio calificado y asociación ilícita*, judgment of 24 August 2004, Decisions: 327:3294, para. 35.

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This publication was co-funded by the European Union. Its contents are the sole responsibility of TRIAL International and do not necessarily reflect the views of the European Union.