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EXECUTIVE SUMMARY AND ANALYSIS



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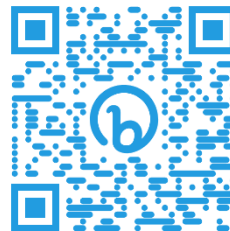
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The full report is available in the following QR code:



EXECUTIVE SUMMARY

The *Cyrus R. Vance Center for International Justice* of the New York City Bar, through the *Lawyers Council for Civil and Economic Rights*, presents a comparative analysis of the legal provisions that would allow filing criminal complaints regarding crimes that could be pursued through universal jurisdiction in Argentina, Chile, Colombia, Costa Rica, Mexico, Panama, Peru, and Uruguay.

The document addresses the impunity that exists in some countries in the region regarding crimes against humanity. Universal jurisdiction ensures that victims of serious crimes obtain justice and reparation, allowing courts from different countries to have jurisdiction over these crimes, even without one of the traditional ties to establish jurisdiction. This provides an opportunity to bring the perpetrators to justice, even if their country of origin is unwilling or unable to conduct the investigation and prosecution, and provides a measure of reparation for victims and their families. At the same time, the use of universal jurisdiction sends a clear message to perpetrators of serious crimes that they cannot evade accountability for their actions, no matter where they are.

This comparative analysis is based on the idea that the effective application of universal jurisdiction strengthens justice at the international level and establishes legal precedents and global norms and standards for the international prosecution of crimes. It also promotes cooperation and information exchange between countries in the fight against impunity and the protection of human rights.

This report is a tool that:

- **Identifies the state of the art regarding universal jurisdiction.** All the countries consulted have ratified relevant international conventions, demonstrating their commitment to international law and standards of protection of human rights, legally opening a way to apply universal jurisdiction in cases of serious international crimes.
- **Identifies significant differences in recognizing and applying universal jurisdiction in the countries analyzed.** Argentina stands out for its proactive approach to universal jurisdiction. Other countries may have limited recognition or may not have a clear legal basis for applying universal jurisdiction.
- **Pinpoints countries that have applied universal jurisdiction in specific cases.** These examples support the claim that these countries could be good places to try universal jurisdiction cases in the future.

The *Vance Center* is grateful for the pro bono legal assistance contributed to conducting this research.

The full report is available in Spanish here: <https://bit.ly/VCLCJULA>

REGIONAL ANALYSIS

War crimes, crimes against humanity, torture, and genocide, among others, are so serious that they transcend national borders, affecting the entire international community. Therefore, there has been a consensus in the international community that these serious crimes should not go unpunished.¹ However, in most countries, the principle of territorial or personal jurisdiction of criminal law restricts the jurisdiction of domestic courts to crimes that occurred in that country's territory, which had an effect in the country, or in which the perpetrators or victims are nationals of that country.

In view of the necessity that these heinous crimes do not go unpunished, it was understood that the territoriality of the laws should not hinder justice and that states should adjudicate these crimes even if the events did not occur in their territory or had no effect on it and are unrelated to their nationals. From this idea, the concept of universal jurisdiction is born as an exception to the territoriality of states' jurisdiction.

Universal jurisdiction is a principle of international law that allows a country to try individuals accused of certain crimes, even though they were not committed within that state's territory and have no direct connection to its nationals.

Universal jurisdiction is the solution for the two main circumstances of impunity for these serious crimes: the perpetrators flee to other countries, and the State that has jurisdiction over the facts cannot or does not want to act. In these circumstances, universal jurisdiction allows for the investigation and prosecution of the alleged perpetrators of these serious crimes.

Universal jurisdiction does not apply to all kinds of crimes

Universal jurisdiction does not apply to all kinds of crimes. It is intended for serious crimes defined by international law, especially crimes against humanity, war crimes, and genocide. Moreover, universal jurisdiction typically has a requirement of subsidiarity.

¹ United Nations. General Assembly. July 29, 2010. A/65/181

Universal jurisdiction allows the investigation and prosecution of certain offenses, which may at the same time be covered by jus cogens², customary international law³, clauses de *aut dedere aut judicare*⁴, or international jurisdiction⁵. Some countries introduce universal jurisdiction into their legal systems through one of these figures. However, they are all distinct concepts with different principles, where the matter covered by one concept does not completely encompass the other. None subclassifies the other, but different categories match in regard to some offenses.

Considering all the above, this analysis studies *the possibility of activation* of universal jurisdiction in eight countries in the region (Argentina, Chile, Colombia, Costa Rica, Mexico, Panama, Peru, and Uruguay).

To determine *the possibility of activating universal jurisdiction*, the analysis considers three points in each country: 1. the status of ratification of treaties characterizing crimes that activate universal jurisdiction; 2. the status of recognition of universal jurisdiction; 3. countries that have applied universal jurisdiction in specific cases.

- **Ratification status of treaties classifying crimes that activate universal jurisdiction**

The first part of the analysis considers the status of ratification of treaties that provide a basis for universal jurisdiction in each country. This is important because a State recognizes certain clearly defined crimes of international significance when it ratifies a convention on serious international crimes or implements internal legislative measures for its implementation. For example, for some governments, the legitimacy of universal jurisdiction in their respective countries arose from efforts deployed internally to ratify and implement the Rome Statute (such as Argentina)⁶.

The eight consulted countries (Argentina, Chile, Colombia, Costa Rica, Mexico, Panama, Peru, and Uruguay) have all ratified the Geneva Conventions of 1949, the United Nations Convention against Torture, the Inter-American Convention to Prevent and Punish Torture, the International Convention for the Protection of All Persons from Enforced Disappearances, and the Rome Statute. However, Chile and Uruguay have not ratified the International Convention on the Suppression and Punishment of Apartheid Crime but have implemented legislative measures to repress and punish the crime of apartheid.

² In international law, it refers to certain fundamental principles and norms that are universally recognized and cannot be derogated from, regardless of state consent. In other words, these norms are considered so fundamental to the international community that no state can breach or opt out of them.

³ It refers to practices and norms that have evolved over time and are accepted as legally binding by the international community of states, even if they aren't codified in written treaties.

⁴ This is a Latin expression that means "to judge or extradite." It refers to the legal principle that requires a state to prosecute an offender within its jurisdiction or extradite him to a state that can do so. This is especially common in the context of serious and universal crimes, such as torture or genocide.

⁵ In international law, international jurisdiction refers to the law and ability of international courts to hear and decide on specific cases. This may involve international crimes such as genocide, war crimes, and crimes against humanity.

⁶ Ibidem. United Nations. General Assembly. July 29, 2010. A/65/181. page 8. paragraph 24.

The ratifications and implementation of legislative measures by all states consulted to prevent and punish the most serious crimes under international law show that the region accepts certain common international criminal offenses. Among the crimes that states have an obligation to prevent and punish are:

- The Geneva Conventions of 1949
 - First Geneva Convention (For the Relief of the Wounded and Sick of the Armed Forces in the Campaign, 1949). Serious crimes include deliberate violence against the wounded and sick, mistreatment or execution of persons in the hands of the enemy, looting of property, misuse of the Red Cross emblem, and taking hostages.
 - Second Geneva Convention (For the Relief of the Injured, Sick, and Shipwrecked of the Armed Forces at Sea, 1949). Serious crimes included deliberate violence against the shipwrecked, wounded, and sick, mistreatment or execution of people in the hands of the enemy and taking hostages.
 - Third Geneva Convention (On the Treatment of Prisoners of War, 1949). serious crimes include torture or inhumanity of prisoners, execution of prisoners without a fair trial, failure to provide adequate food and medical care, and taking hostages.
 - Fourth Geneva Convention (On the Protection of Civilian Persons in Times of War, 1949). serious crimes include deliberate violence against civilians, deportation, hostage-taking, and unwarranted attacks on civilian populations.
- The United Nations Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment and the Inter-American Convention to Prevent and Punish Torture include:
 - Torture (Articles 1 and 2, respectively)
 - Cruel, inhuman, or degrading treatment or punishment (Article 16 and 6 and 7, respectively).
- The International Convention for the Protection of All Persons from Enforced Disappearances and the Inter-American Convention on Enforced Disappearances include:
 - Enforced disappearance (Article 2 and II, respectively).
- The International Convention on the Suppression and Punishment of the Crime of Apartheid
 - Acts of apartheid (Article II). as the following: a. denial of the right to life and freedom of the person.
 - b. legislative measures and other measures calculated to prevent the participation of a racial group in the political, social, economic, and cultural life of the country and to prevent the development of the group by any other means dividing the population by racial lines by creating separate reserves and ghettos for members of a racial group.
- The Rome Statute of the International Criminal Court:
 - Crime of Genocide (Article 6)
 - Crimes against humanity (Article 7)
 - War crimes (Article 8)
 - Crime of aggression (Article 8 bis)

Apart from these treaties, crimes of universal jurisdiction have been included as offenses whose prohibition was elevated to the category of *jus cogens*, such as those of the Rome Statute, and crimes recognized as such by customary international law, such as piracy, slavery, genocide, war crimes, crimes against humanity, crimes against peace, torture, and the crime of apartheid⁷. Universal jurisdiction shares crimes with *ius cogens* and customary law, but they are distinct concepts.

⁷ Ibidem. page 9. paragraph 26-28.

- **Status of recognition of universal jurisdiction**

This second part of this report examines the status of recognition of universal jurisdiction in each country. In terms of recognition and application of universal jurisdiction, four trends are apparent:

1. **Normative universal jurisdiction**

Normative universal jurisdiction can be understood as one in which states authorize their justice system to investigate and prosecute crimes under universal jurisdiction. These countries have express norms in their domestic order that allow universal jurisdiction:

- **Costa Rica** expressly recognizes universal jurisdiction. According to Law No. 8272, regardless of the provisions in force in the place of the commission of the punishable act and the nationality of the author, individuals may be punished under Costa Rican law for committing acts of piracy or acts of genocide; falsifying coins, credit cards, banknotes, and other bearer effects; engaging in the slave trade, or trafficking of women or children; engaging in drug trafficking or obscene publications; as well as those who commit other acts punishable against human rights and international humanitarian law, provided for in the treaties signed by Costa Rica or in the Penal Code. The Costa Rican system is monistic, which allows the immediate inclusion of the crimes stipulated in the treaties of Part I. However, no records of cases on the principle of universal jurisdiction by Costa Rican courts or tribunals exist.
- **Panama** expressly recognizes universal jurisdiction in Articles 19 and 21 of the Criminal Code. The first article enables the prosecution of crimes against humanity, forced disappearance, and human trafficking. Article 21 allows the application of Panamanian criminal law, regardless of the accused's nationality. It also covers the crimes provided for in the international treaties in force in the Republic of Panama if they grant it territorial jurisdiction. This covers crimes against humanity, enforced disappearance, and the crime of human trafficking. Through the principle of universal jurisdiction, Panama emphasizes the state's interest in applying its criminal law to any punishable act, even if it occurs outside its territory. This applies regardless of the place of commission or the nationality of the perpetrator or victim of the crime.
- **Uruguay** expressly recognizes universal jurisdiction as regards the crimes established in the Rome Statute. Law 18.026 establishes that the Uruguayan state is obligated to take the necessary measures to exercise its jurisdiction when there is a person "suspected of having committed" genocide, crimes against humanity, political murder, enforced disappearance, torture, serious deprivation of liberty, sexual assault against a person deprived of liberty, association to commit genocide, crimes against humanity or war crimes, the crime of war, and crimes against the administration of justice, found within the territory of the Republic or in places subject to its jurisdiction. All the above is conditioned on not receiving a request for surrender to the International Criminal Court or extradition requests. In this case, proceedings should be undertaken as if the crime had been committed within the territory of the Republic of Uruguay, regardless of the place of commission and the nationality of the suspected individual or victims. The suspicion referred to in the first part of this paragraph must be based on the existence of substantial evidence.
- **Colombia** explicitly recognizes universal jurisdiction. Article 75 of the Code of Criminal Procedure establishes that Colombian criminal law shall apply to foreigners in Colombian territory who have

committed a crime abroad, to the detriment of another foreigner, provided that the crime has a penalty of imprisonment of no less than three years, that it is not a political crime and that when extradition is requested, it would not have been granted by the Colombian government. When extradition is not accepted, there will be criminal proceedings in Colombia for crimes of universal jurisdiction. Colombian regulations do not strictly establish what crimes are subject to application of the principle of universal jurisdiction. The Constitutional Court has said that universal jurisdiction has been expressly enshrined in several international conventions linking Colombia, such as the Conventions against Torture, Genocide, Apartheid, and Illicit Drug Trafficking; it can therefore be said that, at this point in the development of international law, the principle of universal jurisdiction operates when it is included in a treaty. We found no cases in which I applied the principle of universal jurisdiction.

2. Universal jurisdiction through judicial criteria

This area includes states that do not have an express provision on universal jurisdiction. However, the courts have interpreted the authorities as competent to investigate and prosecute serious crimes based on universal jurisdiction. Courts recognize universal jurisdiction for the following reasons⁸:

- **Argentina** does not recognize universal jurisdiction in its law, but the implicit recognition of universal jurisdiction in the Argentine legal system and in its courts is clear. It is a monistic country. Treaties of the constitutional bloc, like those in the first part of the analysis, enjoy a supra-legal hierarchy. Its Constitution mandates that when a crime is committed against jus cogens outside the limits of the Nation, Congress shall determine by a special law the place in which the trial is to take place. Courts proactively use universal jurisdiction, especially in cases of crimes against humanity and genocide. Among the most notable is the Galvan Abascal case, in which universal jurisdiction was applied to crimes perpetrated in Spain during the Franco government due to the inactivity of the Spanish courts; and the Mazzeo case, in which the Supreme Court adopted a similar criterion, emphasizing that universal jurisdiction must be applied when national authorities hinder access to justice. In the case of Munoz de Bustillo Gallego and Salmeron, the Supreme Court changed the jurisprudence, abandoning the subsidiary application of universal jurisdiction and recognizing its direct application, regardless of the subject, place, or time of commission of the crime. In October 2022, a criminal investigation was initiated against the current president and vice president of Nicaragua, Daniel Ortega and Rosario Maria Murillo, accusing them of crimes against humanity. In June 2023, the Clooney Foundation for Justice denounced human rights violations committed in Venezuela based on

⁸ The first justification is given in monistic countries, where treaties do not need additional domestic law for their application but are applied directly. In these countries, the courts exercise universal jurisdiction because, according to the constitutional regime, the treaties that they incorporate into universal jurisdiction have the same - or more - value as the constitution or national legislation. Here, the courts do not refer at all to national legislation. In these countries, international instruments form part of domestic law from the moment a decree of ratification is issued by the legislature, or from its entry into force at the national level, according to the rules of each country.

The second reason is found in those countries that adopt universal jurisdiction, and they do so through three fundamental concepts: customary international law, the obligations of jus cogens, or the competence to judge due to the denial of extradition of a foreigner under the principle of aut dedere aut judicare. In these states, courts use one or more of these three concepts along with the principle of universal jurisdiction. This allows them to authorize the investigation or trial of actions that are simultaneously seen as crimes under universal jurisdiction and other norms such as jus cogens, customary international law, or treaties containing clauses of aut dedere aut judicare.

the principle of universal jurisdiction. In response, Argentina formalized the opening of an investigation.

- **Chile** does not have rules that expressly recognize universal jurisdiction. As a country, it has a tendency to dualism; however, it retains some monistic traits. In Chile, if a treaty has self-executing clauses, then it is monistic, but without these clauses, an internal law would be required. The Supreme Court of Chile has developed exceptions giving jurisdiction to Chilean courts to hear crimes committed outside the territory of the Republic when they are included in treaties. The Supreme Court understands that international treaties that guarantee respect for human rights have a constitutional hierarchy. On the other hand, the Constitutional Court believes treaties constitute a hierarchy of norms below the Constitution but higher than laws.

The Supreme Court of Chile issued a judgment in favor of two foreigners for facts unrelated to the territory or nationals of Chile. The enabling source came from the treaties ratified by Chile, particularly the American Convention on Human Rights and the Covenant on Civil and Political Rights, but also from recognizing that universal jurisdiction would be a norm of *ius cogens* applicable through article 5, paragraph 2 of the Constitution. The Supreme Court ordered the Chilean government to ask the Inter-American Commission on Human Rights to visit Venezuelan opposition leaders Leopoldo Lopez and Daniel Ceballos in prison to verify their state of health and to prepare a report. The ruling of the highest Chilean court establishes that, in this case, all the requirements for Chile to act under international human rights jurisdiction are met because Venezuelan courts do not appear to be giving sufficient protection to Lopez and Ceballos. The Supreme Court notes three requirements necessary to make use of universal jurisdiction: the inactivity and lack of intention of the State that has territorial jurisdiction to hear and judge the case; the existence of a source that enables hearing about these facts; and that the national legislation to be applied does not contradict international law.

3. Universal jurisdiction not (yet) recognized

This category includes countries in which, despite having ratified a treaty that gives rise to universal jurisdiction and that is part of their internal order, **the courts still have not decided** that national authorities are competent to investigate and prosecute crimes that give rise to universal jurisdiction.

- **Mexico** does not have an explicit recognition of universal jurisdiction in its legislation. Despite having internationally relevant crimes in its Federal Penal Code, it does not establish universal jurisdiction for their prosecution. In the Sixth Committee of the 75th UN General Assembly, Mexico's delegation expressed that universal jurisdiction proceeds only in those cases in which the state that would normally have jurisdiction over the case lacks the will or capacity and where the International Criminal Court lacks jurisdiction. It also recognized that the principle of universal jurisdiction is expressly reflected in the Geneva Conventions of 1949 for war crimes and in the UN Convention on the Law of the Sea for piracy. It also acknowledged that the principle *aut dedere aut iudicare* is reflected in international treaties concerning genocide, torture, enforced disappearance, and attacks against civil aviation and maritime traffic. No cases of universal jurisdiction application have been reported.
- **Peru** does not have an explicit recognition of universal jurisdiction in its legislation. International treaties in Peru are in the same level as national law. In Peru, treaties in force are part of national law. There is no express constitutional decision to give human rights treaties constitutional

hierarchy. Still, the Supreme Court has stated that the rules contained in human rights treaties have constitutional status. There have been no reports of application of universal jurisdiction by Peru's judiciary.

4. Universal Jurisdiction prohibited or restricted

These are the countries where universal jurisdiction has been restricted by interpretation of the courts or expressly prohibited by a domestic law. None of the countries consulted fall within this category.

For example Spain, have legislatively prohibited the use of universal jurisdiction that was used based on judicial criteria.

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