

Universal Jurisdiction (UJ), Argentina & Myanmar

What is Universal Jurisdiction?

Generally national courts can prosecute:

- Crimes committed in their country
- Crimes committed by their nationals outside of their country
- Crimes committed against nationals outside of their country (rare)

In contrast, universal jurisdiction means that, in some countries, national courts can prosecute certain serious crimes even if the crimes did not take place in their country and even if the perpetrator is not a national of their country.

The concept applies only to very serious crimes – crimes that are so serious they are considered crimes against the whole international community and are therefore of universal concern. For these crimes, it is believed that any State should have jurisdiction to ensure justice.

The concept of universal jurisdiction was initially used to address crimes of piracy and the slave trade. Nowadays, it applies to the most serious international crimes, such as war crimes, crimes against humanity, and genocide. It includes torture and terrorist acts.

Many countries have adopted legislation recognizing universal jurisdiction and allowing cases to be filed in their courts on that basis. Such countries include Belgium, Germany, the UK, Spain, Australia, and Argentina.

Famous cases based on universal jurisdiction include Adolf Eichman, Augusto Pinochet, Ariel Sharon and George Bush Senior.

What is happening in Argentina?

Human rights groups have filed a criminal lawsuit in a court in Argentina on 13 November 2019, alleging that the government and military of Myanmar have committed crimes against humanity and genocide against the Rohingya.

The case could be filed because the principle of universal jurisdiction is included in Argentinean law, including in article 118 of the Constitution. In the past, Argentinean courts have taken up other cases using universal jurisdiction, including in relation to the Falun Gong movement in China and ex-dictator Francisco Franco's rule in Spain.

What is the case about?

The complaint demands that top Myanmar military and political leaders be investigated and prosecuted for potential crimes against humanity and genocide.

Individuals named in the complaint include Army chief Senior General Min Aung Hlaing and other military leaders, as well as State Counselor Daw Aung San Suu Kyi and the former presidents Htin Kyaw and Thein Sein. It also lists several civilians, including the monk U Wirathu and politician Nay Myo Wai.

The case is about these individuals' personal criminal responsibility, as perpetrators, accomplices, and cover-ups of the crimes. It is not about the responsibility of the State of Myanmar.

Advantages

- The case in Argentina will complement procedures happening at the ICJ and the ICC:
 - The procedure is about individual responsibility (while the ICJ is about State responsibility).
 - The case deals with crimes against the Rohingya committed on the territory of Myanmar (while the ICC is limited to crimes committed in part on the territory of Bangladesh).
- The court in Argentina can request the Independent Investigative Mechanism for Myanmar (IIMM) to provide evidence collected by the Fact-Finding Mission (FFM) and the IIMM. This would make the work of the court much easier.
- If the case in Argentina moves forward, it will put pressure politically on Myanmar. It might act as a deterrent against further abuses.
- If the court in Argentina issues arrest warrants for those military and civilian leaders, it could potentially limit their capacity to travel abroad.

Limitations

- It is unknown yet if the Argentina court will agree to accept the complaint and proceed with the case.
- Myanmar has rejected the court's jurisdiction and said it will not respond to the allegations.
- The lack of cooperation by Myanmar might make it more difficult for further investigation and evidence collection.
- It will be difficult to get the suspects to appear before the court in Argentina (e.g. obtain extradition), and therefore it might not be possible to hold a trial.
