

Universal Jurisdiction

1. What is universal jurisdiction?

As a general rule, States can only prosecute crimes that happen within their territory. However, some countries have laws that allow them to prosecute crimes that take place beyond territorial borders, and even if the alleged perpetrators – the people who did the crimes – or the victims do not live in that country. This concept is called universal jurisdiction. Universal jurisdiction is only available for specific crimes universally considered as offending the conscience of humanity. Genocide and crimes against humanity are examples of such crimes.

Countries that have universal jurisdiction laws include Argentina (in South America); Germany, Finland, Austria, France, Belgium, Hungary, Italy, Netherlands, Norway, Sweden, and Switzerland (in Europe); Ghana (in Africa); and Australia (in the Pacific).

2. What are examples of universal jurisdiction cases?

In Belgium, former Rwandan civil servant Fabien Neretse was sentenced to 25 years imprisonment for genocide and war crimes. Neretse was found guilty of murdering a Belgian woman, her Tutsi husband, and their daughter in Kigali, Rwanda in 1994. Neretse was arrested in France in June 2011 and extradited to Belgium two months later.

In Argentina, Crown prince and deputy prime minister of the Kingdom of Saudi Arabia, Prince Mohammed bin Salman is currently under preliminary examination for atrocities linked to the military campaign in Yemen launched by Saudi Arabia and other Arab states. The preliminary examination looks into allegations of war crimes, torture and inhumane treatment in violation of the 1984 Convention Against Torture – a treaty that prohibits torture.

In Ghana, former Gambian president Yahya Jammeh is pending investigation for complicity in enforced disappearances and extrajudicial executions of West African migrants, including some 44 Ghanaians, in July 2005. The paramilitary unit alleged to have executed these migrants were revealed by human rights groups to be under the control of Jammeh.

3. Are there universal jurisdiction cases concerning Myanmar?

Yes.

In Australia, lawyer Daniel Taylor, on behalf of the Rohingya community in Australia, filed a case in early 2018 for crimes against humanity against Aung San Suu Kyi for the atrocities that occurred in Rakhine state. However, the attorney-general of Australia, whose consent was needed for the case to proceed, did not approve the prosecution. In 2020, the High Court of Australia sided with the attorney-general and rejected the appeal of the Rohingya community.

In Argentina, Maung Tun Khin, in his capacity as president of the Burmese Rohingya Organisation UK (BROUK), filed on 11 November 2019 a complaint for genocide and crimes against humanity for atrocities suffered by the Rohingya community in Myanmar between 2012 and 2018, and particularly in the context of the 2016 and 2017 “clearance operations” in Rakhine state. The case is currently ongoing.

4. What is the substance of the universal jurisdiction case filed in Argentina?

The criminal complaint filed in Argentina is against the following military officers, civilian government authorities and religious leaders:

- Tatmadaw Commander-in-Chief, Senior-General min Aung Hlaing
- Deputy Commander-in-Chief, Vice Senior-General Soe Win
- Commander, Bureau of Special operations-3, Lieutenant-General Aung Kyaw Zaw
- Commander, Western Regional Military Command, Major-General Maung Soe
- Commander, 33rd Light Infantry Division, Brigadier-General Aung
- Commander, 99th Light Infantry Division, Brigadier-General Than Oo
- Former President Thein Sein
- Former President Htin Kyaw
- State Counsellor Aung San Suu Kyi
- any other civilian authority that may have participated
- President of the Party of Peace and Diversity Nay Myo Wai
- Ashin Wirathu

[For a definition of the crime of genocide and crimes against humanity, see notes on the International Court of Justice and the International Criminal Court.]

5. What are the anticipated challenges of this case?

The lawyers who made the criminal complaint in Argentina relied primarily on the findings of the UN Fact-Finding Mission on Myanmar (FFM). If the case proceeds, investigators will also rely on the work of the UN Independent Investigative Mechanism for Myanmar (IIMM) and others who may provide evidence including countries, victims and civil society organizations.

If an arrest warrant is issued by the Argentinian court to arrest any of the persons listed on Item 2, who are all located in Myanmar, it would be difficult to implement the arrest as they live in Myanmar. Myanmar is expected not to cooperate with the Argentinian authorities. However, the arrest warrants would limit the ability of these defendants (those charged with the alleged crimes) to travel abroad. It would also apply political pressure on the Myanmar government to address the atrocities in Rakhine state.

6. How will the universal jurisdiction case help the Rohingya?

The universal jurisdiction case helps in seeking truth and justice for the plight of the Rohingya, by demanding criminal accountability from government and military leaders responsible. It will also help put political pressure on the Myanmar government to address the Rohingya's concerns on citizenship, repatriation, and lack of access to justice within Myanmar.