



Q&A | SEPTEMBER 2023

The Universal Jurisdiction Case Against Myanmar Argentina Court Considers International Crimes Against Rohingya

On 26 November, 2021, the Second Chamber of the Federal Criminal Court in Buenos Aires launched a universal jurisdiction (UJ) case against Myanmar authorities for the Rohingya genocide, following a complaint filed by Burmese Rohingya Organisation UK (BROUK) in November 2019. BROUK's complaint alleged genocide and crimes against humanity committed in Myanmar by the military and civilian leadership against the Rohingya since 2012, including murder, enforced disappearance, torture, sexual violence, and imprisonment.

In 2017 the Myanmar military launched a genocidal campaign which forced over 800,000 Rohingyas to flee, largely over the border to Bangladesh. These so-called "clearance operations" were conducted through widespread and systematic murder, rape and sexual violence, and other abuses.

Rohingya who continue to live in Rakhine State face stringent restrictions on their freedom of movement as well as on accessing basic services including education and healthcare, a situation that has only been exacerbated in the wake of Cyclone Mocha in May 2023. Additionally, in February 2021 the military defied the results of democratic elections, staged a coup, and seized power in Myanmar in a campaign marked by further atrocities, including against the Rohingya.

In addition to BROUK's UJ case in Argentina, there are currently multiple ongoing international efforts aimed at justice and accountability in Myanmar for crimes against the Rohingya, including a genocide case before the International Court of Justice (ICJ) brought by The Gambia (a Q&A about the case can be found [here](#)), as well as an investigation by the International Criminal Court (ICC) (a Q&A about the ICC investigation can be found [here](#)).

1. What is the principle of UJ? How does it work in Argentina?

Universal jurisdiction is a concept based on the principle that some crimes are of global concern and are so horrific that they concern humanity as a whole. They are seen as harms against the international community; accordingly, all States have an interest in holding perpetrators to account. All states are permitted to exercise universal jurisdiction over crimes under international law.

Universal jurisdiction ensures that regardless of where the crime(s) has been committed or the nationality of the victims or suspect(s), concerned individuals can be investigated and prosecuted for the heinous crimes they have committed, including war crimes, crimes against humanity, torture, genocide, and enforced disappearances. The primary responsibility to investigate such crimes lies with the state on whose territory the crimes were committed. If those states are unable or unwilling to prosecute those crimes, universal jurisdiction exists as an additional tool in the international criminal justice system that allows other states to investigate and prosecute such crimes.

The manner in which states apply universal jurisdiction may vary. These have broadly been [classified](#) into 'pure' universal jurisdiction or 'conditional' jurisdiction. Conditional universal jurisdiction states require some kind of 'connecting link' to be established before a national court can begin investigation. For instance, Germany follows what may be classified as 'pure' universal jurisdiction; that is, there is no need to show a connection between Germany and grave international crimes committed abroad before initiating an investigation or prosecution. However, prosecutors have the discretion to decide whether to open a case where there is no connection to Germany. Other countries require some connection to be established with that country (the victim's or perpetrator's nationality or the country's interests) before an investigation can be initiated. For French courts to exercise universal jurisdiction for certain crimes, it must be shown that the accused was present in France; or for other crimes, courts will only

have jurisdiction if the accused regularly resided in France when the investigation was opened. Spain also now requires some ‘connecting links’ — the suspect must be present in Spain and the victim must be Spanish, or there be some other relevant link to Spain.

Argentinian law enshrines the principle of ‘pure’ [universal jurisdiction](#), including in [Article 118 of the Constitution](#) which permits trials for crimes against public international law committed outside Argentina. Further, Article 5 of [Law 26,200/06](#) explicitly grants federal courts criminal jurisdiction over crimes mentioned in the [Rome Statute](#) of the ICC, among others. BROUK’s case is not the first case in Argentina under the principle of universal jurisdiction.

Through the late 1970s and early 80s, the Argentinian population suffered grave human rights abuses and crimes against humanity at the hands of the military and security forces. This period of dictatorship that came to be known as the ‘Dirty War’ was marred by instances of torture, murder, and forced disappearances, among other crimes. [Having convicted](#) the military junta in a historic trial, and many others who were responsible for committing heinous crimes during this period in their own country, Argentina continues to be committed and has been recognized internationally for leading justice and accountability efforts for crimes against humanity committed elsewhere in the world. In recent years [cases](#) have been tried in Argentina against individuals for crimes committed in Spain during the rule of Francisco Franco, and for persecution against the Falun Gong movement in China. Recently [a case was filed](#) before an Argentinian court related to the genocide and crimes against humanity committed against Uyghurs in China.

2. How is a domestic court in Argentina able to prosecute crimes in Myanmar? What is the current status of the case?

In November 2019, BROUK, with the support of other human rights organizations including Grandmothers of the Plaza de Mayo and the Fundación Servicio Paz y Justicia, led by prominent Peace Nobel Prize Adolfo Perez Esquivel, filed a case under universal jurisdiction before an Argentinian criminal court concerning genocide and crimes against humanity committed against the Rohingya. In December 2019, the court rejected the case holding that Argentinian courts were not the appropriate forum for such an investigation considering that the Office of the Prosecutor (OTP) of the ICC was already looking into crimes committed against the Rohingya. BROUK filed an appeal against this decision, and in August 2021, the Federal Appeals Court heard the testimony of Rohingya women who appeared remotely before the court to speak about their experiences of sexual and gender-based violence during the “clearance operations” of 2017. In November 2021 the Court decided to launch a criminal investigation against Myanmar military and civilian officials.

The investigation continues to steadily progress. In June 2023, lead plaintiffs BROUK with the contribution of Legal Action Worldwide (LAW), organized and facilitated the direct testimony of survivors who had experienced atrocities, including sexual violence. This testimony was historic and precedent-setting, not least because it allowed victims of the 2017 genocide to directly participate in a court process, but also by building the evidence base for Argentinian courts. The Court is also considering the impact of social media in disseminating hate speech against Rohingya that led to the clearance operations, and has sent a request to Facebook to share their files and information.

3. What specific crimes are being investigated? Against whom?

The case relates to crimes perpetrated against the Rohingya by Myanmar authorities in Rakhine State. Specifically, the case calls for Argentinian courts to investigate and prosecute the senior military and civilian leadership, as well as direct perpetrators in Myanmar, for committing genocide and crimes against humanity against the Rohingya in Myanmar. Senior General Min Aung Hlaing, the Tatmadaw Commander-in-Chief, as well as former presidents U Htin Kyaw and U Thein Sein are among those who have been named in the complaint.

4. What law is the court applying?

While the Court derives its authority to deal with the case (universal jurisdiction) from the Constitution of Argentina (Article 118), it will be applying the criminal code of Argentina while deciding on the responsibility for crimes committed (homicide, rape, arbitrary detention, among others) and the subsequent punishments, if any. The Court may also declare that genocide and crimes against humanity were committed, applying the definitions of crimes

under the Rome Statute, to which Argentina is a party.

5. What comes next?

The case is currently in the investigatory stage and the Court is in the process of holding hearings and collecting evidence, which included (as explained above) recent direct testimony of witnesses regarding genocide and crimes against humanity committed against the Rohingya in Rakhine State.

At this stage as the Court continues to hold hearings and collect evidence, there may also be an opportunity for the Court to analyze the evidence collected thus far, and for the plaintiffs to request that it deliver a substantive judicial decision regarding the perpetrators of genocide and crimes against humanity against the Rohingya, as well as a request that warrants be issued against them. The Court may also decide to travel overseas to further gather substantive evidence.

The Independent Investigative Mechanism for Myanmar (IIMM), established by the United Nations (UN) to gather and preserve evidence on human rights violations in Myanmar, is also supporting the Argentinian court including by sharing relevant evidence. The IIMM is not an accountability body in its own right — meaning there is no court or prosecutor attached to it. Rather, the IIMM’s case files are intended to contribute to prosecutions of individuals in national, regional, or international criminal proceedings. The IIMM has shared relevant information and evidence with the ICC, ICJ, and Argentinian authorities in the ongoing cases related to Myanmar, provided that the sources of the information have given their approval to such sharing. In April 2022, the head of the IIMM and members of his team visited Argentina to explore opportunities for assisting the judicial investigation, especially through sharing of relevant information. The IIMM has shared information with the Federal Prosecutor’s Office in Argentina and maintains regular dialogue with the Office to determine the most effective way in which it can continue supporting the universal jurisdiction case.

6. Do survivors from Myanmar have any role in these proceedings?

BROUK and Tun Khin (BROUK’s President), along with others who represent the Rohingya community, serve as plaintiffs in the case. In that capacity they have the right to request the Court to produce more evidence before it, as well as to request the Court to pronounce substantive judicial decisions, including reparations. BROUK, as a Rohingya-led organization, and their legal team are undertaking efforts to ensure that victims are centered in the case. These efforts include ensuring that survivors are able to engage directly with the Argentinian court and its processes, with the view of empowering and giving voice to them, especially women. This is reflected in the direct testimony that witnesses provided to the court in June 2023 regarding sexual and gender-based violence. The Court provided security guarantees to witnesses as well as psychological support during the hearings (through CODESEDH, a specialized NGO), in addition to successfully addressing logistical challenges that included double translation from Rohingya to English, and then from English to Spanish.

7. Are there any other international efforts to pursue justice and accountability for the situation in Myanmar?

There are two major pathways to justice and accountability for the crimes committed against the Rohingya: (1) Myanmar’s responsibility as a state; and (2) individual criminal responsibility of those who planned, participated in, or sanctioned crimes. These efforts are complementary to each other.

Concerning Myanmar’s responsibility as a state, The Gambia’s lawsuit under the Genocide Convention continues at the ICJ. On July 22, 2022, the Court upheld The Gambia’s standing to bring a case against Myanmar for breaching provisions of the Genocide Convention. Currently, written pleadings are being completed in the case before the court hears it on merits.

Potential venues for holding individuals to account include domestic courts in third party states under the theory of universal jurisdiction, and the ICC. Due to [structural and practical barriers](#), the domestic courts of Myanmar are not at present an option for accountability efforts.

The ICC OTP is currently investigating the situation in Bangladesh/Myanmar. On November 14, 2019, the ICC authorized

the OTP to investigate certain alleged international crimes occurring during a wave of violence in Rakhine State in 2016 and 2017. While the acts relevant to the deportations occurred on the territory of Myanmar, which is not a party to the Rome Statute, the OTP [argued](#) that the ICC “may nonetheless exercise jurisdiction” since “an essential legal element of the crime — crossing an international border — occurred on the territory of a State which is a party to the Rome Statute (Bangladesh).” While [granting authorization](#), the Court noted that the Prosecutor is not restricted “to the persons or groups identified in the Request” or “to the incidents identified in the Request.” It also authorized the Prosecutor to investigate crimes committed “after 1 June 2010, the date of entry into force of the Statute for Bangladesh” and also crimes that may have been committed before but continued after this date. The investigation is currently ongoing.

There are also two other universal jurisdiction processes currently ongoing concerning the situation in Myanmar. The first is a [case](#) filed in March 2022 by the [Myanmar Accountability Project](#) with the prosecutor’s office in Turkey to hold the military leadership accountable for their widespread use of torture. The case has been filed on behalf of victims who were tortured in the Yay Kyi Ai military interrogation center in Yangon’s Mingaladon Township.

In January 2023, another [complaint was filed](#) by Fortify Rights and 16 complainants from Myanmar before the Federal Public Prosecutor General of Germany. The complaint calls for the Prosecutor to initiate a case in Germany against senior Myanmar military generals and others for atrocity crimes including for genocide, war crimes, and crimes against humanity. The complaint provides detailed evidence including interviews of more than 1,000 survivors and calls for the Prosecutor to conduct an investigation into the Rohingya genocide between 2016 and 2017, as well as into crimes against other civilians since the coup of February 2021.

Finally, in April 2023 the Indonesian Constitutional Court [rejected](#) a case to hold the Myanmar military accountable for crimes against the Rohingya. Petitioners had argued that the limitation in Indonesia’s universal jurisdiction law that limited cases to those perpetrated “by an Indonesian citizen” be declared unconstitutional; however, the Constitutional Court rejected this argument and held that in implementing human rights, every court must prioritize national interests as determined by each country’s constitution. Hence, even though the Indonesian Constitution refers to “every person” while formulating its human rights provisions, the Court held that this does not automatically create an obligation on Indonesia to protect the human rights of individuals who are not Indonesian citizens.

8. Does the Argentina case not duplicate what these other courts are doing?

Since avoiding duplication of efforts was one of the main concerns of the Argentinian courts before proceeding with the universal jurisdiction case, the Argentinian judiciary has maintained diplomatic communication with the ICC to ensure that its universal jurisdiction case would complement, not duplicate, the ICC investigation in Myanmar.

The case in Argentina is much wider in its scope, since it will cover a range of crimes against the Rohingya in Myanmar. This is in contrast to the efforts undertaken at the ICC, which are limited to crimes which have been committed at least partially in Bangladeshi territory. Absent a Security Council referral, the ICC is unable to investigate many crimes committed by the Myanmar military in Rakhine State, which include murder, enforced disappearances, and sexual violence, as well as genocide.

The case before the Argentinian courts also does not overlap with the case filed by The Gambia before the ICJ. The ICJ case deals with state responsibility, while the Argentinian court will be investigating individual criminal responsibility of senior military and civilian leadership and direct perpetrators.

Finally, at present the investigation in Argentina differs from other recent UJ cases in terms of the victims’ identity, as well as timing, location, and scope of crimes. In addition, as the first Myanmar UJ case, the Argentina case is at a more advanced stage — investigation — than the others. Regular communication among stakeholders bringing these cases can help to ensure that these and any future cases are complementary.