

Myanmar: The case for universal jurisdiction

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The mass atrocities committed against the Rohingyas and others in Myanmar since 2017, and which continue to this day across the country, have generated deep concern around the world.

Crimes against humanity, genocide and torture are forbidden by international law and states should hold accountable those who participate in the commission of these crimes within their borders.

But when the state where these crimes took place does not prosecute them or does not have a court system capable of delivering justice as is the case in Myanmar, the international community has used various mechanisms to hold perpetrators to account.

These have included ad hoc international criminal tribunals, the International Criminal Court (ICC), hybrid criminal tribunals that combine national and international elements, investigating mechanisms and transnational prosecutions.

Under the universal jurisdiction principle, any state may prosecute, adjudicate and punish certain crimes even if it does not have any territorial, national or national-interest link with the crime when it was committed. In some cases, states have a duty to exercise universal jurisdiction regarding these crimes.

Universal jurisdiction is a tool against impunity, which strengthens the international norm that crimes against humanity, genocide, torture and war crimes are outlawed. It gives victims a judicial forum where they can testify, bring other evidence to the courts and ask for justice.

Various international treaties,



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such as the Geneva Conventions of 1949 and the Torture Convention of which the Republic of Indonesia is a state party, require that state parties adopt domestic universal jurisdiction legislation.

(See for example the judgment by the International Court of Justice in *Belgium v. Senegal* of 2012 that makes that obligation crystal clear).

Universal jurisdiction is also a tool for states to prevent people who commit these crimes from entering or immigrating to their territory. States who exercise universal jurisdiction may thus advance these goals, fulfill their international obligations, secure their borders and gain standing as leaders among the community of nations.

Critics of universal jurisdiction have argued that it would bring substantial disruption to international relations. But my research indicates that universal jurisdiction has not brought such consequences.

First, if universal jurisdiction brought such a disruption, there would not be a very large number of states that had adopted universal jurisdiction statutes. But many states have done so.

According to a survey by Amnesty International, by Sept. 1, 2012, 147 out of 193 United Nations members had provided universal jurisdiction over crimes against humanity, genocide, torture and/or war crimes.

Second, if universal jurisdiction brought substantial disruption

to international relations, the number of universal jurisdiction cases would have diminished over time.

But my universal jurisdiction database, assembled in 2009-2010 and updated since, indicates that the number of universal jurisdiction cases over these four crimes has increased in the last twenty years.

"Universal jurisdiction is a tool against impunity, which strengthens the international norm that crimes against humanity, genocide, torture and war crimes are outlawed."

Third, if universal jurisdiction had brought substantial disruption to international relations, the number of universal jurisdiction trials, i.e., cases that reached the adjudication phase where someone may be convicted and punished, would not have increased over time. But my database indicates that universal jurisdiction trials over the aforementioned crimes have been going up, both in their numbers and their regularity.

Universal jurisdiction trials have not brought substantial disruption to international relations because, as my research shows, over 70 percent of universal jurisdiction trials have related to crimes the international community has broadly agreed must be prosecuted. Most universal jurisdiction trial defendants have been Nazis, former Yugoslavs,

Rwandans and Syrians.

Furthermore, universal jurisdiction prosecutions have respected the immunity of heads of state, ministers of foreign affairs and other officials, as the International Court of Justice held they should in 2002 in the case of *Congo v. Belgium*.

Many states also require the presence or even the residence of a defendant in their territory to launch universal jurisdiction prosecutions, further limiting potential tensions with other nations and underscoring the interest of the state in not becoming a

South like Argentina, Senegal and South Africa are exercising universal jurisdiction over core international crimes.

There is growing global consensus that the international crimes being committed in Myanmar must be addressed and it is encouraging to see a multifaceted approach emerging.

The ICC has limited economic and human resources, and, arguably, does not have jurisdiction in Myanmar, because though the democratic, National Unity Government has accepted the jurisdiction of the court, the junta has not.

However, the ICC has opened an investigation for the crimes against humanity of deportation, persecution and other inhumane acts, since hundreds of thousands of Rohingyas were forced across the border into Bangladesh, which has accepted the ICC's jurisdiction.

The UN Human Rights Council created the Independent Investigative Mechanism for Myanmar to collect evidence of the most-serious international crimes that can be used in universal jurisdiction prosecutions.

Gambia filed an application against Myanmar before the International Court of Justice for the violation of the Genocide Convention. Argentinian courts have opened an investigation based on universal jurisdiction.

There is now an opportunity for other states to embrace universal jurisdiction and join efforts to hold accountable at least some of the people committing these most serious international crimes: crimes that we have a collective responsibility to address and remedy.