

International Legal Systems - An Introduction



United States Department of Justice
National Security Division
Office of Justice for Victims of
Overseas Terrorism (DOJ/OVT)



If you or a loved one are the victim of a terrorist attack in a foreign country, you may have questions about what actions the United States and other governments can take to hold perpetrators responsible and prevent future attacks. The information in this brochure is intended to help you to understand the legal processes governments use to pursue accountability in the aftermath of terrorist attacks. The Office of Justice for Victims of Overseas Terrorism in the U.S. Department of Justice (DOJ/OVT) developed this brochure to assist you with navigating the criminal justice process in foreign countries.

Introduction

Because the attack took place outside the United States, the primary jurisdiction (or power) to investigate and prosecute the case automatically rests with the government of the country where it happened. Each country is sovereign over its own territory, which means that the foreign government will determine how to investigate an attack, whether a crime has occurred according to its own law, and the manner in which any prosecution occurs in its own courts or tribunals— the same way the United States (U.S.) does about crimes that happen within the U.S. Terrorist attacks against Americans in foreign countries may also be investigated by the U.S. government, usually by the Federal Bureau of Investigation; however, only a limited number of those investigations typically result in prosecutions in the U.S. The U.S. has power under its own laws to investigate and prosecute terrorist attacks against U.S. citizens that happen outside the U.S. (“extra-territorial jurisdiction”); however, because the U.S. does not have sovereignty in foreign countries, its ability to investigate is more limited than it would be if the crime happened in the U.S. That is one reason why terrorism prosecutions are more likely to take place in the country where the attack happened. The justice system in the foreign country provides a means of seeking justice for what you and your family have suffered.

Each foreign legal system is unique. Each will differ from what you may be expecting based on your familiarity with the system in the U.S. Some of the differences between foreign and U.S. prosecutions may include which legal professionals will investigate the crime, what rights victims will have during the investigation and prosecution, and the length of time a trial may take. In addition, although there are law enforcement and justice professionals all over the world who are dedicated to helping you seek justice, they may lack the resources, capacity, and support within their own countries to go forward. You should be prepared for the possibility that the investigation may not identify or locate a suspect or, conversely, that perpetrators are identified and prosecuted quickly. We are here to help you understand what is happening in the foreign justice system and participate in the process to the extent you desire and foreign law allows. Because each country’s system -- and each case -- is different, it is impossible in a brochure to describe all of the legal possibilities. Nevertheless, the information that follows provides basic generalizations about legal and court systems, as well as some basic legal concepts, to help provide a context for what you may encounter or experience.

Types of Legal Systems

Legal systems vary from country to country, and sometimes within a single country. Although they develop in different ways, legal systems also have some similarities based on historically accepted justice ideals. Legal systems do fall into groups or patterns with some similar features within each group. Among the main groups that you might encounter are: 1) common law; 2) civil law; 3) religious law; and 4) customary law. Many countries employ more than one of these systems at the same time to create a hybrid system. In some places, the current security situation can also impact the way that legal systems work. It is helpful to understand some of the similarities and differences as you move through your case.

This section of the brochure contains some very broad generalizations about the types of legal systems, but they are not specific to a country. DOJ/OVT can help you to identify the type of legal system present in the country where the prosecution is taking place. For more specific country information, please contact DOJ/ OVT.

Common Law Legal Systems

General principles:

- The laws governing a case are based on both legal precedent, created by judges, and statutory laws, created by legislatures;
- Usually an adversarial system, where the judge acts as an impartial referee between opposing parties to a case;
- A jury may determine the facts, and a judge will decide the law to be applied;
- There is an active role for prosecutors and defense attorneys;
- Victims have a role as witnesses and may have rights as a victim to receive information and limited participation – however, victims are not a party in criminal cases;
- The U.S. and the U.K. are examples of common law systems.

Common law was originally developed by judges through case-by-case court decisions, rather than through legislation enacted by a legislature. In this system, much of the law is made by judges' decisions, called precedent. This means that if a similar case has been resolved by a court in the past, a court is bound to follow the reasoning used in the prior decision. While judges are very important in common law systems, legislatures still have a part to play. Common law systems also rely on statutes that are passed by the legislature or a parliament, and judges have the role of interpreting how the legislature's laws are applied in individual cases.

In common law legal systems, legal proceedings are mostly adversarial, rather than inquisitorial. This means that for the most part, two opposing parties (adversaries) appear before a judge who moderates. Defendants are entitled to be present and to be represented by a lawyer. The attorneys on both sides generally have an active role in representing their clients throughout the case and in presenting evidence and arguments in court. A jury of people without legal training can decide the facts of the case, and if there is a conviction, then a judge determines the appropriate sentence based on the jury's verdict.

Key Justice Participants in a Common Law System

Police: Under common law, police officers have significant independent investigative powers, including investigation of a crime, with only indirect oversight from a judge. Police must get warrants from a judge, but the police are responsible for collecting and securing all evidence.

Prosecutor: The prosecutor is responsible for filing criminal charges against the perpetrator if there is sufficient evidence to proceed to trial, and plays a very active role in presenting the prosecution evidence at trial. The prosecutor represents the government, not the victims directly. In many common law systems, the prosecutor has broad discretion as to whether to file charges, which charges to file, and how to present the case.

Judge: Common law judges act as “referees” in a case, with both sides coming to the judge only to resolve disagreements and for trial. In common law systems, judges have the power to interpret legislative laws, and are responsible for instructing the jury about the law that applies.

Defense Counsel: Defense counsel plays an active role in trial proceedings and is considered an equal party to the prosecution. Defense counsel can be present during the questioning of a suspect from the moment of arrest and can advise his/her client during questioning. Defense attorneys can gather evidence independently, hire expert witnesses, and select witnesses to call at trial. The right to cross-examine prosecution witnesses constitutes an essential element of the rights of the accused.

Juries: The jury’s role is to decide the facts to determine whether the accused person is proven guilty. The right to have a jury decide the facts may be contained in a country’s Constitution or in a legislative law, and not all common law countries rely upon juries. The country’s laws and type of court also dictate the number of jurors and how many must agree on a verdict.

Victims: In common law systems, victims have a less active role in proceedings than in some other systems. The victim’s primary role is as a witness at trial, and victims may have the opportunity to have their views heard by the court through a victim impact statement at the sentencing hearing. Under victims’ rights laws, victims may be entitled to rights within the criminal justice system during legal proceedings. In the United States federal system, for example, victims generally have rights to safety (to be reasonably protected from the accused and to respect for privacy), information (reasonable, timely and accurate notice of public court proceedings involving the crime or release of the accused), and participation (right to confer with the prosecutor, be present in court and be heard by the court at various points in the prosecution).

Civil Law Legal Systems¹

General principles:

- Most of the law is statutory law created by legislatures and not by judges following precedent;
- Usually an inquisitorial system, where an investigating judge is actively involved in investigating the facts of a case;
- Juries are rarely used; a judge or panel of judges will decide the facts and the law to be applied;
- Prosecutors and defense attorneys may play a more limited role;
- Victims may be parties and have rights regarding their involvement, which may include having their own attorneys and filing the initial charges;
- In many civil law systems, victims may bring civil claims, e.g., for monetary damages, in the context of a criminal prosecution.

¹ “Civil law systems” should not be confused with the concept of “civil law” in the U.S. U.S. civil law describes lawsuits with a non-criminal claim like divorce, breach of contract, torts, bankruptcy, etc. A foreign civil law system contains both criminal and non-criminal claims.

- Many European countries, including France and Germany, and a number of North, Central and South American countries, like Mexico and Brazil, are examples of civil law systems.

Civil law systems place greater emphasis on legal codes crafted by the legislature. Civil law statutes tend to be more detailed than statutes under common law systems, and contain continuously updated legal codes that specify all matters capable of being brought before a court, the procedure to be followed, and the appropriate punishment.

Civil law systems rely less on judges and more on academic legal experts to make legal interpretations. In a civil law system, the judge's role is to establish the facts of the case and to analyze and apply the legislature's written laws. Because of this, legislators and legal scholars who draft and interpret the codes are important in civil law legal systems.

The role of judges is different in civil law systems compared to common law systems. There are two types of judges in a civil law system: an investigating judge (or magistrate) and trial or sitting judges. Civil law systems are based on the belief that justice is best served when a judge is an active participant in investigating the facts of the case, thus the investigating judge or magistrate will typically lead the investigation. Unlike common law systems, which focus on the trial to determine the facts, civil law legal systems mostly focus on pre-trial investigation and hearings to establish the facts. The actual trials can be relatively brief and informal because the trial judge will review the case file developed by an investigating judge. During trial, witnesses are generally allowed to give additional kinds of evidence and the defendant often gives a statement. Cross-examination is rare.

Key Justice Participants in Civil Law Systems

Police: The main role of the police is to inform the prosecutor about a crime. In many civil law countries, there are “judicial police” who are tasked with assisting the investigating judge and prosecutor in the investigation and may have power to search a home or business, collect evidence, and arrest suspects.

Prosecutor: The prosecutor's role can vary among civil law countries —representing the state, society, and/or the victim. The prosecutor opens the preliminary investigation and his/her main role is to determine whether sufficient evidence exists to refer the case to the investigating judge. The prosecutor's investigation will be mostly paper-based and will not be as extensive as the investigating judge, and the prosecutor's role may be limited to verifying that the correct procedures are followed as the case moves through the legal system. In many civil law systems, the prosecutor is an advisor to the court rather than an adversarial party.

Investigating judge: Basically, the investigating judge acts like the typical prosecutor we are used to in the common law system. The police present evidence to the investigating judge as a case file (sometimes called a “dossier”). The investigating judge then reviews the file and asks most of the questions of the witnesses in preliminary court hearings. This judge is responsible for leading criminal investigations, including interviewing the accused, victims and witnesses; determining the appropriate type of evidence to be heard; and preparing the case file to be passed on to the sitting judges for their verdict. The investigating judge has broad powers, including ordering warrants and visiting the crime scene. Many civil law countries do not have a trial as you may be familiar with it (a presentation of evidence on consecutive days using oral proceedings). Instead, the investigating judge will call for oral testimony when needed to develop the case. This means that court hearings may take place over months or years, with the case only having scheduled hearings a few days at a time. Once the investigating judge finishes the investigation, he or she can refer the case to a trial judge or panel of trial judges for the formal trial.

Sitting or trial judge: These judges preside over the trial in court and, though the number may vary by country, usually sit on a panel of three judges. Sitting judges can question witnesses and experts, and examine evidence. Like the proceedings before the investigating judge, the trial may take place over a period of months or years with trial proceedings scheduled a few days at a time. The sitting judges determine the guilt of the accused.

Defense counsel: Defense counsel is generally independent of the state and the client, trained to be an impartial advocate, and plays a more limited role in criminal cases. Historically, defense counsel is not present when the judge interviews the suspect, but more recent developments have allowed for defense counsel to be present for such interviews in some countries. Even when the defense attorney is present for the suspect's interview, counsel may only be there to make sure that the suspect is being treated legally and the attorney may not participate in the investigation. Defense counsel is normally forbidden from contacting witnesses.

Juries: Jury trials are rare under civil law systems; however, they do exist in some countries. The civil system jury's role is the same as that of juries in common law - to determine whether a defendant is proven guilty. In some civil law countries, non-legal professionals are combined with professional judges to form a mixed jury.

Victims: In civil law systems, victims have a more central role in criminal proceedings. The victim often has the right to be represented by counsel who participates in the trial, including asking questions and presenting evidence. Some civil law countries allow individual victims the right to initiate prosecutions and/or become a co-plaintiff with the prosecutor. This enables victims' families to have greater access to and control over information. Some countries require the victim to file a complaint before an investigation can begin, which can be very difficult for victims who don't live in that country or who cannot afford to pay a local lawyer.

Religious Law Legal Systems – Canon Law, Islamic Law, and Talmudic Law

In traditional religious legal systems, criminal law is based mainly on religious texts and interpretations of those texts. Religious legal systems include Canon law (e.g., Roman Catholic, Anglican), Islamic law, and Talmudic (Jewish) law. Even in countries that have common or civil law systems, religious courts may exclusively hear some matters (examples: marriage, divorce and inheritance) for the followers of individual faiths if the country has different religious groups. Some countries incorporate some aspects of religious law into civil or common law systems (see Hybrid Legal Systems, below). In some countries, elements of Hindu, Buddhist, Confucian, or Sikh laws may be incorporated into the legal systems.

Canon law is the body of laws and regulations made or adopted by ecclesiastical authority for the government of Christian communities. Although at the root of much of the Western legal tradition, Canon law is applied very seldom across the world today.

Islamic law² is the religious law that applies in many Muslim communities to varying extents. Islamic law is a basic set of rules that are based on two primary sources: the Koran and the Sunnah (the model written behavior of the Prophet Muhammad), but also on a variety of legal interpretations. In some countries, Islamic law only governs family matters and all other legal issues are handled through the secular court system. Other countries

² The term "Islamic law" is sometimes used interchangeably with "Sharia law", but these two terms are not completely synonymous.

take a variety of approaches: some apply Islamic in combination with secular law; in others, Islamic is applied in a modified form; and some other countries apply strict Islamic legal interpretations in all courts. Legal interpretation may depend on the branch of Islam practiced within a country. Islamic law generally recognizes a role for victims in the justice system.

Talmudic law applies in some countries and regions with heavily concentrated Jewish populations. The major sources of law in this legal system are the Torah (the first five books of the Old Testament in the Christian western tradition), both written and oral, as well as the Talmud. The Talmud is a written commentary of valuable opinions about the content of the written and oral Torahs. Similar to the importance placed on interpretations of academic scholars and legal experts in the civil law system, the Talmudic legal system also relies on the written opinions of those learned in the law.

Other Legal Systems - Customary Law and Hybrid Legal Systems³

Customary law - Countries that do not historically have strong formal justice systems may rely upon customary law. Customary law is generally found at the tribal or local level in districts, counties, and villages, and is a vast set of practices that vary from community to community. These traditional rights and obligations are generally unique to a particular society or culture. Customary law is based on longstanding local customs which greatly shape the ideas of justice. Customary law is often oral, not written. It generally uses a case-by-case approach to dispute resolution. Customary law can sometimes involve informal mediation or arbitration, and typically does not include a formal trial. Customary law frequently becomes a function of tribal or village elders in the absence of a functioning formal justice system, as in a conflict or post-conflict country.

Hybrid Legal Systems - Countries may have mixed legal systems that draw on common law and/or civil law traditions, mixed with customary or religious laws. For example, Islamic law operates alongside civil or common law in some countries. India has a common law system combined with separate personal law codes that apply to Muslims, Christians, and Hindus. Pakistan's legal system combines common law and Islamic law. Nepal's legal system combines Hindu legal concepts and common law. The Philippines has a mixed legal system of civil, common, Islamic and customary law. Sri Lanka's legal system combines civil law, common law and customary law. Most Pacific island countries recognize customary law as well as common law. In some African countries, customary law still has great influence, and local values play a role in informal justice systems and accountability.

Types of Courts Hearing Terrorism Cases in Foreign Countries

Terrorism cases are handled in a variety of ways depending on the country. In some countries, terrorism cases are heard in courts with jurisdiction over a wide range of crimes. This means that, for the most part, a terrorism case would follow the same procedure as any other criminal case before that court. The judges would be the same judges as would hear other non-terrorism cases, and the courtroom would be the same, too.

In other countries, terrorism cases are heard in special courts that are intended to focus on the unique issues involved in terrorist crimes. Sometimes these special courts are national courts that specialize in terrorism cases, or slightly different versions of the country's regular courts.

³ This is not an exhaustive list of hybrid systems, but merely an example of how this occurs within some countries.

A few countries have military courts that focus on terrorism prosecutions. The rules of procedure – the way the trial will happen and who will participate in it – and the laws that describe the crime of terrorism may be different than those in a general national court.

In both specialized and military courts the judges may have received special training in terrorism cases, and this may be the only kind of case they hear.

The type of court hearing a case may also directly impact the issue of security surrounding the court and case information. Courts may be closed to the public, may hear classified information, and have increased security measures for judges and court personnel while in and out of court. It may be more difficult to find out information about a case in these circumstances. Talk to DOJ/OVT about the court where your case will be heard. Finding out what type of court may hear your case may help you understand any limitations on how much information you are able to find out.

Important Legal Concepts

In addition to the type of legal system and the type of court hearing the matter, there are some basic legal concepts that will affect how a criminal prosecution proceeds.

Statutes of Limitation

In the common law legal system, “statutes of limitation” are laws that limit the government’s ability to bring charges or start a prosecution after a certain period of time. Statutes of limitation encourage law enforcement officials to promptly investigate suspected criminal or terrorist activity and help cases to be more quickly decided, closed and resolved.

Civil law legal systems have “prescription periods”, which work much the same as statutes of limitation but limit the time within which criminal prosecutions must be completed. Religious legal systems also have similar concepts. The length of a statute of limitation varies by country and the type of offense.

If too much time has elapsed since the terrorist attack, prosecutors may not be able to bring some charges because of these types of laws. Some crimes have no statute of limitations.

Plea Bargains

In the United States, plea bargains are used frequently and have proven to be an efficient and effective way of holding defendants accountable for their crimes. In a typical plea bargain, the accused agrees to admit to committing a crime in exchange for some concession from the prosecution, such as dropping some charges or agreeing to a certain punishment. If a case is resolved through a plea bargain, there is no trial and usually no appeal. The U.S. is unique in its use of plea bargains, and most other countries around the world have been slow to adopt this tool. Please do not be surprised if there is no discussion of a plea bargain, or even a possibility of one. Plea bargains may not be an option in the country where the case is being investigated and tried. DOJ/OVT can answer questions you may have about plea bargains and whether they are permitted in the foreign system with which you are dealing.

Sentences

If there is a conviction in your case (after trial or after an accused pleads guilty), the court will impose a sentence, which is the punishment the convicted offender will receive. Sentences for terrorism cases vary from country to country, and can range from a short time in jail to the death penalty. The country's law may or may not allow a victim to offer a statement about the impact of the crime, which in some systems can include the victim's opinion about the appropriate sentence. Either way, the sentence may not be what a victim thinks it should be. Sentencing laws can be complex, and can allow for prisoners to get reductions in their sentences if they work, exhibit good behavior, or reach a certain age while in prison. In many countries, there is a practice to release a prisoner after a certain length of time regardless of the formal sentence. It is also possible for foreign governments to grant prisoners a "remission," which is a reduction in the sentence usually resulting in release. Remissions may happen during a major religious holiday or for other political reasons. If a prison sentence is imposed, you should be aware that other countries may not determine or keep track of prison release dates in the same way the U.S. does. This lack of information can be frustrating and concerning for victims. Reductions can be very hard to keep track of, and the country may not be equipped to keep accurate records. In some past cases, foreign governments have released prisoners long before their official release date because of prisoner illness, new laws or prisoner exchanges. DOJ/OVT will work with you to try to keep you informed about prisoner releases.

Conclusion

We at DOJ/OVT hope that this information helps you understand some of what lies before you. We are sincerely sorry for the suffering that you and your loved ones are going through, and we are here to walk beside you through this ordeal. Please try to be patient with the criminal justice system and the justice actors that will work with you, as our ultimate goal is to help pursue justice and accountability – no matter how long it may take.



Should you require additional information or assistance, please

contact DOJ/OVT at:

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