UNITED STATES COMMISSION *on*
INTERNATIONAL RELIGIOUS FREEDOM

LEGISLATION FACTSHEET

PROSECUTION OF MASS ATROCITY CRIMES

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USCIRF's Mission

To elevate and promote international religious freedom as a norm and practice.

By: Kirsten Lavery, International Legal Specialist

Overview and Purpose

Mass atrocities are large-scale, deliberate attacks against civilians. Legally, crimes considered mass atrocities include war crimes, crimes against humanity, and genocide. When these crimes occur, states have an obligation, under international law, to see that those responsible are held accountable through criminal prosecutions. The investigation and prosecution of mass atrocities is *fundamental in societies dealing with the legacy of conflict*. Accountability can deter future abuses and promote reconciliation and harmony. Universal prosecution also affirms the rule of law and reinforces the unacceptability of these crimes.

Mass atrocity crimes often target the most vulnerable groups, including minority religious communities, as seen in countries such as *Burma, Iraq, Syria, and North Korea*. Mass atrocities can also be committed in the name of religion or belief. In the lead up to mass atrocities, religious freedom is often violated in less severe ways. The UN Special Rapporteur on freedom of religion or belief has *noted* that early warning signs include lack of adequate legislation ensuring freedom or religion or belief, lack of accountability for crimes targeting a specific religious community, and the existence of patterns of religious discrimination.

Definitions

The legal definitions of the three distinct crimes that constitute mass atrocities are described in the table on the following page.

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Media@USCIRF.gov

732 N. Capitol Street, NW, Suite #A714
Washington, DC 20401
202-523-3240

Overview of International Crimes

Crime	Crimes Against Humanity	Genocide	War Crimes
Legal Definition	Specific acts when committed as part of a widespread or systematic attack directed against a civilian population, pursuant to or in furtherance of a state or organizational policy to commit the attack	Specific acts when committed with the specific intent to destroy, in whole or in part, a national, ethnic, racial, or religious group	Serious violations of international humanitarian law that are criminalized under international law
Acts	Includes torture, enforced disappearances; killings; enslavement; deportation; persecution on political, racial, or religious grounds; institutionalized racial, ethnic, or religious discrimination (apartheid); and certain crimes of sexual and gender-based violence, including rape	Includes killing, causing serious bodily or mental harm, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, imposing measures intended to prevent births within the group, forcibly transferring children of the group to another group	Includes willful killings, targeting civilians, torture, using poison or poisoned weapons, the murder or ill-treatment of prisoners of war, crimes of sexual violence, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly
Context	War or peace	War or peace	War – requires armed conflict (domestic or international) and connection to the conflict
Committed Against	Civilian population	A protected group (national, ethnic, racial, or religious)	Combatants or non-combatants
Sources in International Law	Statutes of tribunals including the Rome Statute of the International Criminal Court ("the Rome Statute")[1]	UN Convention on the Prevention and Punishment of Genocide ("the Genocide Convention")	The 1949 Geneva Conventions I, II, III, and IV and their 1977 Additional Protocols

Forums for Prosecutions

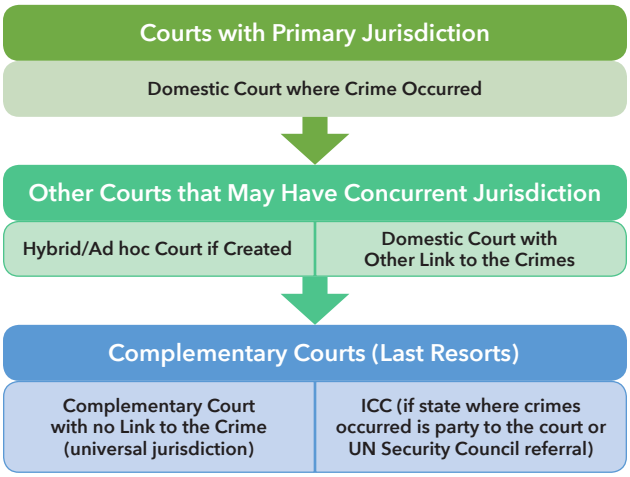
Criminal prosecutions for mass atrocity crimes can occur before various types of courts, including: (1) domestic courts, (2) hybrid domestic/international tribunals, or (3) international courts and tribunals.

(1) Domestic courts: States have the primary obligation to ensure accountability for mass atrocity crimes. There are several ways that domestic courts can have the power to prosecute atrocity crimes.

Jurisdiction of Domestic Courts for International Crimes

Type of Jurisdiction	Connection to State
Territorial	Crime occurs on the territory of the state (primary competence)
Nationality	Perpetrator's nationality
Passive Personality	Victim's nationality
Protective	Need to protect vital national interests of state
Universal	None required

Forum Options for Mass Atrocity Crime Prosecutions



The traditional bases for criminal jurisdiction exist when there is a link between the state and either the specific offense or the alleged perpetrators. While the courts in the countries where the crimes are committed have primary competence to prosecute atrocity crimes, some societies may lack the political will or institutional capacity to address these difficult and sensitive crimes. In those cases, national jurisdiction can also be based on the nationality of the perpetrator or victim, or the interests of a state.

1 The United States is not a signatory to the Rome Statute.

Domestic courts can also prosecute mass atrocity cases through the application of universal jurisdiction. Originally applied to hold pirates and slave traders accountable, universal jurisdiction allows states to prosecute serious international crimes committed by anybody, anywhere in the world, based on the principle that such crimes harm the international community or international order. In addition to specific treaty obligations that may require universal jurisdiction, international customary law allows the use of universal jurisdiction for mass atrocity crimes. Typically, universal jurisdiction is a last resort for victims when the courts with links to the crimes are ineffective and international courts lack jurisdiction.

(2) Hybrid/ad-hoc tribunals, courts, and chambers: Ad-hoc courts and special tribunals or chambers can also be created to investigate and prosecute mass atrocity crimes, often where domestic courts are unable or unwilling.

The International Criminal Tribunal for the Former Yugoslavia (ICTY) was a hybrid court established by **UN Security Council Resolution 827** in 1993 to prosecute mass atrocities that occurred during the conflicts in the Balkans in the 1990s. It considered the rights of religious minorities in several of its cases, including the **Kordić and Čerkez Case**. There, the Trial Chambers found Kordic, a political leader, and Cerkez, a military commander, guilty of crimes against humanity and war crimes for, among other actions, deliberately targeting mosques and other religious and educational institutions as part of a common plan to destroy the Bosnian Muslim community.

Typically, ad-hoc judicial institutions are purely domestic. On the other hand, hybrid courts, which are increasingly popular, combine domestic and international elements, often include a mix of international and domestic staff, and apply elements of international and domestic law. Hybrid courts can be created domestically or by an agreement between the country and a regional or international body.

(3) International Courts: International courts further complement national courts and hybrid courts, helping to bridge the impunity gap for mass atrocity crimes.

- International Criminal Court (ICC): The Rome Statute, signed by 120 states in 1998, established the ICC as a permanent court based in the Netherlands. The ICC can investigate and prosecute serious international crimes including genocide, crimes against humanity, and war crimes. The ICC's jurisdiction only extends to crimes committed on the territory or by nationals of states that have accepted its jurisdiction or cases referred to it by the UN Security Council. Its jurisdiction is complementary to national jurisdiction, meaning the ICC can only take up cases where the states concerned are incapable of pursuing the perpetrators or unwilling to do so.

The **Al Mahdi Case** was the first time that the ICC sentenced a defendant for war crimes for attacking religious sites with a discriminatory religious motive. Al Mahdi was an Islamic cleric who worked with Al Qaeda of the Islamic Maghreb (AQIM). He pleaded guilty to intentionally directing attacks against protected historic monuments and buildings dedicated to religion in Timbuktu, Mali. In 2016, the ICC sentenced Al Mahdi to 9 years' imprisonment and later **ordered** him to pay 2.7 million euros in individual and collective reparations to the community in Timbuktu.

- International Court of Justice (ICJ): The UN Charter established the ICJ in 1945. As the judicial organ of the UN, it settles legal disputes between states and gives advisory opinions on legal matters referred to it by UN bodies.

  Although the ICJ does not conduct criminal investigations or prosecutions, certain treaties give it the authority to decide legal disputes related to these crimes. For example, under Article IX of the Genocide Convention, the ICJ has jurisdiction to decide disputes relating to the interpretation, application, or fulfillment of the Convention.

In 2007, the ICJ in **Bosnia and Herzegovina v. Serbia and Montenegro** held that the massacre of thousands of Bosnian Muslims in Srebrenica in 1995 was a crime of genocide, as it was committed with the intent to destroy a particular religious group. While the ICJ further found that the Serbian government was not directly responsible or complicit in this genocide, the Court ruled that Serbia breached the Genocide Convention by failing to prevent the violence and not cooperating with the ICTY to punish perpetrators.

In the wake of mass atrocities, the path to justice is often unclear. This is the current situation for Rohingya Muslims and other religious and ethnic minorities in **Burma**. In September 2018, the United Nations Independent Fact-Finding mission **found** sufficient information to warrant investigation and prosecution of individuals involved in certain crimes to determine their liability for genocide in Rakhine State (and other areas) and determined that domestic prosecutions are not feasible in light of Burma's pervasive culture of impunity and the absence of an independent judiciary. The UN-commissioned report did not specify which international court should lead the prosecutions. Although Burma is not a party to the Rome Statute, in September 2018 the ICC **opened** an investigation into the alleged crimes committed against the Rohingya population in Burma and the deportation of the Rohingya people from Burma to Bangladesh. There also have been calls for other options to be pursued, including a UN Security Council referral to the ICC, a state bringing a case before the ICJ based on Burma's violations of the Genocide Convention, or the establishing of an ad-hoc tribunal.

Standards for Legislation

States are increasingly incorporating mass atrocity crimes directly into domestic codes. According to the U.S. Law Library of Congress, as of 2016, at least *149 states* maintained legislation that punish at least one mass atrocity crime. While these laws differ greatly on the scope of jurisdiction granted to domestic courts, the incorporation of these crimes into domestic law is essential to ensuring accountability. Without domestic legislation criminalizing mass atrocity crimes, states may be able to prosecute perpetrators for the underlying ordinary crimes, such as murder, assault, and rape. Nevertheless, expressly codifying mass atrocity crimes, as defined in international law, addresses any impunity gaps, recognizes the gravity of these crimes, and allows for prosecutions based on command or superior responsibility.

The United States Institute of Peace's (USIP) **Model Codes for Post-Conflict Criminal Justice** includes a chapter on **genocide, crimes against humanity, and war crimes**, which includes draft statutory language and an overview of the relevant international law cases.

States should incorporate international standards: National legislation should comprehensively define mass atrocity crimes and their elements, consistent with international law. States also should ensure that legislation sufficiently addresses the potential impact of these crimes on freedom of religion or belief and comprehensively protects religious groups. Specifically, crimes against humanity should be defined to include persecution against religious groups; genocide to include all prohibited acts and protected groups, such as religious groups; and war crimes to include those related to the protection of religious sites and respecting the religious convictions and practices of protected persons.

States should define the territorial and temporal jurisdiction and any limiting principles: Mass atrocity legislation often extends jurisdiction beyond territoriality and nationality (based on the crime occurring in the state and the nationality of the perpetrator) to also permit passive personality and protective jurisdiction (based on the nationality of the victim and the need to protect the vital interests of the state), even when not permitted for ordinary crimes. States are also increasingly passing laws that empower their courts to exercise universal jurisdiction, particularly when the states with connections to the mass atrocity crimes are unwilling or unable to hold perpetrators accountable. Only a few states maintain laws with "pure" universal jurisdiction, meaning that no link to the crime is required. Reasons to limit extraterritorial jurisdiction include to protect against politicized prosecutions, ensure political support for prosecutions, and minimize tensions with other states. In including any limitation, states should ensure the promotion of accountability to the fullest extent possible.

International law allows states to adopt legislation providing for retroactive prosecutions for conduct recognized as criminal under international law before the passage of the domestic legislation. This means that states do not need to restrict the temporal jurisdiction of mass atrocity crimes to only non-retroactive cases, which is often the case in criminal legislation.

States should align jurisdiction with treaty obligations: Some treaties, such as the Rome Statute, require state parties to implement specific mass atrocity offenses into domestic law. Other treaties directly require that states apply universal jurisdiction to specific crimes. Other treaties, such as the 1949 Geneva Conventions on the Laws of War, require states to either prosecute or extradite suspects. In application, this means a state must ensure that its courts can exercise universal jurisdiction for cases where it cannot extradite the suspect to other states or surrender the suspect to an international court.

In **Iraq** and **Syria**, the Islamic State of Iraq and Syria (ISIS) waged a **genocidal campaign** against Yazidis, Christians, and Shi'a Muslims. While some criminal investigations are ongoing and a UN body was **established** to collect and preserve evidence in Iraq, Iraqi penal law does not incorporate international crimes. Some ISIS members have been prosecuted domestically under Iraq's counterterrorism law, with many of these prosecutions marred by due process concerns. There have been similar challenges to holding former ISIS members accountable in Syria. Given this impunity gap, the UN Syrian Commission of Inquiry has **expressly called** upon states to utilize universal jurisdiction to "investigate and prosecute persons and groups implicated in egregious violations."

Germany is one such state. **Section 1 of the 2002 Code of Crimes Against International Law** incorporates the Rome State and empowers German courts to exercise pure universal jurisdiction over an accused person for committing mass atrocity crimes. The suspect does not need to be present in Germany before an investigation can be opened, although the prosecutor has discretion to close the investigation if the suspect is not present or expected to be present or if another court takes up a genuine prosecution. Under this provision, German prosecutors opened an investigation into crimes against the Yazidi minority committed by alleged ISIS members in Syria and Iraq, which has spurred investigations into 30 specific individuals.

States should consider creating special chambers or courts: Many states have created specialized units, chambers, or standalone courts to deal exclusively with mass atrocity crimes. If creating separate bodies, states should consider integrating religious and traditional legal processes and tools where appropriate. As noted in the *African Union's Transitional Justice Policy*, successful criminal prosecutions may incorporate procedures that draw on religious and cultural legal sources, including those that guarantee the participation of victims, the cooperation of perpetrators, and the awarding of reparations.

The Special Criminal Court (SCC) in the Central African Republic (CAR) was created by **law** in 2015 to prosecute serious violations and human rights and international humanitarian law, including mass atrocity crimes, committed in **CAR** since 2003. The atrocities committed include sectarian violence and killings based on religious identity that started after a 2013 coup. The SCC is integrated into CAR's domestic judicial system and staffed by both international and national judges, prosecutors, and administrators. It applies national criminal legislation, including the domestic rules of procedure and evidence, supplemented by substantive and procedural international norms. While legal, administrative, and bureaucratic obstacles delayed its establishment until 2018, the SCC is currently operational.

States should adequately support mass atrocity crime prosecutions: States should ensure that mass atrocity prosecutions receive adequate resources and funding, especially in relation to evidence gathering, which can be particularly complex when investigating crimes that occurred in other states. States also should ensure that all personnel involved in these cases are well trained in this complicated area of law.

States should provide effective safeguards for fairness and due process: Mass atrocity investigations and prosecutions should meet international standards regarding due process and fair trial. These include independent, objective, non-politicized, non-discriminatory, and timely investigations and prosecutions, adequate standards of proof, and providing the defense access to evidence, including evidence abroad in cases based on extraterritorial or universal jurisdiction.

In 1999, the **Chinese** government created an extrajudicial security apparatus designed specifically to eradicate Falun Gong adherents. It continues to classify the Falun Gong as an "evil cult" and persecute Falun Gong practitioners for observing their faith. Between 2003 and 2007, several criminal complaints were brought before the Spanish National Court for genocide against Falun Gong practitioners, and an investigation was opened. At the time, Spain maintained a pure universal jurisdiction law. In 2009, a Spanish judge indicted two Chinese officials for crimes that included genocide, including former Chinese president Jiang Zemin. The cases were stayed in 2014 after Spain's Parliament passed a new law that limited investigations of cases not involving Spanish victims or alleged perpetrators.

Examples of Victims' Roles in Mass Atrocity Prosecutions

States should consider the role of victims in investigations or prosecutions: States should define the scope of rights afforded to victims in mass atrocity prosecutions. Victim participation can help prosecutions discover the truth and empower victims to share their stories. Victim outreach also can be useful to ensure that victims and witnesses understand the criminal process and increase their engagement. Relatedly, *states must provide victims an effective remedy and reparations for gross violations of human rights*, including mass atrocity crimes.

Professional Staff

Ferdaouis Bagga
Policy Analyst

Keely Bakken
Researcher

Dwight Bashir
Director of Research and Policy

Elizabeth K. Cassidy
Director of International Law and Policy

Lindsey Eilon
Senior Congressional Relations Specialist

Patrick Greenwalt
Researcher

Alex Iverson
Researcher

Thomas Kraemer
Director of Operations and Finance

Kirsten Lavery
International Legal Specialist

Jason Morton
Policy Analyst

Tina L. Mufford
Deputy Director of Research and Policy

Dominic Nardi
Policy Analyst

Javier Pena
Communications and Congressional Affairs Specialist

Jamie Staley
Senior Congressional Relations Specialist

Zachary Udin
Research Assistant

Scott Weiner
Policy Analyst

Kurt Werthmuller
Policy Analyst

Henry Young
Management and Program Analyst