Prosecuting Human Rights Violations in Europe and America: How Legal System Structure Affects Compliance with International Obligations

Micah S. Myers
Stanford Law School

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INTRODUCTION

Imagine that a democratic government, in a fit of exasperation, decides to do the unthinkable. Confronted by members of an ethnic minority who they believe to be terrorists, but against whom they have been unable to take legal action, top officials decide to play dirty. They form a secretive paramilitary organization and arrange for it to be financed and armed by the state. Its members take on dozens of "missions;" their activities include kidnapping, torture, and outright murder. High-ranking government officials are regularly informed of these activities, sometimes while kidnappings or murders are underway.

* J.D. Candidate, Stanford Law School, 2004. A.B., summa cum laude, Harvard University, 2000. Special thanks to Thomas Grey and Juan E. Garcés for their insightful comments and their guidance. Thanks also to Jason Morgan-Foster and Julia Sutherland of the Michigan Journal of International Law for their helpful editing.
Almost everybody would agree that participants in a plan of this sort should face criminal sanctions. Indeed, not only could the sponsoring government be said to have clearly violated several major human rights conventions,¹ the participants’ conduct would also constitute torture and crimes against humanity, conduct proscribed by customary international law.²

Now consider another scenario. A politically influential person in a non-democratic country is known to have orchestrated or participated in torture, forced disappearances, and crimes against humanity. That person then travels abroad, visiting or moving to a country with established legal institutions. Almost everybody would agree that this person also deserves to face criminal sanctions.

But would the government officials in the first scenario, the traveler in the second, or anybody else accused of crimes against international law ever actually be prosecuted? International law itself suggests that the answer needs to be yes. As Part I of this Note will demonstrate, countries are obliged to prosecute this sort of behavior by treaties they have adhered to, and by peremptory norms of customary international law. These obligations to prosecute arise whenever crimes banned by treaty or _jus cogens_ (peremptory norms) occur in a nation’s territory. In many instances, they also arise whenever somebody—whether a citizen or a

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¹. _See, e.g.,_ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, art. 2, 1465 U.N.T.S. 113, 114, 24 I.L.M. 535 (1985) [hereinafter _Convention Against Torture_] (requiring states to prevent torture in territory under their jurisdiction, and stating that internal political instability or public emergency may not be invoked to justify torture); _International Covenant on Civil and Political Rights, opened for signature_ Dec. 19, 1966, arts. 6, 7, 9, 10, 999 U.N.T.S. 171, 174–76, 6 I.L.M. 368, 370–71 [hereinafter _ICCPR_] (requiring states not to arbitrarily deprive people of life, stating that people will not be subjected to torture, stating that states will not subject persons to arbitrary arrest or detention, and requiring humane treatment of persons deprived of their liberty by the state).

². _See infra_ notes 54–58 and accompanying text. The Rome Statute of the International Criminal Court provides a generally accepted definition of crimes against humanity. _Rome Statute of the International Criminal Court_, adopted July 17, 1998, art. 7, 37 I.L.M. 999, 1004 [hereinafter _Rome Statute_]. They include:

- [a]ny of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: murder; extermination; enslavement; deportation or forcible transfer of population; imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; torture; . . . ; [and] forced disappearance of persons . . .

Article 7 also clarifies that for the purposes of defining crimes against humanity, "'[a]ttack directed against any civilian population' means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a state or organizational policy to commit such attack . . ." On torture, _see Convention Against Torture, supra_ note 1, art. 1.
foreigner—accused of committing such crimes abroad is found within a nation’s territory.

Will states really live up to these obligations? Are some states, and some legal systems, better equipped to do so than others? After all, it is one thing to commit to prosecuting horrendous offenses, or to recognize that there is an obligation under customary international law to do so, yet it is quite another to actually prosecute the perpetrators of such an offense; this is particularly the case when the government has a strong desire not to prosecute, because the accused are members of the government, because they are strong supporters of it, because they are foreign allies of the government, or because the accused’s government might somehow make life uncomfortable for the government of the prosecuting state. Parts II, III, and IV of this Note seek to examine these issues.

While seemingly remote, questions about prosecuting internationally proscribed offenses are not merely theoretical. Indeed, they are of unquestionable salience for countries undergoing major institutional reform as part of a transition to democracy. Such countries may have to deal with a horrific recent history in a manner consistent with their international obligations. Or they may simply need to position themselves institutionally to deal with an uncertain future. Questions about unspeakable state-sponsored crimes are also not necessarily remote for those of us fortunate enough to live in stable democracies. Amazingly, the facts described in the first scenario at the beginning of this Note really occurred, and in a developed, democratic country: Spain. Regardless of a country’s history with democracy, it may at some point face the second scenario, that of the traveler. For instance, just in the last six years, Spanish courts dealt with two other cases resembling this second scenario.

These events serve not only as jarring reminders that prosecution of internationally prescribed offenses is a matter of relevance to everybody, they also serve as a starting point for analyzing factors that facilitate or

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4. See Urbano, supra note 3, at 483–552 (describing the cases of Argentine naval officer Adolfo Schilingo, who was arrested and tried in Spain for crimes committed in Argentina, and Augusto Pinochet, who was arrested for crimes committed in Chile when he was found to be in the European Union).
impede the prosecution of such offenses. The Spanish officials who organized and directed the paramilitary organization—GAL—were ultimately arrested, convicted, and sentenced to jail for their crimes. Not surprisingly, their punishment came in the face of strong resistance from other Spanish government officials. The cases dealing with foreigners—those of ex-Argentine naval officer Adolfo Schilingo and former Chilean dictator Augusto Pinochet—each produced an investigation, indictment, and arrest, also in the face of strong opposition from the Spanish government. Thus, it is noteworthy that these prosecutions were successful despite opposition from influential quarters.

It is also noteworthy that these prosecutions took place in a country with a civil law justice system. Yet, this Note will suggest, it is not surprising. The pages that follow argue that structural features existing in many civil law systems of justice, but not in America’s common-law-based system, greatly facilitate the prosecution of human rights crimes, whether committed in the forum state or abroad. They do so by helping to overcome political impediments to prosecution, impediments that are likely to arise in many human rights cases. As a consequence, this Note will demonstrate, countries with justice systems marked by these features will be more likely to comply with their international obligations to prosecute.

Many authors have examined the features of civil law justice systems that are highlighted in this Note. Indeed, these features, and their merits, have been extensively debated in the past. The phenomena of

7. Id. at 483–552.
8. See, e.g., John H. Langbein, Comparative Criminal Procedure, Germany 1 (1977) [hereinafter Criminal Procedure: Germany] (outlining the German model of criminal procedure and suggesting that this model is, on the whole, “untroubled” in comparison with the American model); Mirian Damaska, The Faces of Justice and State Authority (1986) (analyzing ideological foundations of common law and civil law justice systems, and comparing the ideological currents he associates with these systems); Kenneth C. Davis, Overall Perspective, in Discretionary Justice in Europe and America 195, 195–96 (Kenneth C. Davis ed., 1976) [hereinafter Discretionary Justice] (advocating adoption of European style compulsory prosecution rules—discussed infra); Richard Frase, Comparative Criminal Justice as a Guide to American Law Reform: How the French Do It, How Can We Find Out, and Why Should We Care, 78 Cal. L. Rev. 539 (1990) [hereinafter Frase, Criminal Justice] (outlining the French model of criminal procedure and suggesting that adoption of some French procedures would improve the overall quality of American criminal justice); Richard S. Frase, Main-Streaming Comparative Criminal Justice: How to Incorporate Comparative and International Concepts and Materials into Basic Criminal Law and Procedure Courses, 100 W. Va. L. Rev. 773 (1998) [hereinafter Frase, Main-Streaming] (arguing that foreign criminal procedures should be taught in introductory criminal law and criminal procedure courses); Abraham Goldstein & Martin Marcus, The Myth of Judicial Supervision in
human rights prosecution in national courts has also received considerable attention in academic literature. Case studies and discussions of the evolution of international human rights law abound. Criminal procedures have even been discussed in the context of human rights norms before; a few scholars have observed that incorporation of rights for the accused into some human rights treaties has led to convergence among legal systems, as nations adopt procedural protections in order to ensure compliance.

Although this Note uses these bodies of literature as a starting point, it departs significantly from them. It looks at basic features of European and American justice systems in the specific context of a human rights case. Instead of examining how these systems' characteristics affect the ordinary case, this Note examines how they affect the extraordinary case; the case involving a crime so shocking that international law mandates prosecution. And rather than examine whether substantive criminal laws permit these human rights prosecutions to occur, or should permit these human rights prosecutions to occur, this Note examines why they do occur

Three 'Inquisitorial' Systems: France, Italy, and Germany, 87 YALE L.J. 240 (1977) (suggesting that European Civil law rules designed to constrain prosecutorial discretion are ineffective in many cases); William T. Pizzi, Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform, 54 OHIO St. L.J. 1325, 1329-31 (1993) (arguing that the overall quality of criminal justice in America would not be improved by imposing European style constraints on the discretion of prosecutors); William T. Pizzi & Luca Marafioti, The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation, 17 YALE J. INT'L L. 1, 6 (1992) (arguing that adversarial procedures should not have been adopted in Italy because judges, prosecutors and lawyers, accustomed to a purely inquisitorial system, will have difficulty learning to play the roles they need to fulfill after institution of the new procedures).


and will continue to occur in certain legal systems, but will not occur in others even if authorized by law.

Part I of this Note outlines existing international obligations to prosecute, and concludes that by now, both treaty-based and *jus cogens-*based obligations have become firmly established as a part of international law. Part II examines America's federal criminal justice system. It illustrates how certain structural features of the American system would permit prosecution of an internationally prescribed offense to be derailed, or simply never commenced, if executive branch officials deemed such a course of action expedient. Part III examines the civil law-based justice systems of four European countries: France, Spain, Italy and Germany. This Part contends that four features of their justice systems help to overcome potential obstacles to prosecution. Part IV focuses on America again, examining how the American system has dealt with criminal conduct by public officials when the problem has arisen outside the realm of human rights. This Part notes an adoption—just for cases against public officials—of some of the features of the civil law systems discussed in part three; this occurred through the institution of the special prosecutor. Therefore, this Part concludes that mechanisms to ensure compliance with international obligations to prosecute can easily be built into American style justice systems.

These findings are significant, of course, because international obligations to prosecute don't just exist to vex national political leaders. They exist because prosecution gives victims the satisfaction of seeing justice done, and promotes a sense that victims no longer have anything to fear. They also exist because prosecution serves as a deterrent and signals worldwide condemnation of human rights violations. Thus, judicial systems that ensure obligations to prosecute will be met help the people of that country, and the world, reap significant rewards. Those that cannot guarantee compliance leave justice and deterrence to chance.

The emergence of the International Criminal Court ("ICC") gives these findings an additional element of significance. The ICC can hear a case only when national authorities where the alleged offense occurred are unable or unwilling to investigate, or when they investigate but refuse to prosecute substantiated allegations due to a simple lack of interest. Countries whose judicial systems guarantee prosecution of meritorious accusations are therefore unlikely ever to give rise to a case the ICC can hear. Indeed, an ICC prosecutor could presume that any case


not pursued was not pursued because it lacked merit. In contrast, countries like the United States, whose systems offer no such guarantees, could give rise to a case over which the ICC has a legitimate claim to jurisdiction. This means that an ICC prosecutor could not presume that a case not pursued lacked merit. For countries that prefer to investigate and try allegations of human rights abuses domestically, according to their own procedural rules and norms, this makes the ability to guarantee prosecution of meritorious cases a matter of considerable import.

This Note, however, is not about the benefits of human rights prosecution, or the pluses and minuses of domestic or international prosecution of human rights violations. Rather, it simply seeks to elucidate various international obligations to prosecute, and to show how legal systems with certain characteristics are more likely to produce compliance with them. The full implications of these conclusions, however, are beyond the scope of the present Note.

I. INTERNATIONAL LAW AND OBLIGATIONS TO PROSECUTE

In recent years, the idea that nations have international obligations to prosecute certain crimes has become increasingly accepted. Obligations to prosecute have been identified in a growing body of academic literature. They have also been included in recent human rights conventions, and have been embraced by the few courts that have had to consider their existence.

14. Naomi Roht-Arriaza, The Pinochet Precedent and Universal Jurisdiction, 35 New Eng. L. Rev. 311, 489 (2001). Obligations to prosecute are often viewed as obligations to either try the alleged offender or extradite that person to a nation that will conduct a trial. Formulated in this manner, the principle is frequently referred to by the Latin name aut dedere aut judicare. See, e.g., Mohamed M. El-Zeidy, The Principle of Complementarity: A New Machinery to Implement International Criminal Law, 23 Mich. J. Int'l L. 869, 947–48 (2002); Nicole Fritz & Allison Smith, Current Apathy For Coming Anarchy: Building the Special Court for Sierra Leone, 25 Fordham Int'l L.J. 391, 426 (2001). It should be noted that an option to extradite does not obviate the need for effective prosecution mechanisms. In many instances, there will be no nation requesting extradition of an individual alleged to have committed human rights crimes. Mark S. Zaid, Will or Should The United States Ever Prosecute War Criminals?: A Need for Greater Expansion in the Areas of Both Criminal and Civil Liability, 35 New Eng. L. Rev. 447, 452 (2001). In this common situation, an obligation to extradite or prosecute is an obligation to prosecute. Consequently, this paper will generally refer to these obligations simply as obligations to prosecute.

15. See, e.g., Jimmy Gurule, United States Opposition To The 1998 Rome Statute Establishing An International Criminal Court: Is The Court's Jurisdiction Truly Complementary To National Criminal Jurisdictions?, 35 Cornell Int'l L.J. 1, 6 (2001-02); Orentlicher, supra note 12; See also infra note 74.

16. See infra notes 26–51, 59–73 and accompanying text.
Obligations to prosecute come from two different sources. Some treaties create obligations to prosecute the acts that they forbid. Obligations to prosecute have also been found to be a part of customary international law; these obligations are considered to have gained sufficient acceptance to bind all nations, whether or not they have obliged themselves by treaty to prosecute the offenses these obligations attach to.

A. Treaty Based Obligations to Prosecute

Many international treaties and conventions criminalize actions that individuals can take. Major multilateral treaties prohibit taking hostages, hijacking aircraft, planting bombs for the purposes of terrorism, genocide, torture, the practice of systematic racial segregation, and war crimes. Thus, international treaty law prohibits a wide variety of conduct.

Many of these international conventions also oblige signatory states to prosecute acts that they proscribe. Some conventions impose this


18. See infra notes 52-83 and accompanying text.


26. See, e.g., Convention Against Torture, supra note 1, art. 7; ICCPR, supra note 1, art. 2(3); Genocide Convention, supra note 22, art. 4; American Convention on Human Rights, Nov. 22, 1969, 9 I.L.M. 673; European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, arts. 1, 14, 213 U.N.T.S. 221, 224, 232 (entered into force Sept. 3, 1953) [hereinafter European Convention].
obligation explicitly.\textsuperscript{27} Others have been interpreted by authoritative bodies to implicitly contain such an obligation.\textsuperscript{28}

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is a well-known example of a treaty that explicitly obliges signatories to prosecute. Signatory states undertake to, "ensure that all acts of torture are offences under their criminal law."\textsuperscript{29} Each signatory also agrees that when a person who is alleged to have committed torture is found in its territory, it "shall . . . submit the case to its competent authorities for the purpose of prosecution," in the event it does not extradite the alleged torturer.\textsuperscript{30} Therefore, torture is a crime that most nations are internationally obligated to prosecute.\textsuperscript{31}

Most nations have also bound themselves by treaty to prosecute genocide.\textsuperscript{32} Following World War II, the newly formed United Nations decided to formalize the international prohibition against genocide in the Convention on the Prevention and Punishment of the Crime of Genocide.\textsuperscript{33} This convention's text presents the prohibition on genocide as inextricably linked with an obligation to prosecute it. In art. 1, signatories "confirm that genocide . . . is a crime under international law which they undertake to prevent and to punish."\textsuperscript{34} Article 4 elaborates, stating that persons "committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally respon-


\textsuperscript{28} See infra notes 26–33 and accompanying text.

\textsuperscript{29} \textit{Convention Against Torture, supra} note 1, art. 4. The precise definition of torture employed by the convention can be found in art. 1.

\textsuperscript{30} \textit{Id.} art. 7 (emphasis added).

\textsuperscript{31} 127 nations, including the United States, are parties to the Convention Against Torture. The United States ratified the Convention on November 20, 1994. \textit{Office of the Legal Advisor, United States Department of State, Treaties in Force 478} (2001). It should be noted that the Inter-American Convention to Prevent and Punish Torture, also obliges signatory states to punish torture and crimes related to it. It therefore largely duplicates the work of the Convention Against Torture. See Inter-American Convention to Prevent and Punish Torture, \textit{supra} note 27, art. 6. For interpretation of this convention, see Orentlicher, \textit{supra} note 12, at 2560 n.92.

\textsuperscript{32} 134 nations are parties to the Genocide Convention. The United States ratified on February 23, 1989. \textit{Office of the Legal Advisor, supra} note 31, at 392.

\textsuperscript{33} \textit{Genocide Convention, supra} note 22.

\textsuperscript{34} \textit{Id.} art. 6.
possible rulers, public officials or private individuals." The imperative "shall" in the Convention's 6th article underscores the obligation to prosecute: "[p]ersons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal."

The Genocide and Torture Conventions are not the only ones with explicit obligations to prosecute. The Inter-American Convention on the Forced Disappearance of Persons creates an obligation to prosecute those alleged to have orchestrated disappearances. The International Convention Against the Taking of Hostages ("Hostage Convention") also includes such an obligation.

Some human rights conventions that do not explicitly impose an obligation to prosecute have been interpreted to implicitly contain such an obligation. The International Covenant on Civil and Political Rights is one example. The Human Rights Committee, the body charged with making authoritative interpretations of the Covenant, has held that: "it

35. *Id.* art. 4.

36. *Id.* Significantly, articles three and six extend the obligation to prosecute, covering incitement to commit genocide, attempt to commit genocide, and complicity in genocide. Compare *id.*, art. 3, with *id.* arts. 4, 6. Thus, the convention creates obligations to prosecute a host of genocide-related crimes, some of which might not be covered by the obligation to prosecute embedded in customary international law. See Orentlicher, *supra* note 12, at 2566. The *Restatement (Third) of Foreign Relations Law of the United States* is one authority that interprets the Genocide Convention as expanding the list of offenses that there is an obligation to prosecute. *Id.* The *Restatement* suggests that customary international law imposes only an obligation to prosecute genocide, while the convention also imposes obligations to prosecute incitement to commit genocide, attempt to commit genocide, and complicity in genocide. See *id.* at 2566 (citing *Restatement (Third) of Foreign Relations Law of the United States* § 702 cmt. d (1987) [hereinafter *Restatement (Third)*]).


39. Louis Henkin, *Introduction to The International Bill Of Rights 8–10* (Louis Henkin ed., 1981). Created in 1966, the ICCPR was designed to create a comprehensive and detailed international law of human rights, providing specificity to the general language of the United Nations charter, and legalizing many of the rights outlined in the Universal Declaration of Human Rights. *Id.* Although "[t]he possibility of requiring states’ parties to punish violations was never seriously considered by the drafters of the international covenant," the covenant’s text does not preclude the imposition of such a duty. Orentlicher, *supra* note 12, at 2569–71. And the committee charged with overseeing the ICCPR has interpreted it to require prosecution. *Id.* at 2571.

follows from art. 7, read together with art. 2 the Covenant, that . . . [c]omplaints about ill treatment must be investigated effectively by competent authorities, [and that t]hose found guilty must be held responsible.' It later clarified that holding a person responsible entails punishment. In the case of an extralegal execution, the committee found that a state is obliged "to bring to justice any persons found to be responsible for [the] death;" it has found states to be under a similar obligation when confronted with forced disappearances. Both the American Convention on Human Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms have also been interpreted to contain an implicit obligation to prosecute violations. The Inter-American Court of Human Rights found such an obligation in article 1 of the American Convention, which requires states to guarantee the rights included in the Convention. The European Court of Human Rights, which oversees the European Convention, also found that preservation of rights entails prosecution of those who violate them. Failure to provide for prosecution, it concluded, violates article 8 of that convention.


46. Orentlicher, supra note 12, at 2576.

47. Id. at 2580.

48. Id. Article 8 states:

(1) Everyone has the right to respect for his private and family life, his home and correspondence. (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the
It is noteworthy that many treaty-based obligations to prosecute do not just cover offenses committed within a nation's territory.49 They impose obligations to prosecute or extradite any person accused of committing the offenses they are linked to, regardless of the offender's nationality or where the offense was committed; the offender just needs to enter a nation's territory for the obligation to attach. The Convention Against Torture provides one example. Its seventh article states: "The State Party in the territory under whose jurisdiction a person alleged to have committed any offense . . . is found, shall . . . if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution."50 The Geneva Conventions of 1949, which outlaw war crimes, are equally clear. "The duty to punish attaches . . . to all signatory states . . . and it exists without regard to the nationality of the perpetrator or victim or to the place where the crime took place."51 Thus, countries face treaty based obligations to prosecute their own nationals, and even foreigners, for certain crimes committed abroad. If political officials would prefer to let such people remain in the country without being prosecuted, giving effect to their preference would place the country in violation of international law.

In sum, numerous human rights conventions either explicitly or implicitly require states to prosecute violations of their provisions. Consequently, these treaties create international obligations that states violate when they fail to investigate allegations and prosecute those that are substantiated.

B. Obligations to Prosecute Under Customary International Law

Not only are many nations bound by treaty to prosecute certain crimes, all nations are now considered bound by customary international law to prosecute crimes that have achieved jus cogens status. Although these crimes are largely the same as those that states have undertaken by treaty to prosecute, neither category fully encompasses the other.52

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49. See, e.g., Convention Against Torture, supra note 1, art. 7; Geneva Conventions, supra note 25; Hostage Convention, supra note 19; Inter-American Convention Against Terrorism, supra note 21.

50. Convention Against Torture, supra note 1, art. 7.


52. See supra notes 19–51 and accompanying text; infra note 58 and accompanying text.
Therefore, customary international law expands the realm of situations in which states have an obligation to prosecute.

_Jus cogens_ norms are norms of customary international law that a significant majority of states have agreed to accord a special status.\(^5\) Specifically, _jus cogens_ are norms that states view as peremptory, such that derogation from them is not permitted.\(^5\) This means, moreover, that the norm is binding even on aberrant states that profess to disagree with it.\(^5\) A norm can be identified as a _jus cogens_ norm by its appearance in numerous treaties, adjudications, and scholarly works.\(^5\) Certain actions done by individuals are considered crimes under customary international law.\(^5\) Several of these crimes have achieved _jus cogens_ status, they include piracy, slavery, war crimes, genocide, and crimes against humanity.\(^5\)

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54. **Black's Law Dictionary** 864 (7th ed. 1999) ("_jus cogens_ is a "mandatory norm of general international law from which no two or more nations may exempt themselves or release one another."); Vienna Convention, supra note 53, art. 53 (_jus cogens_ is a "peremptory norm of general international law [that] is . . . accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.").


57. Kelly, supra note 57, at 319; Bassiouni, supra note 37, at 106; M. Cherif Bassiouni, *The Sources and Content of International Criminal Law: A Theoretical Approach*, in 1 INTERNATIONAL CRIMINAL LAW: CRIMES 41 (M. Cherif Bassiouni ed., 2d ed. 1999); Restatement (Third), supra note 36, § 102(2); Siderman de Blake, 965 F.2d at 717 (holding that the international law prohibition on torture has achieved _jus cogens_ status). El Ziedy, moreover, states:

Th[e] legal basis [for saying that genocide, war crimes, and crimes against humanity have achieved _jus cogens_ status] can be found in international pronouncements, or what can be called international _opinio juris_, that reflect the recognition that these crimes are deemed part of general customary law. Language in preambles . . . or other provisions of treaties applicable to these crimes, also indicate that these crimes have a higher status in international law. Another indication is the large
International instruments that reflect the sentiment of an overwhelming number of nations, as well as judicial decisions and academic literature, suggest that an obligation to prosecute crimes that have achieved *jus cogens* status has come to be considered an integral part of the *jus cogens* prohibition on these crimes. Perhaps nowhere is this clearer than in the charter of the International Criminal Court, a document highly indicative of international sentiment, as only a handful of nations failed to sign it. The preamble states that there is "an absolute duty to prosecute," international law crimes that have achieved *jus cogens* status. "The most serious crimes of concern to the international community as a whole must not go unpunished and ... their effective prosecution must be ensured by taking measures at the national level." Indeed, the process by which the ICC initiates cases reflects a belief that it is really the duty of states to prosecute these offenses. ICC prosecutors refer all allegations to authorities in the state where the alleged offense occurred. The case moves forward in the international court only if, after a time, the national authorities have not begun the appropriate proceedings, and will not do so.

Mention of a duty to prosecute offenses that have achieved *jus cogens* status in recent treaties, conventions, and declarations reinforces the idea that obligations to prosecute follow necessarily from the *jus cogens* status of these offenses. As was previously mentioned, the Convention on the Prevention and Punishment of the Crime of Genocide, the Convention Against Torture, the Inter-American Convention to Prevent and Punish Torture, the Inter-American Convention on the Forced Disappearance of Persons, and the International Convention Against the Taking of Hostages all mention the obligation to prosecute. So do the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, a document endorsed by the U.N.

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number of States that have ratified treaties related to these crimes.... The writings of scholars and diplomats further buttress this legal foundation.

El-Ziedy, *supra* note 14, at 947 (internal citations omitted).


64. *See id.; supra* notes 16-35 and accompanying text.
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General Assembly in 1989.65 "The frequent reiteration of the duty to punish grave violations of physical integrity in international instruments is evidence that the duty is, or is emerging as, a customary norm."66

This conclusion is supported by the pronouncements of tribunals that have dealt with alleged violations of customary international law. Some such prosecutions have taken place in foreign courts exercising universal jurisdiction on the basis of complementarity—this is the principle that while international law crimes should be prosecuted in the country where they occurred, other countries must do so when that state cannot or will not fulfill its obligation.67 One early affirmation came in the case of Adolf Eichmann, a Nazi tried in Israel in the 1960s. In rejecting Eichmann's jurisdictional appeal, the Israeli Supreme Court suggested that the state where the crime occurred has an obligation to try the person.68 But, it held, when that state fails to do so, other nations are authorized to prosecute as well.69 Recent Spanish decisions involving crimes of the Conosur dictatorships adopt similar arguments. These proceedings took for granted the desirability of prosecution being conducted where offenses occurred.70 However, Judge Baltasar Garzon wrote in the case of Argentine naval officer Adolfo Schilingo, "crimes that attack . . . the most basic values . . . of the modern international community . . . must be prosecuted," even if this means prosecution in another nation because the state where the crime occurred refuses to fulfill its responsibility.71 Another Spanish court reiterated these sentiments a few months later in the case of Chilean General Augusto Pinochet.72 The International Criminal Tribunal for the Former Yugoslavia endorsed the same analysis shortly before the Spanish courts.73 Relevant courts, it seems, have accepted the existence of an obligation to prosecute.

65. Orentlicher, supra note 12, at 2584.
66. Id.
68. Eichmann, 36 I.L.R. at 285.
69. Id.
70. Pinochet, supra note 67, Fundamento Juridico Cuarto.
71. Schilingo, supra note 67, Fundamento Juridico Noveno (translation by the author).
72. Pinochet, supra note 67, Fundamento Juridico Cuarto.
Unofficial sources have also largely agreed with the existence of such an obligation. A customary international law-based obligation to prosecute *jus cogens* offenses has been broadly accepted in academia.74 Indeed, one academic commentator has gone so far as to call the obligation “black letter law” as it applies to genocide and grave breaches of the Geneva Conventions.75 The International Law Commission has also found that states have an obligation to extradite or prosecute people who commit crimes that have achieved *jus cogens* status.76 An obligation has even been recognized by the drafters of the *Restatement (Third) of Foreign Relations*.77 A government violates international law “if, as a matter of state policy, it practices, encourages or condones,” crimes that are prohibited by peremptory norms.78 “[A] government may be presumed to have encouraged or condoned these acts . . . if such acts, especially by its officials, have been repeated or notorious and no steps have been taken to prevent them or to punish the perpetrators,” the *Restatement* explains.79

Customary international law-based obligations to prosecute, like those derived from the Convention Against Torture and the Geneva Conventions, even cover offenses committed outside a nation’s territory. Because *jus cogens* offenses “undermine the foundations of the interna-

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77. *Restatement (Third)*, supra note 36, at 162, § 702.

78. Id.

79. Id.
tional community," states are required to cooperate in bringing perpetrators to justice.\textsuperscript{80} This means that states must either extradite or prosecute perpetrators of \textit{jus cogens} offenses who enter their national territory.\textsuperscript{81} Moreover, the obligation to prosecute \textit{jus cogens} offenses committed extraterritorially has itself achieved \textit{jus cogens} status.

Today it is generally recognized that customary international law of a peremptory nature places an obligation on each nation-state to search for and bring into custody and to initiate prosecution of or to extradite all persons within its territory or control who are reasonably accused of having committed, for example, war crimes, genocide . . . \textsuperscript{82}

The obligation to prosecute offenses committed abroad has achieved this status due to the number of treaties in which it appears,\textsuperscript{83} and due to the widespread support these treaties enjoy.\textsuperscript{84}

In sum, there exist a large number of international obligations to prosecute. Many are treaty based. As result, states can control, to a certain extent, the number of situations in which they will face such an obligation. Yet, customary international law also imposes obligations to prosecute the most serious of international law crimes. These are obligations applicable to all states. Therefore, all states must be able to ensure prosecution of at least some offenses.

\section*{II. The American System and Obligatory Prosecution:}

To what extent are national judicial systems structured to deal with crimes so universally condemned that failure to prosecute is not an option? This will largely be a function of how well the system can overcome political obstacles to prosecution. And these obstacles could be considerable. The government of a nation is likely to be linked to any such crime committed within its borders; at the very least, officials are

\begin{itemize}
  \item \textsuperscript{80} Steven, \textit{supra} note 74, at 441–42 (1999) (citing Bassiouni & Wise, \textit{supra} note 75, at 24).
  \item \textsuperscript{81} Steven, \textit{supra} note 74, at 442.
  \item \textsuperscript{82} Paust, \textit{supra} note 74, at 300 n.1, \textit{see also} Fritz & Smith, \textit{supra} note 14, at 426; Bassiouni, \textit{supra} note 37, at 148–49.
  \item \textsuperscript{83} Steven, \textit{supra} note 74, at 447. Steven notes that an obligation to prosecute such offenses, or extradite the perpetrator, appears in "over 70 international criminal law conventions." \textit{Id.}
\end{itemize}
likely to be complicit in it, or close to people who are.⁸⁵ Hence, there will be powerful political pressure not to pursue allegations seriously. Even where a regime has changed, there might be powerful political forces operating to discourage prosecution. A government might deem it politically expedient not to pursue the crimes of its predecessor out of fear of being tarnished by links to that predecessor, desire to court supporters of the previous government,⁸⁶ a perception that prosecution could cause political instability,⁸⁷ or a simple desire to spend energy and resources on other things.⁸⁸ The government may also have incentives not to try foreigners who enter the country. The foreigner might be linked to a government that was or is supported by the government of the forum state; thus, the forum state’s government might be seeking to avoid exposure of its own complicity, or even just an appearance of guilt by association. That government may also seek to ignore allegations because it believes that its political, diplomatic, or economic interests in the accused’s home country would be better served by protecting the accused; this is particularly the case if the accused’s government threatens reprisals against those interests should charges be brought.⁸⁹

America’s common-law legal system is designed in such a way that the government’s political opposition to prosecution can make it impossible to punish violations of international human rights law. As a result, prosecution will depend on the political will of the executive, who for the self-interested reasons previously mentioned, may be strongly disinclined to see crimes prosecuted. Three basic features of the American system make this so: prosecutorial discretion, the government’s exclusive power to prosecute, and the fact that prosecution is a function of the executive branch.

While these features do not all exist in every U.S. state,⁹⁰ they are present in the federal system, which is the system of greatest relevance for human rights prosecution. This is because the crimes which there is an international obligation to prosecute—genocide, torture, war crimes,

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⁸⁶. Marks, supra note 74, at 38.
⁸⁸. Id.
⁸⁹. Email from Juan E. García y Ramón, Chief Attorney for the Private Plaintiffs in the Spanish case against Augusto Pinochet and others to author (Jan. 22, 2003, 12:15 PST) (on file with author).
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etc.—are federal offenses.\textsuperscript{91} Although it is likely that conduct that could be classified as genocide, torture, or war crimes would also violate state law, it is possible, and indeed likely, that such crimes would not occur within the jurisdiction of a U.S. state. For instance, the prohibitions on genocide and war crimes cover acts committed outside the United States.\textsuperscript{92} The federal prohibition on torture only covers acts committed outside the United States, or conspiracies to commit acts outside the United States.\textsuperscript{93} In addition to acts committed outside the United States, acts committed on military bases would not be subject to the laws of a state.\textsuperscript{94} Moreover, while acts committed in the District of Columbia—where many government officials work, and where many orders to lower level officials are given—are subject to local and federal law, prosecution of non-petty offenses there is conducted by federal officials.\textsuperscript{95} Therefore, the likelihood that the U.S. fulfills its obligations depends heavily on the structure of the federal prosecutorial system.

The relationship between federal prosecutors and the executive branch gives cause for concern that alleged human rights abuses will not be impartially pursued. This is because, under the current system, the prosecutor's agenda can and likely will be fully aligned with the executive's political interests. The manner in which prosecutors are selected is one major reason why. U.S. Attorneys—the federal government's chief prosecutors in each district—are selected by the President.\textsuperscript{96} While they officially receive four year terms, they traditionally resign when a new president is elected.\textsuperscript{97} The President, moreover, has the power to remove U.S. Attorneys.\textsuperscript{98} Personnel decisions at Main Justice are also heavily

\textsuperscript{92} 18 U.S.C. § 2441(a) (applying statute to "[w]hoever, whether inside or outside the United States, commits a war crime"); 18 U.S.C. § 1091(d)(2) (banning genocide committed abroad by U.S. nationals).
\textsuperscript{93} 18 U.S.C. § 2340A(a) (2002) (applying statute to "[w]hoever outside the United States commits or attempts to commit torture.").
\textsuperscript{94} Military courts would be responsible for offenses committed by members of the military, but ordinary federal courts would have jurisdiction over offenses committed by civilians, or civilians who had directed offenses committed by members of the military. See 10 U.S.C. § 802 (2002); U.S. v. McIntyre, 4 F.2d 823 (9th Cir. 1925) (holding that civilians are not subject to military jurisdiction); Cole v. Laird, 468 F.2d. 829 (5th Cir. 1972) (holding that civilians are not subject to court martial, except when they accompany the military in the field during a declared war).
\textsuperscript{95} D.C. CODE § 23-101(c) (2002).
\textsuperscript{96} Ross E. Wiener, Inter-Branch Appointments After the Independent Counsel: Court Appointment of United States Attorneys, 86 MINN. L. REV. 363, 380 (2001).
\textsuperscript{98} Wiener, supra note 96, at 404. Assistant U.S. Attorneys, in turn, are hired by the U.S. Attorney. While these attorneys are not considered political appointees, and thus need not resign when the administration changes, turnover among Assistant U.S. Attorneys is quite
influenced by politics. "The President appoints over two hundred Department officials who serve at his pleasure." Often, these officials are "active members of the President’s political party." Many also "have strong ambitions for higher appointive office." Moreover, most recent Presidents have named a close political ally as Attorney General. The Deputy Attorney General and the Assistant Attorney General in charge of the Criminal Division are also often chosen due to their partisan activities.

The Attorney General, in particular, is not only a political appointee, but also performs a job that is highly political. The Attorney General is a member of the Cabinet. Consequently, he “necessarily has close and continuing relationships with the President,” and “is enmeshed in the administration.” Moreover, the Attorney General traditionally has been one of the President’s closest political advisors. Thus, the Attorney General is someone with a strong personal and professional interest in preserving the administration’s reputation and authority.

The Department of Justice is organized so as to give the Attorney General and other top officials—those with the greatest political motive to protect the administration—complete control over how a case is handled. "It is clear today that the Attorney General has ultimate authority over U.S. attorneys.” He can take control of an existing case or investigation by “directing more immediate subordinates to supervise closely the U.S. Attorney’s handling” of it. Moreover, the Attorney General can order that a matter be handled exclusively from Washington.

high. Kamisar et al., supra note 97, at 871. Therefore, it is likely that many of the prosecutors in an office will have been selected by the present U.S. Attorney. The Attorney General retains the authority to both hire and fire assistant U.S. Attorneys, although this rarely occurs in practice. Tuerkheimer, supra note 97, at 600.


100. Id.

101. Id.


103. Tuerkheimer, supra note 97, at 601–02.


105. Id. at 119.

106. Id. at 118.

107. Wiener, supra note 96, at 381.

108. Id.

only a tiny number of investigations are initiated or taken over by Main Justice, this is more likely to occur when the administration has a strong interest in a matter. And because the President and Attorney General can fire U.S. Attorneys and their assistants, prosecutors have no ability to resist supervision.

The nature of the Attorney General’s position and of the Justice Department’s structure therefore creates serious potential for conflicts of interest when the Department must investigate alleged wrongdoing by government officials. These conflicts can be both personal and political. On a personal level, an official may supervise an investigation that targets a friend within the administration, or that could uncover his own misconduct. Additionally, an official seeking advancement may control an investigation that a superior wants to reach a certain result for political reasons; the official may therefore have career-related motives for pursuing a particular course of conduct. There is also potential for “partisan conflicts.” An official may feel loyalty to an administration and consider its protection to be part of his job. All of these interests conflict with the prosecutor’s duty to pursue the public interest; they create a risk that, when interest and duty conflict, interest will prevail. This risk is particularly great because the highest officials—those most likely to give an order that protects the administration by failing to enforce the law, or most eager to pass along such an order when one is issued by the President or requested by another administration official—can control the actions of all federal prosecutors.

Anecdotal evidence suggests that some officials who control federal prosecutions do view political goals and loyalties as being more important than their obligation to the law. President Nixon, for example, actively participated in efforts to frustrate the Watergate investigation.

On a more mundane level, Professor Tuerkheimer—a former prosecutor

110. Id.
112. Reich, supra note 99, at 977.
113. Id.
114. Id.
115. Id.
116. Id. at 978.
117. Id.
118. Id.
119. Tuerkheimer, supra note 97, at 610. For example, Nixon ordered the head of the Criminal Division, Henry Peterson, to send him information about the investigation, which he then passed along to its targets. Lloyd Cutler, Conflicts of Interest, 30 EMORY L.J. 1015, 1018 (1981). Nixon also asked Peterson to let him know if John Dean made statements implicating him. Tuerkheimer, supra note 97, at 609. As President, Nixon was charged by Article III of the Constitution with enforcing the laws of the United States. U.S. CONST. art. II, § 3.
who studies the Justice Department—recounts that when an Assistant U.S. Attorney subpoenaed a man linked to Richard Nixon to testify about illegal campaign contributions, the U.S. Attorney had the subpoena withdrawn and instead interviewed the man personally. Indeed, as evidence that decisions about prosecution will be made, first and foremost, to protect the administration, Tuerkheimer cites Deputy Attorney General Richard Kleindeinst's remarks to a conference of U.S. Attorneys. "It is of the utmost importance to keep this administration in power," he told them. "[Y]ou men must do everything you can to ensure that result."

In and of itself, the political pressure on federal prosecutors makes it much harder to pursue a human rights case against someone a top government official does not want prosecuted. This influence poses a potentially insurmountable barrier in light of the broad discretion given American prosecutors. In the federal courts, a prosecutor's discretion not to charge a crime is nearly absolute. As recently as 1995, the Supreme Court reaffirmed its commitment to broad discretion for federal prosecutors, holding that the choice to prosecute is a "special province of the executive." This means that a person who has not been prosecuted cannot challenge the federal prosecutor's exercise of discretion in any case. Even the victim "has no constitutional right to insist on prosecution" by federal officials.

120. Tuerkheimer, supra note 97, at 607. The man involved was Frank Thornton, an employee of Nixon's friend L. Arnholt Smith. The U.S. Attorney was Harry Steward, of the Southern District of California. Id.
121. Id. at 601.
122. See, e.g., Newman v. United States, 382 F.2d 479 (D.C. Cir. 1967); Smith v. United States, 375 F.2d 243 (5th Cir. 1967).
125. In re Fraley, No. 91-7585, 1991 4th Cir. WL 135214, at *1 (N.D. W. Va. July 25, 1991) (citing Sattler v. Johnson, 857 F.2d 224 (4th Cir. 1988)). There are two reasons why victims are unable to compel federal prosecution: 1) lack of standing and 2) judicial assumption that prosecutorial decision-making is not amenable to review.

When a person has not been prosecuted or threatened with prosecution, he lacks standing to challenge any prosecutorial decision. Inmates of Attica, 477 F.2d at 378. This is because, "in American jurisprudence, at least, a private citizen lacks a judicially cognizable interest in the prosecution or non-prosecution of another." Id. (quoting Linda R.S. v. Richard D., 410 U.S. 614, 619 (1973). The sole exception occurs when failure to prosecute would leave the citizen in immediate "danger of direct personal injury." See id. However, when injunctive relief against the source of the threat would suffice, this standing requirement will not be met. Id. In the context of torture, war crimes, or another internationally proscribed offenses, it is conceivable that a victim could meet this requirement. More likely, however, any complaint will be filed after the fact, thereby depriving the victim of standing to challenge the prosecutor's handling of the case.

Courts have also refused to compel prosecution on the ground that prosecutorial decision-making is not amenable to review. As then Circuit Judge Warren Berger put it: "Few
The federal prosecutor's discretion extends well beyond the decision whether to charge a crime about which there is sufficient evidence. It encompasses decisions about what charges to bring, where to bring them, and when. Most significantly, it covers the decision about whether to even investigate an allegation, and how to do so. Therefore, the government can decide that allegations of torture, war crimes, etc. against its officials or their allies simply will not be looked into, and thereby prevent the truth of what happened from being ascertained.

The prohibition on privately prosecuted criminal cases in the federal system is closely related to the concept of absolute prosecutorial discretion. "It is well settled that a private citizen has no right to prosecute a federal crime." This is because, in American legal thought, crimes are offenses against the community, not the victim, and punishment seeks to promote social goods—like deterrence, rehabilitation, and retribution—not individual ones. Prohibiting victims, or other private parties from initiating criminal cases further extends the

subjects are less adapted to judicial review than the exercise of his discretion in deciding when and whether to institute criminal proceedings." Newman, 382 F.2d at 480. The Second Circuit elaborated on this reasoning, asserting that "the manifold imponderables which enter into the prosecutor's decision to prosecute or not to prosecute make the choice not readily amenable to judicial supervision." Inmates of Attica, 477 F.2d at 380. For this reason, even when failure to prosecute does leave a person in imminent danger of injury, a court will not order a federal prosecutor to bring charges. Id. Thus, a victim of torture or war crimes, for example, would be unable to compel prosecution of these crimes by the government, even if he had standing to bring a case.

There are some grounds on which a prosecutor's exercise of discretion can be challenged. A person against whom there is sufficient evidence to secure an indictment can challenge the decision to indict on equal protection grounds if it appears to have been racially motivated. See, e.g., Armstrong, 517 U.S. at 464 (citing Heckler, 470 U.S. at 832). Such a person can challenge the indictment on due process grounds if it was motivated by "vindicativeness" elicited by the exercise of a procedural right, such as appeal of a prior conviction. See Blackledge v. Perry, 417 U.S. 21 (1974). However, none of these grounds enable a person who has not been prosecuted to challenge the exercise of discretion.

127. Id. There are a small number of limits on prosecutorial discretion. See Todd D. Peterson, Prosecuting Executive Branch Officials for Contempt of Congress, 66 N.Y.U. L. REV. 563, 596–97 (1991). A prosecutor may not be able to unilaterally dismiss charges already brought. Id. Moreover, a court can name private prosecutors to handle criminal contempt proceedings when the U.S. Attorney does not want to prosecute. Id. Finally, some provisions of the lapsed independent counsel statute, discussed in more detail in part IV, infra, compel actions by the Department of Justice. Id.
federal prosecutor's discretion; not only can he decide if the government will pursue the case, he has discretion to decide if it gets into the court system at all.

Absolute unreviewable and uncircumventable discretion about charging and investigation is therefore entrusted to federal prosecutors; they in turn are subject to direction from officials with strong incentives not to allow development of cases damaging to the administration. This suggests that attempts to investigate officials or their allies will face formidable barriers. Historical evidence confirms this conclusion.

The "Saturday Night Massacre" is perhaps the most prominent example of an administration obstructing investigation of its own activities. When the prosecutor investigating Watergate sought access to tapes of President Nixon's conversations, Nixon ordered him to be fired. He then accepted the Attorney General's resignation, and fired the Deputy Attorney General, when they refused to give this order.\textsuperscript{131} In the previously mentioned case about contributions to the Nixon campaign, the Nixon-appointed U.S. Attorney shut down the investigation after withdrawing his subordinate's subpoena. Investigations of other prominent Republicans were also halted by this U.S. Attorney.\textsuperscript{132} Indeed, Professor Tuerkheimer has noted that as of the late 1970s, lawyers at Main Justice had never charged a cabinet member with a crime.\textsuperscript{133} In two of the three 20th Century instances in which an ad hoc investigation began to investigate a sitting president, the prosecutor has been fired.\textsuperscript{134} Moreover, in the Teapot Dome and Watergate scandals, two instances when investigations reached the highest levels of government, prosecutors proceeded with the investigation only because Congress placed intense pressure on the administration.\textsuperscript{135} This suggests that the government's ability to prosecute human rights abuses committed or ordered by top officials, their friends, or their foreign allies depends on the extent of Congressional interest in the matter; if administration allies control Congress, prosecution may never occur.

In sum, the American legal system is organized in a way that provides no guarantee that international obligations to prosecute will be met. Individuals subject to the control of an administration's key political officials have complete discretion. Therefore, when allegations of human rights abuses implicate government officials, their friends, or foreign allies, these individuals will therefore have the incentives, and the

\textsuperscript{131} Tuerkheimer, supra note 97, at 611.
\textsuperscript{132} Id. at 607–08.
\textsuperscript{133} Id. at 613.
\textsuperscript{135} Tuerkheimer, supra note 97, at 612.
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capacity, to order inaction. Unable to file charges of their own, private individuals have no way to circumvent inactive prosecutors. Thus, fulfillment of international obligations to prosecute is contingent on political officials putting the interests of justice ahead of their own self interest; such public spiritedness seems unlikely if that self interest is sufficiently strong.

III. THE FOUR KEY FEATURES OF CIVIL LAW JUSTICE SYSTEMS

Criminal justice systems in civil law countries, such as Germany, Italy, France, and Spain, are structurally quite different from the American system. It has been questioned whether this structural difference leads most run-of-the-mill cases to be disposed of in a manner all that different from the way they would be in the U.S. However, it is unquestioned that characteristic features of many civil law systems can, at least in theory, affect how certain particularly significant cases are handled. This section seeks to elucidate the implications of these features on the handling of alleged human rights crimes.

Examination of European civil law countries reveals that their institutions do not create the same systematic barriers to human rights prosecutions that exist in the American system. Four characteristic features of civil law justice systems make this so. They are: 1) prosecutorial independence, 2) the absence of prosecutorial discretion, 3) opportunities for a crime victim to participate in criminal proceedings, and 4) an active judicial role in pre-trial investigation of alleged crimes. Each of these features, and their implications for human rights prosecutions, will be examined in turn.

It should first be noted, though, that not all civil law justice systems contain each of these four features. In fact, none of the countries—Spain, France, Germany, and Italy—considered by this Note has a system containing all of them. Thus, in analyzing the abovementioned factors, the goal is not to show that they are characteristic of a pure civil law justice system, and that a pure civil law justice system is therefore better able to handle alleged human rights violations than a pure common-law legal system. Rather, it is to show that each feature individually should help overcome potential barriers to the prosecution of human rights violations. Combinations of these features may be particularly helpful; therefore their interrelationship will also be examined. However, the focus will be on identifying features of these justice systems that, in and of

136. Goldstein & Marcus, supra note 8, at 279–83.
137. See id. at 279–80.
138. See infra notes 118–235 and accompanying text.
themselves, make it less likely a government could prevent the prosecution of human rights abuses in the way that the American government can.

A. Prosecutorial Independence

The status of the public prosecutor in many civil law countries serves to facilitate prosecution of human rights offenses. While the civil law public prosecutor often maintains some relation to the executive branch, he tends to be freer from its control than an American federal prosecutor. As a result, an order not to prosecute would not necessarily be effective.

There are several reasons why prosecutors in European civil law countries are less subject to control by political officials. The first is largely formalistic. In France and Italy, prosecutors are considered magistrates, and hence part of the judicial branch. Indeed, prosecutors and judges in these countries often move back and forth between the two jobs over the course of their careers. In Germany as well, judges may accept a prosecutorial post, then move back to judging, or vice versa. This nominal affiliation with the judiciary breeds a judicial outlook amongst prosecutors, who like judges are guided by the values of objectivity, independence, and impartiality.

The actual structure of the prosecutor's relationship with political officials varies widely across civil law countries; in many cases, that


140. David, supra note 139, at 59; Grande, supra note 139, at 236.


142. David S. Clark, The Selection and Accountability of Judges in West Germany: Implementation of a Reichsstaat, 61 S. Cal. L. Rev. 1795, 1819 (1988). In Germany, the idea that prosecutors are judicial officers is further reinforced for them by the historical origins of that office. Until the mid-nineteenth century, the functions now performed by prosecutors were separated on the initiative of the jurist Carl von Savigny, who served as Prussian Minister of Justice. He felt that a separate prosecutor would promote efficiency and impartiality in adjudication. See Criminal Procedure: Germany, supra note 8, at 90.

relationship is structured in ways that prevent executive branch officials from impeding human rights prosecutions. Separation of prosecution from the executive branch is most complete in Italy. There, prosecutors are “entirely independent from the politically responsible Ministry of Justice.”[^144] This separation came about due to fear that crimes perpetrated by politically powerful individuals would not be prosecuted if the executive could control prosecutorial activities.[^145] Separation, therefore, leaves the executive branch no control over decisions about investigating or prosecuting any crime; this strongly increases the odds that legitimate accusations will be pursued.

French and German prosecutors are not as free from control as their Italian counterparts. In these nations, prosecutors are organized hierarchically under the direction of the Minister of Justice, a political official.[^146] In France, the Minister supervises an Attorney General for each appellate district, who in turn supervises the prosecuting attorney of each court of general jurisdiction.[^147] In Germany, prosecution is organized state by state. Prosecutors report to the chief prosecutor of the judicial district, who reports to the “Prosecutor General” of the state. He in turn reports to the state Minister of Justice.[^148] Federal prosecutors report to the head of the federal prosecutor’s office; he is in turn under the authority of the Federal Minister of Justice.[^149]

These organizational systems permit the executive branch to issue orders to prosecutors. For the most part, they are orders that German and French prosecutors must heed. French prosecutors are required to argue in writing any position ordered by their superiors.[^150] However, the French prosecutor is free to present his personal opinion when making oral arguments.[^151] The German prosecutor too is obliged to follow directions, including orders to prosecute or not prosecute an act.[^152] Yet the German

[^144]: Grande, supra note 139, at 240.
[^145]: Id. Belief in the need for prosecutorial/executive separation was so strong that it was enshrined in the Italian Constitution. Id.
[^146]: Criminal Procedure: Germany, supra note 8, at 91; David, supra note 139, at 59–61.
[^147]: Richard Frase, France, in Worldwide Study, supra note 139, at 146 [hereinafter France]. The prosecuting attorney will himself supervise a staff of prosecutors. Id.
[^148]: Hans-Heiner Kuhne, Germany, in Criminal Procedure Systems in the European Community 137, 141 (Christine Van den Wyngaert et al. eds., 1993); Criminal Procedure: Germany, supra note 8, at 91.
[^149]: See Kuhne, supra note 148, at 141. Federal prosecutors have jurisdiction only over subversive activities. See id.
[^150]: David, supra note 139, at 60–61.
[^151]: Id.
[^152]: Jescheck, supra note 142, at 511.
prosecutor is bound not to follow instructions that are clearly contrary to
the law, which rigidly regulates performance of his duties.\footnote{153}

Selection and promotion practices also help to insulate prosecutors
from political influence in many civil law countries. European prosecu-
tors are selected largely on the basis of competitive examinations.\footnote{154}
In France and Italy, they must pass the same competitive examinations as
judges.\footnote{155} In Spain, aspiring prosecutors take a slightly different exam.\footnote{156}
German prosecutors, in contrast, are chosen from the pool of recent law
school graduates by the Minister of Justice. However, selections are
largely based on scores from an examination given to all prospective
lawyers.\footnote{157} Promotion decisions are also largely free from political influ-
ence. Although French and German prosecutors are subject to transfer,
dismissal, or discipline for failure to follow orders, promotion decisions
are largely based on merit.\footnote{158} In Italy, prosecutorial promotions are based
on seniority.\footnote{159}

These hiring and promotion practices make civil law prosecutors less
receptive to influence from the executive branch, and hence less likely to
ignore human rights offenses committed by it, in several ways. Having
entered the profession by examination and not appointment, they are not
beholden to the executive for their positions. Moreover, they are not
more likely than average people to support the incumbent regime. Even

\footnote{153. See id. While both French and German prosecutors operate under limited obliga-
tions to follow orders from political superiors, French prosecutors may, in practice, be more
able to disregard orders than their German counterparts. In Germany, "higher officials of the
prosecuting attorney's office are empowered to assume the duties of a subordinate at any time,
or to entrust them to another." Id. Thus, if a German prosecutor does not wish to follow a
directive, believing it to be against the law or just contrary to his personal convictions, it is
relatively easy and costless to assign the case to a prosecutor who thinks differently. This
prevents prosecutors from having to act against their convictions. Id. When a French prosecu-
tor declines to follow a directive, however, it is more difficult for his superiors to see that the
directive is carried out. This is because, so long as the prosecutor holds his office, "nobody
can serve as a substitute for him and act in his place." Vouin, supra note 141, at 487. Thus, to
ensure that an order is carried out, superiors would be forced to transfer or dismiss an intrans-
gent prosecutor. Id. In the human rights context, however, this is not likely to provide much
insulation from political influence. When his superiors do not believe that implementing an
order is important enough to dismiss a prosecutor, the prosecutor may be able to disregard the
order. Yet, when superiors feel strongly about a directive—as they are likely to with decisions
related to human rights prosecutions—a prosecutor would have to comply or face dismissal.

LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA 104–5, (2d ed. 1985) [hereinafter
CIVIL LAW TRADITION].

155. DAVID, supra note 139, at 61; Grande, supra note 139, at 236.
156. Vogler, supra note 139, at 371.
158. CRIMINAL PROCEDURE: GERMANY, supra note 8, at 91; see also DAVID, supra note
139, at 60–61; Frase, Criminal Justice, supra note 8, at 559–64.
159. Grande, supra note 139, at 236.
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in Germany, where Ministries of Justice play a role in selecting prosecutors, the heavy emphasis on merit and the young age at which prosecutors are selected reduce the effects that beholdenness or political affiliation may have. Meritocracy or seniority-based promotion schemes mean that prosecutors can act in accordance within their own view of the law, and need not fear that angering the executive will endanger their chances for advancement; they must only be sure that their actions do not go so far as to subject them to discipline or dismissal.

In sum, West European civil law countries structure prosecutorial/executive branch relations in ways that limit the latter's ability to control when and how cases are brought. Italy, the extreme case, totally separates prosecutors from the Ministry of Justice. The French, German, and Spanish systems have characteristics that make prosecutors prone to resist orders they consider improper. All of these features limit the ability of political leaders to derail prosecutions for genocide, crimes against humanity, or other internationally proscribed offenses.

B. The Principle of Compulsory Prosecution

The principle of compulsory prosecution also has the potential to facilitate the investigation and punishment of human rights offenses. This principle, which has been incorporated into the laws of many European civil law nations, holds at base that prosecutors must prosecute all crimes about which they obtain sufficient evidence. It therefore places the European civil law prosecutor in a position diametrically opposed to that of his American counterpart, who has unfettered discretion about whether and how to prosecute.

The principle has been studied extensively as it exists in Germany, where it was introduced in the nineteenth century. When the prosecutorial power was separated from the judicial power and placed under the Minister of Justice's control, it was feared that prosecutors "could be subjected to political pressure to abuse [their] considerable powers of prosecution and non prosecution." The principle of

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160. Jescheck, supra note 142, at 509.
161. See, e.g., CRIMINAL PROCEDURE: GERMANY, supra note 8, at 91-1100; Frase & Weigend, supra note 10, at 337-41; Goldstein & Marcus, supra note 8; Joachim Herrmann, The German Prosecutor, in DISCRETIONARY JUSTICE, supra note 8, at 16; Jescheck, supra note 142; John H. Langbein, Controlling Prosecutorial Discretion in Germany, 41 U. CHI. L. REV. 439 (1974) [hereinafter Controlling Prosecutorial Discretion].
163. CRIMINAL PROCEDURE: GERMANY, supra note 8, at 91. Proponents of compulsory prosecution believed that in the aftermath of the 1848 revolutions, criminal laws had been used to selectively prosecute "opponents of the regime." Later partisans of the rule noted that the Nazis made exceptions to it in order to stop members of their paramilitary organizations
compulsory prosecution was developed as a response; it provides the prosecutor a basis to resist orders not to prosecute crimes the executive would like ignored. This principle remains enshrined in the German statute regulating criminal procedure.

The compulsory prosecution principle imposes several related obligations; these limit the ways in which the political preferences of prosecutors or their superiors can affect enforcement of the law. On the most basic level, prosecutors must bring charges when they possess sufficient evidence to obtain a conviction. Yet, in doing so, their discretion is also restricted. They must present the court with evidence regarding the entire criminal transaction; they cannot select specific elements of it to prosecute. Thus, the principle leaves no room for political preferences to influence the scope of the prosecution. Additionally, once the prosecutor files charges, he cannot withdraw them unilaterally. Only the court can authorize discontinuance of a prosecution. This prevents charges from being dropped for reasons that are not strictly legal. The prosecutor’s discretion is also limited even before he decides whether to bring charges. The compulsory prosecution principle prevents him from deciding whether to institute an investigation, or whether and how to continue an investigation, on any basis other than the facts. Thus, the principle also limits political influence over whether and how potentially incriminating facts are obtained.


164. Criminal Procedure: Germany, supra note 8, at 91.

165. Id.

166. Jescheck, supra note 142, at 509 (quoting Strafprozessordnung § 152 II [hereinafter StPO]) (“[the prosecutor] is obliged, unless otherwise provided by law, to take action against any activities which may be prosecuted and which are punishable in a court of law, to the extent that sufficient factual particulars may be obtained.”). In addition to this explicit statutory basis, the principle is also considered to have a constitutional basis in Germany. Compulsory prosecution is considered to be a requirement of Germany’s equal protection clause, and of the broader constitutional mandate that there be rule of law. Herrmann, supra note 161, at 18.

167. Id. at 16.

168. Id. at 48.

169. Frase & Weigend, supra note 10, at 339.

170. Jescheck, supra note 142, at 509.

171. The compulsory prosecution principle also limits the discretion of the police. Unless it did so, the police themselves would have discretion over whom to prosecute; they could decide what offenses to report to prosecutors, and what evidence to pass along for the prosecutor to use in determining whether to file charges. Moreover, if the police were subject to executive branch control, their decisions might become a mechanism for political control of law enforcement activity, a fear expressed by Germany’s nineteenth century legal reformers. Id. at 509–10. Therefore, German police are obligated to pursue all reports of criminal activity. They must also inform the prosecutor of all such reports. Id. at 510. Moreover, while police are technically affiliated with the Ministry of the Interior, they are “delegated” to the prosecu-
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Non-statutory corollaries to the compulsory prosecution rule limit the use of legal and factual ambiguity as vehicles for exercising discretion. The High Federal Court of Appeals has held that prosecutors must follow the Court's interpretation of relevant laws in deciding whether a given act is proscribed. Thus, the prosecutor has no discretion not to prosecute based on his own interpretation of the law, or an interpretation imposed by political officials with ulterior motives. Moreover, common practice is that in cases where the law is ambiguous, a charge will be brought so that the ambiguity can be resolved by a court. Doubts about the sufficiency of evidence are handled similarly. Even if officials do not follow the common practice of charging in borderline cases, the discretion is limited to situations where there is ambiguity in the facts or the law.

There are some exceptions to the rule of compulsory prosecution. Indeed, Professor Langbein—a prominent student of German criminal procedure—has noted that the Germans do not "prosecute every jay-walker." Under German law, "[t]he prosecution of petty infractions is remitted to the duty-bound discretion of the prosecuting authorities." There is also some discretion about whether to prosecute misdemeanors. While these exceptions have been much discussed in academic literature, they are of little relevance to the prosecution of human rights violations; no crime that generates an international obligation to prosecute could be classified as a misdemeanor or petty offense.

The discretion permitted in charging "political offenses" and offenses committed outside Germany is potentially more significant.

\begin{enumerate}
\item[	extsuperscript{172}] Herrmann, supra note 161, at 21-22.
\item[	extsuperscript{173}] \textit{Id.} at 21.
\item[	extsuperscript{174}] \textit{Id.} at 25 (noting that when evidence is of questionable sufficiency, charges will be brought and the court will decide if it has enough facts to convict).
\item[	extsuperscript{175}] Jescheck, supra note 142, at 511.
\item[	extsuperscript{176}] \textit{Criminal Procedure: Germany,} supra note 8, at 92.
\item[	extsuperscript{177}] \textit{Id.} at 93 (quoting Gesetz über Ordnungswidrigkeiten § 147 [hereinafter \textit{GÜO}]).
\item[	extsuperscript{178}] \textit{Id.} at 98 (quoting StPO § 153.1). A prosecutor may decline to prosecute these crimes "if the guilt of the actor would be regarded as minor (gering), and there is no public interest in prosecuting." \textit{Id.} However, the prosecutor may do so only if the court that would try the case approves. \textit{Id.} at 99.
\item[	extsuperscript{179}] See, e.g., \textit{id.} at 92-100; \textit{Controlling Prosecutorial Discretion,} supra note 161, at 451-55; Herrmann, supra note 161, at 31-41; Jescheck, supra note 142, at 513-14.
\item[	extsuperscript{180}] The "political offenses" exception was created to prevent prosecution of visiting East German dignitaries, which might otherwise have been compelled. Schram, supra note 163, at 627-29. Potential charges included subversive activities against West Germany, as well as manslaughter or deprivation of freedom—for having people trying to flee from East Germany shot. West German law held that citizens of both Germanies were subject to the provisions of its penal code. \textit{Id.}
\end{enumerate}
These types of offenses need not be prosecuted if doing so creates a danger of "severe disadvantage" to Germany, or if "abstention is required by other dominant public interests." Authority to invoke these exceptions is granted to the Federal Prosecutor General. These exceptions may significantly undermine the general principle's ability to guarantee prosecution in situations where it is compelled by international law. However, in at least some such situations, the exceptions cannot be invoked. Genocide, aggressive war, and preparation for aggressive war must be prosecuted, regardless of where they are committed.

The principle of compulsory prosecution, as it exists in Germany, should help to prevent political interference with prosecutions mandated by international law. It compels prosecutors to investigate and charge major crimes, including crimes that violate international law, except when they are political crimes or are committed outside Germany. It therefore requires prosecutors to disregard orders not to investigate or prosecute most international law crimes about which there is evidence.

The principle of compulsory prosecution also exists in Spain and Italy. In both these countries, a prosecutor cannot decline to prosecute a case when there is enough evidence to obtain a conviction. In Italy, this means that before he can decline to prosecute, the prosecutor must obtain a ruling from a judge saying he is unlikely to get a conviction. There, the obligation also requires prosecutors to investigate all allegations of criminal activity within six months of the time they are reported. Moreover, like the Germans, the Italians imposed the compulsory prosecution requirement because "the lack of discretion on the side of the prosecutor would avoid future unfair treatment of crimes perpetrated by the political regime." Thus, Italy too adopted the rule in order to avoid interference with the type of prosecution likely to be sparked by allegations of human rights violations.

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181. *Id.* at 629.
182. *Id.*
183. *Id.* at 629 n.9; Herrmann, *supra* note 161, at 51 n.159.
186. *Id.* at 232–33. The Spanish impose the obligation to prosecute by statute, whereas in Italy, as in Germany, the obligation is constitutional. *Id.* (citing Cost. art. 112) (Italy); L.E.Crim. art. 105 (Spain).
188. Unlike Germany, Italy, and Spain, France has not formally adopted the principle of compulsory prosecution. Frase, *Criminal Justice, supra* note 8, at 612 (noting that Article 40 of the French Code of Criminal Procedure grants prosecutors discretion not to bring charges even in cases of provable guilt). However, in France prosecutorial discretion is more restrained than in the U.S. *Id.* at 611. While the French prosecutor enjoys broad discretion before a charge is brought, he can drop the charge only with a magistrate’s approval. *Id.* at 613. Ac-
While it therefore appears that German, Italian, and Spanish prosecutors can exercise almost no discretion when handling major crimes, it has been argued that, with respect to many such crimes, this is not really the case. In a seminal article, Goldstein and Marcus identified several ways in which prosecutors ostensibly bound by the compulsory prosecution principle in fact exercise discretion. Determinations about the sufficiency of evidence, they argue, are one mechanism prosecutors commonly exploit. In Italy, for instance, the prosecutor may conclude that evidence against the accused is insufficient when additional investigation could turn up facts sufficient to support a charge. Or, the prosecutor may make a determination of evidentiary sufficiency that turns on “assessments of credibility.” According to Goldstein and Marcus, German prosecutors also use these methods for injecting discretion into their decisions. Moreover, they argue that when a German prosecutor prefers not to bring a case, he unquestioningly accepts police assertions that further investigation will be fruitless. Goldstein and Marcus also express skepticism at German prosecutors’ assertions that they do not reclassify serious crimes as misdemeanors so that they can legally decline to prosecute.

It is unclear how many of these unofficial avenues for discretion could realistically be employed in a human rights case. Given the nature of the allegation, there would be little possibility of a prosecutor reclassifying the actions as a misdemeanor. Moreover, given the attention such a case would likely receive, unquestioning deferral to a police assessment of the evidence, especially one of dubious validity, also seems unlikely.

cording to Professor Frase, the tendency toward career-long service amongst French prosecutors creates a de facto curb on their discretion. Without high turnover, French prosecutors learn and consistently apply policies governing when to prosecute; these in essence become the contours of the offense's definition. The victim's power to file charges provides another de facto check on discretion. If meritorious charges are going to be brought anyway, the prosecutor may feel pressure to bring them himself.

While prosecutorial discretion in France may be more limited than in the U. S., it may not be restricted in ways that prevent political interference with human rights prosecution. De facto limits on discretion generated by a routine application of standards and pressure generated by privately brought charges could be easily overridden in a case important enough to attract the attention of top political officials. Limits on dropping charges would be relevant only if charges were brought in the first place. Thus, the French prosecutor's ability to prosecute alleged human rights abuses would seem to be subject to the same limitations as an American prosecutor's.

189. See Goldstein & Marcus, supra note 8.
190. Id.
191. Id. at 271–75.
192. Id. at 271.
193. Id.
194. Id. at 275.
195. Id.
196. Id. at 272–73.
The prosecutor’s assessment of the evidence, however, might provide an avenue by which discretion could realistically be exercised. It is true that the attention such a case would receive increases pressure for the prosecutor not to drop the matter when it is clear that evidence exists. Yet, practice suggests that this may be insufficient to ensure adherence to the rule of compulsory prosecution. Schram has observed that in West Germany, before the political crimes exception was enacted, prosecutors declined to prosecute an East German radio broadcaster on evidentiary grounds when the government strongly desired not to have accusations brought.\footnote{Schram, \textit{supra} note 163, at 630.} When officials from Argentina’s repressive military dictatorships became the subject of a case in Spain for genocide, terrorism, and crimes against humanity—a case the Spanish government did not want to go forward\footnote{Email from Juan E. Garcés y Ramón, Chief Attorney for the Private Plaintiffs in the Spanish case against Augusto Pinochet and others (Dec. 27, 2002, 02:49 PST) (on file with author) [hereinafter Garcés E-mail].}—prosecutors declined to bring charges, alleging, among other things, insufficiency of jurisdictional facts the court later found clearly sufficient.\footnote{Pinochet case, SAN, Sept. 15, 1998 (Sumario 19/97-J, Auto, Juzgado Central de Instrucción num. 6), \textit{at} http://www.chip.cl/derechos/images/1509.rtf (last visited Nov. 13, 2003).} These incidents suggest that, in and of itself, the principle of compulsory prosecution may not be sufficient to prevent political interference with human rights prosecutions.

In sum, many civil law countries attempt to ensure that the law will protect all people by mandating prosecution when sufficient evidence is available. Although the rule was created largely to prevent government officials from ordering prosecutors not to prosecute crimes that the government would like to go unpunished, the rule’s ability to accomplish this by itself, especially in the context of human rights cases, is debatable. In some situations, other factors may be necessary to ensure that human rights abuses are prosecuted.

**C. Opportunities for Victims to Participate in the Criminal Process**

Unlike in America, complainants in Spain, France, Germany and Italy have formal opportunities to participate in the criminal process. Frequently, opportunities for participation place the complainant in a position to circumvent the prosecutor’s decision not to pursue a case. Thus, in some civil law countries, the complainant’s role in proceedings can help to ensure that international law-based obligations to prosecute are met.
In many nations, crime victims have the right to appeal from prosecutorial decisions. German crime victims, for example, have two opportunities to do so. First, if the prosecutor declines to pursue an allegation, the victim may file a formal request that investigative proceedings be initiated.\textsuperscript{200} Second, if the prosecutor does not comply, or if, at the end of the investigation, the prosecutor does not file charges, the victim may file a "departmental complaint" with the prosecutor general.\textsuperscript{201} If the prosecutor general rejects the complaint, the victim may appeal to the state court of appeals. Should that court agree with the victim, it will order the prosecutor to file charges.\textsuperscript{202} To facilitate activation of this review process, German law requires the prosecutor to notify the victim if charges will not be brought. The prosecutor must also provide explanation of his decision.\textsuperscript{203}

These procedures provide the victim, through the courts, with ability to control the prosecutor's adherence to the compulsory prosecution principle.\textsuperscript{204} Politically motivated decisions not to adhere strictly to the principle in a human rights case could be reviewed on the victim's initiative, and reversed. Appeal all the way to the court of appeals rarely occurs, however. There is strong disincentive to bring such an appeal, as the complainant may be liable for court costs if it is rejected.\textsuperscript{205} But the mere potential for appeal makes prosecutors reluctant not to pursue cases.\textsuperscript{206}

\textsuperscript{200} Herrmann, supra note 161, at 26; Jescheck, supra note 142, at 512.

\textsuperscript{201} Jescheck, supra note 142, at 512. This "departmental complaint" rarely results in charges being brought. However when the victim accompanies the complaint with new evidence, it can serve as an effective mechanism for getting the case reopened. Herrmann, supra note 161, at 27.

\textsuperscript{202} Jescheck, supra note 142, at 512. Appeal to this court is proper only when the prosecutor declines to bring charges that the victim cannot bring himself. Herrmann, supra note 161, at 30. However, few of the likely charges in a human rights case can be brought by a victim in Germany. The charges that a victim can file are: "trespass, libel and slander, violation of mail secrecy, destruction of property, patent and trademark violations, unfair competition, assault and battery, and negligent wounding," Frase & Weigend, supra note 10, at 350.

\textsuperscript{203} Weigend, supra note 184, at 448.

\textsuperscript{204} Jescheck, supra note 142, at 512.

\textsuperscript{205} Herrmann, supra note 161, at 27.

\textsuperscript{206} Id. at 26. Another procedure permits any German citizen to challenge decisions not to prosecute. A person who believes prosecution should have gone forward may file an administrative complaint with the immediate superior of the prosecutor who declined to act; it alleges "neglect of duty" on the prosecutor's part. Jescheck, supra note 142, at 512. If the official to whom the complaint is addressed fails to act, the citizen can complain to his superior, and so forth, so that the final complaint will be addressed to the Ministry of Justice. Id. Although Jescheck notes that these complaints receive immediate and thorough responses, he also observes their nickname: "'wastepaper basket' complaint[s]." Id. Indeed, this nickname is likely to be particularly apt in the context of a human rights case, where the decision not to prosecute was likely taken by the Ministry of Justice itself.
France and Italy too, allow for appeal of the prosecutor's decision not to pursue a case. In France, this includes the right to appeal a decision not to prosecute, and the right to appeal a court order dropping charges if the prosecutor procures one.207 Although Frase observes that such appeals rarely occur in France, he speculates this is because victims may not want to delay compensation conditioned on final resolution of the case.208 As politically motivated decisions not to prosecute human rights abuses are not likely to be conditioned on payment of restitution, this deterrent to the pursuit of review is unlikely to be relevant in the human rights context. In Italy, where the decision not to prosecute must be approved by a judge, the victim is allowed to participate in this determination.209 The victim can ask the judge to order additional investigation or indictment of the accused, regardless of the public prosecutor's position.210

Ability to obtain review of decisions not to prosecute gives victims of human rights abuses a powerful tool for pushing forward cases the government does not want to prosecute. Once an investigation has been initiated or charges have been filed, the victim's right to join the proceedings as a party in many civil law countries increases the odds that the case will be fully and effectively prosecuted. This right typically arises from the victim's request for damages, which is handled in the same proceeding as the criminal charges.211 Indeed, in Spain, Germany, and Italy, a claim for damages cannot go forward in criminal court unless the criminal case does as well.212 Thus, victims have strong incentives to demonstrate the defendant's guilt.

The right to participate as a party encompasses several related rights, each of which helps ensure that meritorious accusations are fully pursued. In France, victims have the right to participate in the pre-trial proceedings conducted by the investigating magistrate;213 they have the right to be notified of the magistrate's orders, to ask that the magistrate hear the testimony of experts, or to request that the magistrate take other investigative steps.214 This helps to ensure that the pre-trial investigation will be conducted with vigor, regardless of the prosecutor's—or the government's—desires. At trial, the victim may propose witnesses, examine witnesses proposed by other parties, file briefs, and make a closing ar-

207. Frase, Criminal Justice, supra note 8, at 613, 618.
208. Id. at 623.
209. Grande, supra note 139, at 234.
210. Id.
211. Weigend, supra note 184, at 449.
212. Id.
213. These proceedings are discussed at more length in Part III.D, infra.
214. Vouin, supra note 141, at 494.
gument. The victim can also appeal an adverse judgment. In Germany, where the victim of a personal crime becomes an "auxiliary prosecutor," this status comes with the right to question witnesses at trial, propose evidence, and appeal an adverse judgment. He also has a right to assistance of counsel and the right to inspect the prosecutor's case-file. These participatory rights make it more likely that charges will be vigorously prosecuted at trial. Thus, in human rights cases, they make it more likely a nation will fulfill its international obligations to do justice.

Perhaps the most sweeping form of participation granted to victims is the right to bring charges on their own. French and Spanish crime victims have this right, while Italian victims do not. Only the victims of certain minor crimes may file charges in Germany.

The victim of a major crime in France may bypass the prosecutor and file a complaint directly with the investigating magistrate. When he does, he is in the same position as if he had joined a proceeding initiated by a prosecutor's complaint. Although the primary purpose of initiating proceedings is generally to seek damages, the victim need not claim money damages to do so. Moreover, the victim may request investigation of all suspects, not just those from whom he has requested damages.

The French crime victim's ability to start the judicial process himself provides a powerful tool for circumventing government mandated prosecutorial inaction. Professor Frase argues that it also pressures prosecutors to file complaints when they know the case will be opened.

215. Id.
216. See id. at 491.
218. Id. All of these participatory rights also accrue to the victim whenever the prosecution was the result of an order by the Court of Appeals. See id.
219. See infra notes 200-215 and accompanying text.
220. See Frase & Weigend, supra note 10, at 350. Under German law, victims are generally not allowed to bring criminal charges. Indeed, the possibility of private prosecution was considered and explicitly rejected by nineteenth century reformers as creating proceedings that were too partisan for German taste. CRIMINAL PROCEDURE: GERMANY, supra note 8, at 90. While private prosecution is allowed today for some minor offenses, assault and battery are the only such offenses that involve physical harm intentionally inflicted upon a person. Frase & Weigend, supra note 10, at 351. Given that re-categorization of human rights abuses as "assault and battery" would be the only way to bring a privately initiated human rights prosecution in Germany, this method for overcoming prosecutorial inaction is essentially precluded in Germany.
221. Frase, Criminal Justice, supra note 8, at 613, 669; Vouin, supra note 141, at 493.
222. Vouin, supra note 141, at 493-94.
223. See id. at 492.
224. Id.
anyway,\footnote{226} although in a human rights case that is potentially embarrassing to the government, it seems unlikely that this pressure alone would suffice. Despite its benefits, the private complaint is rarely used by crime victims, and might not be used even in the human rights context; this is due to the various costs and risks associated with it. Before filing a complaint, victims are often asked to post a bond. If they lose, they may be held liable for court costs and attorney's fees, which the bond can be used to satisfy.\footnote{227} This means that victims need resources available to even initiate legal action, and face financial risk in doing so. The cost and logistical difficulty private parties face in gathering evidence to present the court also limits the usefulness of private criminal complaints. Thus, the effectiveness of private complaints may be dependent on having an active investigating magistrate who will employ state resources to help gather incriminating evidence.\footnote{228}

One peculiar feature of French law may remove some obstacles to effective use of the private criminal complaint. Relaxed standing requirements permit associations to prosecute people who harm their members.\footnote{229} Some groups are granted standing explicitly by statute. They include professional associations and family associations.\footnote{230} These groups would be more likely to have the resources to post bond and to gather the facts needed to start a judicial inquiry. Concerns about excessive prosecution by associations have prompted some judicial backlash against these complaints.\footnote{231} Nonetheless, if members of one of these associations become victims of an internationally proscribed crime, associational complaints could overcome prosecutorial inaction.

The right to bring charges neglected by the prosecutor takes its most expansive form in Spain.\footnote{232} As in France, victims can file criminal and civil complaints directly with an investigating magistrate; if he accepts them he becomes responsible for the investigation.\footnote{233} The victim can then request acts of proof, submit comments on the case-file, and request indictments.\footnote{234} Yet unlike in France, the right to bring charges is afforded

\begin{footnotes}
\item[226] Frase, Criminal Justice, supra note 8, at 670.
\item[227] French System, supra note 225, at 20–21.
\item[228] Frase, Criminal Justice, supra note 8, at 669–70.
\item[229]德国: Criminal Procedure, supra note 8, at 88 n.2; Weigend, supra note 184, at 449; Vouin, supra note 141, at 495.
\item[230] Vouin, supra note 141 at 495.
\item[231] Id. at 495–96.
\item[232] Weigend, supra note 184, at 449.
\item[233] Vogler, supra note 139, at 363.
\item[234] Id. at 383–86. On requests for acts of proof, see id. at 385. For comments on the case file, see id. at 386. On requests for indictment—and specific charges—see id. at 386–87. The ability of private citizens to bring criminal charges is considered so important that it is constitutionally guaranteed. C.f. art. 125.
\end{footnotes}
not just to the victim or groups to which the victim belongs, but to every citizen.\textsuperscript{235} However, despite the alleged value placed on victim participation by Spanish law, privately initiated complaints are rare there, as in France, a fact that Weigend attributes to the difficulty of preparing a criminal case without the resources of the state.\textsuperscript{236}

Thus, many civil law legal systems are set up in ways that give crime victims the ability to overcome prosecutorial inaction. To the extent that they work, they should facilitate the prosecution of human rights abuses. Yet German appeals from decisions not to prosecute can be effective only if the prosecutor ordered to go forward does so zealously—which he may not given his initial decision not to prosecute—or if the victim joins the proceedings and has the resources to be effective. It has been hypothesized that the effect of French and Spanish rules allowing victims to join proceedings, and to initiate them, will be limited by the same constraints.\textsuperscript{237} In Spain, however, in Pinochet's case, the victims' ability to file complaints overcame the prosecutor's government-directed refusal to investigate the charges.\textsuperscript{238} This suggests that giving victims the ability to file charges, or to otherwise participate in criminal proceedings, may be effective at facilitating prosecution of human rights abuses.

\textbf{D. Judicial Control Over Pre-Trial Investigation}

For the purposes of human rights prosecution, the active role of judges is one more crucial feature of many civil law justice systems. Specifically, active judicial supervision of pre-trial investigation provides another avenue by which political opposition to prosecution can be circumvented. This type of control has been identified as a hallmark of "inquisitorial" justice.\textsuperscript{239} It therefore suggests that the inquisitorial judicial model often associated with civil law systems itself facilitates the prosecution of human rights abuses, at least at the pre-trial stage.

In the "Napoleonic pre-trial model,"\textsuperscript{240} judicial investigation is the first stage in criminal proceedings that concern a major crime.\textsuperscript{241} It is conducted by an investigating magistrate, a member of judiciary not

\begin{footnotes}
\item[235] Weigend, supra note 184, at 449.
\item[236] Id.
\item[237] See supra note 222, and accompanying text.
\item[238] Roht-Arriaza, supra note 14, at 318; Garcés E-mail, supra note 198.
\item[239] Weigend, supra note 184, at 446.
\item[240] Vogler, supra note 139, at 383.
\item[241] Weigend, supra note 184, at 446. While no judicial investigation occurs when less serious offenses are alleged, it would certainly occur in any case that engenders an international obligation to prosecute. Goldstein & Marcus, supra note 8, at 247; Vogler, supra note 139, at 383.
\end{footnotes}
controlled by the Ministry of Justice.\textsuperscript{242} France and Spain still employ this procedure.\textsuperscript{243} Germany abolished the investigating magistrate’s post in 1975. Italy followed suit in 1988.\textsuperscript{244}

Inquisitorial theory’s rationales for the investigating magistrate’s role relate closely to the types of obstacles a human rights case will likely encounter. On a general level, the goal is to ensure that investigations are conducted with integrity and impartiality.\textsuperscript{245} More concretely, the goal is to facilitate direct judicial control over prosecutorial activities.\textsuperscript{246} Moreover, unlike ex-post forms of supervision—such as the American exclusionary rule—the French and Spanish procedure does not limit supervision “to the cases that survive for trial.”\textsuperscript{247} Thus, the investigating magistrate’s reasons for existence are to check improper decisions in cases the prosecutor does not want to try—such as improper decisions not to prosecute—and to ensure impartiality in determinations about who is investigated, or more importantly, who is not.

As the official in charge of investigation, the French or Spanish investigating magistrate has a number of powers. This magistrate can order arrests and searches, interrogate suspects and other witnesses, inspect the crime scene, appoint experts, or take any other relevant investigative step; he may do so whether or not the prosecutor, or another party, proposed the step.\textsuperscript{248} The magistrate is assisted by “judicial police,” who are under his control.\textsuperscript{249} In practice, they perform much of the investigative work.\textsuperscript{250}

In France and Spain, responsibility for charging offenses is also left to the investigating magistrate. This magistrate determines when the investigation is complete and whether any charges will be filed.\textsuperscript{251} Charges filed by a Spanish magistrate are sent directly for trial.\textsuperscript{252} Those recommended by a French magistrate are sent to a panel of other judges for

\begin{thebibliography}{99}
\bibitem{242} Frase, Criminal Justice, supra note 8, at 666–67 (on France); Vogler, supra note 139, at 383 (on Spain). The investigating magistrate is not the same judge who will hear the case if it goes to trial. Vogler, supra note 139, at 373; see also, France, supra note 147, at 147.
\bibitem{243} Vogler, supra note 139, at 383.
\bibitem{244} \textit{Id}.
\bibitem{245} Goldstein & Marcus, supra note 8, at 247–48.
\bibitem{246} Frase, Criminal Justice, supra note 8, at 667.
\bibitem{247} Goldstein & Marcus, supra note 8, at 247.
\bibitem{248} \textit{Id}; Vogler, supra note 139, at 386. As the investigating magistrate goes through these steps, he compiles the results in a dossier. If the case goes to trial, this dossier will be given to the trial judge, who will use it to help structure the trial. Some information in the dossier is also admissible as evidence at the trial. \textit{Id}.
\bibitem{249} Goldstein & Marcus, supra note 8, at 247.
\bibitem{250} \textit{Id} at 248.
\bibitem{251} \textit{Id} at 247. If charges will be filed, the magistrate also determines their number and severity. \textit{Id}; see also Vogler, supra note 139, at 383–85.
\bibitem{252} Vogler, supra note 139, at 383–85.
\end{thebibliography}
review. However, this panel almost always approves the investigating magistrate's decision.

The institution of the investigating magistrate therefore strips prosecutors and their superiors of control over even minor details of pre-trial proceedings, facilitating prosecutions opposed by the government. Not only are charging decisions given to someone independent from the government, so too are routine decisions about how to investigate. Thus, political officials cannot affect the outcome by influencing the investigative process. Moreover, the French and Spanish procedure gives control over the investigation's particulars to somebody bound by law to examine "all relevant avenues of inquiry," regardless of where they lead. Because the investigating magistrate has police who report to him and not to a ministry, the diligence with which investigations are carried out also cannot be influenced by the government. In sum, because of his powers and duties, the French or Spanish investigating magistrate may be particularly able to facilitate prosecution of human rights abuses.

Italy has attempted to retain judicial control of pre-trial activities while eliminating the investigating magistrate. This is accomplished through judicial review, which takes place when the prosecutor decides whether to recommend filing charges. Regardless of what his recommendation is, it must be approved by a judge; thus, even decisions not to charge receive judicial review. The judge may grant permission not to prosecute only if the evidence appears insufficient to obtain a conviction. If the judge is not sure this is the case, he can order further investigation, or mandate that charges be brought. In deciding whether charges should be brought, the judge is not bound by the evidence presented by the parties; the judge may call witnesses and procure his own experts. In conjunction, these rules provide for extensive judicial review of prosecutorial decisions, and transfer some control over investigation to the judge. However, because the Italian prosecutor is fully separated from the government, they only marginally increase the independence with which investigation will be carried out.

While pre-trial proceedings in France, Spain, and Italy are structured to give judges control over investigation and charging, Goldstein and Marcus question whether they really exercise control. Particularly, they suggest, because investigating magistrates investigate only the most

253. France, supra note 147, at 147.
254. Frase, Criminal Justice, supra note 8, at 668.
255. Vogler, supra note 139, at 384.
256. Grande, supra note 139, at 233.
257. Id.
258. Id. at 234.
259. Id. at 258.
serious crimes, prosecutors will classify crimes as less severe so as to avoid giving a magistrate control of the investigation. They also suggest that, in practice, magistrates will provide the police with little supervision. Yet in cases involving any crime that might be internationally proscribed, practice is likely to be closer to the theoretical model previously described. Goldstein and Marcus have observed that where a crime is complex, serious, or controversial, under-classifying to avoid review by the investigating magistrate is difficult and rare. Moreover, if the victim can file a complaint with the investigating magistrate, any attempt to under-classify could be circumvented. In a controversial or major case, police discretion is also likely to be more limited, as the judge will likely supervise their conduct more actively. Yet more importantly, while absence of supervision may create police discretion, it does not necessarily create possibilities for improper government influence; even without supervision, this will not occur so long as police are under judicial—not executive branch—control. Goldstein and Marcus' doubts about the efficacy of judicial involvement in pre-trial proceedings therefore seem inapplicable in the context of a human rights case.

The transfer of control over pre-trial decisions from prosecutors and police to judges should limit the extent to which a government can obstruct human rights prosecution. This transfer gives an independent judge control over charging; the institution of the investigating magistrate also gives an independent official control over the investigation's details. While the efficacy of this procedure likely depends on the magistrate's impartiality and initiative, it should facilitate the prosecution of human rights cases.

E. Conclusion

The civil law justice systems of Spain, France, Italy, and Germany are marked by features that facilitate the prosecution of human rights abuses—prosecutions a government's executive branch is not likely to approve of. Although they come in countless variations, these features, broadly speaking, can be categorized as: 1) prosecutorial independence, 2) absence of prosecutorial discretion, 3) opportunities for victims to participate in proceedings, and 4) an active judicial role in investigation and charging. These features all reduce the ability of a government's political leaders to interfere with a case.

260. Goldstein & Marcus, supra note 8, at 250–51.
261. Id. at 249.
262. Id. at 252.
263. Id.
All four countries examined make their prosecutors more independent from the executive branch than they are in the U.S. Thus, these prosecutors should be less prone to having their activities restricted by political officials. However, where prosecutors are independent only by virtue of selection and promotion policies, and are not freed from hierarchical command, this independence may not be sufficient to prevent interference with a high profile human rights case unless there are additional limits on political influence over case outcomes. In Italy, where prosecutors are wholly independent members of the judiciary, insulation from political control should be more complete. However, absent some other feature, even complete independence provides no guarantee that internationally compelled prosecutions will be brought, as prosecutors could always be lazy or have political sympathy with the potential suspect.

Elimination of prosecutorial discretion could also facilitate prosecution by preventing an interested government from ordering that a case be dropped. Even where prosecution is compulsory, mechanisms exist for injecting discretion into the process, although some that exist in many cases do not exist in the human rights context. This suggests that a compulsory prosecution rule may be most effective only in conjunction with one of the other abovementioned features: prosecutors sufficiently independent that they would not exploit opportunities for discretion, or opportunities for a victim or judge to enforce the compulsory prosecution rule.

Giving victims a role in criminal proceedings facilitates prosecution regardless of the prosecutor’s obligations. This is because it provides opportunities to circumvent the prosecutor entirely. While enabling victims to override prosecutorial inaction should make human rights cases easier to get to trial, victims seeking to participate in the process often face resource constraints. Therefore, this feature may be most able to facilitate prosecution when groups with resources can bring charges, or when an investigating magistrate can use state resources to elaborate a case initiated by a victim.

An active judicial role in pre-trial decision-making can also override prosecutorial inaction. When the judge controls proceedings, he can investigate when the prosecutor was ordered not to, and bring charges when the prosecutor was ordered not to recommend them. As judges command state resources, giving them a role may be a particularly useful mechanism for ensuring that alleged human rights violations get thoroughly examined. However, as judges cannot initiate cases, this mechanism can guarantee prosecution only when other features of the justice system—like a compulsory prosecution rule, a right to bring private criminal complaints, or
truly independent public prosecutors—ensure that legitimate charges get into court.

Thus, in sum, each of the abovementioned features of some civil law justice systems should greatly decrease the odds that a government could block prosecution of human rights abuses. The extent to which each feature can serve this goal, though, depends on the context, including the case, the actors' dispositions, and the legal system's other features. Nonetheless, the presence of each makes it somewhat more likely that a country will fulfill its international obligation to prosecute crimes that offend all of humanity.

IV. PROSECUTING PUBLIC OFFICIALS IN AMERICA: SPECIAL PROCEDURES AND INDEPENDENT COUNSEL S

At first glance, comparison of these civil law systems with the American system suggests that far-reaching reform may be necessary for the American system to ensure punishment of human rights violations. After all, while each feature discussed in Part III should help prevent the complete obstruction that is possible in the American system, they are features that apply broadly within the systems marked by them.

For reasons unrelated to human rights prosecution, some authors have suggested that America undertake system-wide reforms along civil law lines.\textsuperscript{264} Many have advocated that American jurisdictions adopt guidelines that would limit prosecutorial discretion in most cases,\textsuperscript{265} and it has been suggested that selection of prosecutors and judges in the United States be made on a more meritocratic basis.\textsuperscript{266} However, others have questioned whether reforms modeled on the civil law tradition are feasible in the American system.\textsuperscript{267} Professor Pizzi, for instance, has asserted that features of civil law systems like obligations to prosecute or judicial review of charging decisions stem from a particular cultural un-

\begin{itemize}
\item \textsuperscript{264} See, e.g., Davis, supra note 8, at 194–97 (arguing, in particular, for adoption of a compulsory prosecution rule modeled after Germany's).
\item \textsuperscript{265} KENNETH C. DAVIS, DISCRETIONARY JUSTICE, A PRELIMINARY INQUIRY, 189–90 (1969); Frase, Criminal Justice, supra note 8, at 611–16; James Vorenberg, Decent Restraint of Prosecutorial Power, 94 HARV. L. REV. 1521 (1981); see also Pizzi, supra note 8, at 1363 (discussing prominent advocates of guidelines).
\item \textsuperscript{266} Frase, Criminal Justice, supra note 8, at 565.
\item \textsuperscript{267} Pizzi, supra note 8, at 1372–73; see also Thomas Weigend, Continental Cures for American Ailments: European Criminal Procedure as a Model for Law Reform, in 2 CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 381 (Norval Morris & Michael Tonry, eds., 1980); Peter Arenella, Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction Without Adjudication, 78 MICH. L. REV. 463, 524–29 (1980); see generally Mirjan Damaska, Structures of Authority and Comparative Criminal Procedure, 84 YALE L.J. 480 (1975).
\end{itemize}
understanding of the judicial process; it would therefore be difficult, he argues, to import features of civil law systems into a judicial process with different underlying cultural bases.268 Yet others have argued persuasively that there is no significant “legal culture gap” between Europe and America, as can be seen from the systems’ many shared institutions.269

Pizzi and others have also advanced arguments premised on the notion of balance. Given the interrelationship between aspects of a legal system, they argue, it is difficult to change one or two aspects of the system alone; importing some aspects of a system into the body of another leaves a system with institutions that are misaligned, and unable to function together.270 Yet the extensive procedural variety within the European and American systems casts doubt on the notion that all of a system’s institutions are so inextricably linked. For instance, Prof. Pizzi asserts that prosecutorial discretion in the United States is tightly intertwined with “the American political tradition, in which prosecutors are local officials who answer to the voters.”271 Yet not all states have locally elected prosecutors.272 The federal system, moreover, has prosecutors appointed by a President sitting far from the cities where they work, and who was elected largely due to positions on issues unrelated to criminal justice.273 In most ordinary cases, the American system functions smoothly, even in jurisdictions where prosecutors are not elected or politically accountable.274

Yet more importantly, even if Pizzi and others are correct in assuming that parts of a judicial system are so interrelated that none can be altered without throwing the whole enterprise out of balance, that does not mean that the balance a system achieves contemplates every case.

268. Pizzi, supra note 8, at 1372–73.
269. Abraham Goldstein, Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure, 26 STAN. L. REV. 1009, 1020 (1974) (noting convergence in European and American legal culture); Merryman, supra note 143, at 1865–76 (noting that the French and German systems have undergone significant convergence in the post-war era, and that newer processes make French and German judges more like American judges); Cynthia Vroom, Constitutional Protection of Individual Liberties in France: The Conseil Constitutional Since 1971, 63 TUL. L. REV. 265, 266 (1988) (noting that a “revolutionary” 1971 decision of the Constitutional Court has produced a significant change in the political culture underlying the French judicial system).
270. Pizzi, supra note 8, at 1373.
271. Id.
274. See, e.g., Green, supra note 272, at 492 n.23 (arguing that in ordinary cases, the American system produces results that are more equitable in jurisdictions that do not have elected prosecutors).
For instance, the combination of political controls over prosecutors, jury trials, and prosecutorial discretion—all elements of the American balance outlined by Pizzi—did not prevent dozens of African Americans in the small, largely white town of Tulia, Texas, from being convicted of drug offenses they did not commit, all based on the uncorroborated testimony of an itinerant white police officer accused of racism. Nor did that balance prevent notorious KKK murders from going unprosecuted throughout the South during the civil rights era. Thus, the logic that some say counsels against broad adoption of individual civil law institutions provides no reason not to employ such institutions in certain extraordinary scenarios. This, of course, raises the question of whether system wide reforms are really necessary to resolve the quandary outlined in part II, or whether smaller, situation-specific reforms are feasible and up to the task. Fortunately, America's own experience with prosecution of government wrongdoing suggests the latter.

The American system has handled official misfeasance through procedures applicable only to this particular type of behavior. Passed in 1978, the Ethics in Government Act took responsibility for investigating the most serious government scandals away from the Department of Justice. Instead, a judicially appointed independent counsel had responsibility for these investigations. The independent counsel system, however, is no longer; relevant statutory provisions lapsed when Congress failed to renew them in 1999.

For cases of official misfeasance, the Ethics in Government Act created a new prosecutorial framework marked by features found in civil law systems. First, it created a prosecutorial office at least somewhat independent of the executive branch. Additionally, it attempted to control official discretion. Provisions in the independent counsel statute when it lapsed also gave judges a very modest role in supervising pre-trial prosecutorial activities. Thus, the independent counsel procedure

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275. Pizzi, supra note 8, at 1373.
280. Erwin Chemerinsky, Learning the Wrong Lessons From History: Why There Must be an Independent Counsel Law, 5 WIDENER L. SYMP. J. 1 (2000).
282. Id. at 2272–3.
is an example of how features found in some civil law systems can be incorporated into an American-style system on a limited basis to solve problems related to prosecution of government officials.

That the independent counsel statute employs mechanisms like those discussed in Part III is not surprising, given its origins; it was in fact motivated by problems similar to those a human rights case would likely face. Its impetus was the “Saturday Night Massacre,” when President Nixon ordered the firing of Watergate prosecutor Archibald Cox, forcing intermediate officials who would not fire Cox to resign.\textsuperscript{284} Almost immediately after this happened, Congress began debating proposals about how to prevent another such executive \textit{coup-de-force}.\textsuperscript{285} Those involved in the debate quickly concluded that the answer was some form of special prosecutor, one who would only handle allegations against top federal officials.\textsuperscript{286}

The law that finally passed created the independent counsel.\textsuperscript{287} Such a prosecutor’s mission was to investigate specific allegations of criminal conduct levied against top executive branch officials, including the President, Vice-President, cabinet secretaries, agency heads, and many others.\textsuperscript{288} When informed by the Attorney General that an independent counsel was needed, a special panel of the U.S. Court of Appeals would appoint one,\textsuperscript{289} and define precisely what he should investigate.\textsuperscript{290} Once appointed, the independent counsel “exercise[d] all investigative and prosecutorial” powers held by the Attorney General or his subordinates, and was not subject to direction by them.\textsuperscript{291} The Attorney General retained the authority to terminate a counsel for good cause or “extraordinary impropriety.”\textsuperscript{292} However, the three-judge panel could terminate whenever it felt transfer of the case to the Justice Department was appropriate.\textsuperscript{293} These provisions gave independent counsels almost total independence.\textsuperscript{294}

\begin{itemize}
  \item \textsuperscript{284} \textit{Id.} at 608.
  \item \textsuperscript{285} \textit{Id.} at 609.
  \item \textsuperscript{286} \textit{Id.} at 609–13.
  \item \textsuperscript{287} \textit{Id.} at 625–26. Between 1978 and 1982, this position was labeled “special prosecutor.” In 1982, the name was changed to “independent counsel” to better reflect its holder’s independence from the Justice Department. \textit{Id.} at 692.
  \item \textsuperscript{288} \textit{Id.} at 625.
  \item \textsuperscript{289} \textit{Id.} at 625–26.
  \item \textsuperscript{290} \textit{Id.} at 626.
  \item \textsuperscript{291} Sunstein, supra note 281, at 2272–73.
  \item \textsuperscript{292} Gormley, supra note 283, at 626 (citing 28 U.S.C. § 596(b)(2) (1994)). The statute’s original language granted power to remove only for incapacity and “extraordinary impropriety.” Language referring to “good cause” was added during subsequent reauthorization. See Sunstein, supra note 281, at 2274.
  \item \textsuperscript{293} Gormley, supra note 283, at 626.
  \item \textsuperscript{294} \textit{Id.} at 625.
\end{itemize}
The Ethics in Government Act did not leave requests for a counsel's appointment to the Attorney General's unchecked discretion. When the Attorney General received "specific information" about criminal conduct by a covered official, the Justice Department would have to conduct a preliminary investigation,^295 it could decline to investigate only based on an accusation's specificity or credibility. After investigating for ninety days, the Attorney General could close the case if he determined that the allegation was "so unsubstantiated as not to warrant further investigation."^297 Otherwise, the Attorney General had to request appointment of an independent counsel. Although this triggering mechanism sharply limited the amount of discretion left to the Attorney General, it did not wholly eliminate his discretion. Determinations about "credibility" and the extent of "substantiation" could in truth be made on the basis of other considerations; one study suggested that—at least during the Reagan administration—they were. Nevertheless, the goal, and substantial result of these provisions, was limited discretion in triggering the statute.

Once the statute was triggered and an independent counsel appointed, the three-judge panel maintained a limited supervisory role. Under provisions added the last time the independent counsel statute was reauthorized, it would have to periodically evaluate each investigation. This review was primarily to see if further investigation was really needed. Nonetheless, this provision gave the court some authority over investigation of allegations against high-level officials.

This experience with independent counsels shows that it is possible to create a prosecutorial framework incorporating features from civil law systems, and employ the framework only in a limited number of pre-set circumstances. Moreover, it shows that those features that facilitate prosecution of government officials in civil law countries can be applied in the American context to certain cases of government malfeasance. Thus, a special set of prosecutorial procedures, designed along civil law lines, may be a feasible way for the American system to guarantee hu-

295. Id. at 625 (citing 28 U.S.C. § 591).
298. Gormley, supra note 283, at 625.
300. Gormley, supra note 283, at 686. Evaluations would take place after an investigation's second and fourth year, and every year thereafter.
301. Id. After all, with a completely independent prosecutor, it should be unnecessary to review whether fruitful lines of investigation have been ignored.
302. The panel's review was necessarily limited in order to avoid potential separation of powers problems, Id. at 686–87, which the Supreme Court warned might be a consequence of too much direction by the three-judge panel. Morrison v. Olson, 487 U.S. 654, 682–83 (1988).
man rights cases the procedural treatment required under international law. Indeed, a system of independent counsel investigations just for alleged human rights abuses appears to be a feasible option; in the U.S., for instance, something sufficiently similar to the old independent counsel would have the advantage of pre-established constitutionality.303

The independent counsel provisions, however, were allowed to lapse because they grew unpopular. Independent counsel Kenneth Starr’s investigation of President Clinton sparked strong outcry.304 In the debates his investigation prompted, academics outlined several interrelated critiques of the independent counsel statute. First, some observed that the triggering mechanism forced appointment of counsels to investigate activities that, while criminal, were not particularly serious.305 Second, the independent counsel provisions were said to incentivize zealotry, without placing effective checks on the prosecutor.306 The prosecutor was driven to justify his existence by finding some criminal conduct; the prospect of fame provided further motive to charge something.307 In the face of these incentives, the three-judge panel’s periodic review was the only check, and these reviews tended to be perfunctory.308 Third, the counsel’s jurisdictional flexibility allegedly compounded problems with excessive zeal and investigation of trivial matters.309

As an example, both Gormley and Sunstein cite the independent counsel investigation into allegations former HUD Secretary Henry Cisneros lied to the FBI about payments to a mistress. Sunstein also cites investigations into alleged cocaine use by President Carter’s chief of staff and campaign manager, and an investigation into perjury allegations against then Assistant Attorney General Theodore Olson. Gormley, supra note 283, at 643; Sunstein, supra note 281, at 2275. These arguably unnecessary independent counsel investigations were criticized for having caused harm to their targets’ reputations and great expense of public funds. See Sunstein, supra note 281, at 2275, 2279–80.

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If the counsel came across information about criminal conduct by the target that was not covered by the jurisdictional charter, he could inform the Attorney General and request permission to investigate the new unrelated matter. The Attorney General then had to investigate for thirty days to see if an expansion of jurisdiction was warranted. Id. at 662. In deciding, the Attorney General had to give “great weight to any recommendations of the independent counsel.” 28 U.S.C. § 593(c)(2)(A)(2002). If the Attorney General decided to expand
counsel with incentives to be zealous could expand his investigation almost at will, and investigate crimes of minimal gravity. This, some felt, produced witch-hunts.\textsuperscript{311}

Any proposal to incorporate elements of European justice systems into the American system, to operate only in cases involving alleged human rights abuses, would have to respond to the perceived flaws of the discarded independent counsel system. For a proposal to have these cases handled by a prosecutor separated from the executive, this would be particularly important. Yet, a system of independent counsels for allegations of human rights abuse would not be subject to many of the criticisms leveled at the old statute. If the counsel’s jurisdiction were limited \textit{ab initio} to crimes which there is an international obligation to prosecute, there would be no risk of costly, embarrassing investigations into trivial criminal acts. This risk would be further alleviated if the counsel were prohibited from redefining his jurisdiction to include crimes unrelated to human rights. With these limits, the incentive to investigate and prosecute zealously would be less problematic; evidence of behavior within the prosecutor’s jurisdiction that turns up will necessarily have been worth the cost. Incentives to prolong a fruitless investigation could be countered with periodic judicial reviews, as under the old independent counsel system. Thus, in the human rights context, an independent counsel system could facilitate prosecution without generating the problems that prompted America to abandon its old system.

An independent counsel system, of course, is not the only way to take features of European systems and employ them within the American system exclusively in human rights cases. For instance, some scholars have advocated giving victims a greater role in the criminal process.\textsuperscript{312} One proposal would permit the victim to seek judicial review of a decision not to prosecute; if the court ruled that the case had merit, the victim would be allowed to prosecute it personally.\textsuperscript{313} Another proposal would permit judicial review of the decision not to prosecute only when non-prosecution posed a danger to the victim; if the court sided with the victim, it would appoint an attorney to prosecute the case.\textsuperscript{314} While initially proposed as across-the-board reforms, these proposals could also be adopted only for cases involving allegations of grave human rights abuses.

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the counsel’s jurisdiction, the three-judge panel had to order it. Gormley, \textit{supra} note 283, at 662.

\textsuperscript{311} See \textit{supra} notes 304–305 and accompanying text.

\textsuperscript{312} See, \textit{e.g.}, Cárdenas, \textit{supra} note 90; Green, \textit{supra} note 272; Wainstein, \textit{supra} note 130.

\textsuperscript{313} Cárdenas, \textit{supra} note 90, at 393.

\textsuperscript{314} Wainstein, \textit{supra} note 130, at 727.
There are numerous ways features of European systems that facilitate human rights prosecution could be incorporated into the American system—on a system-wide basis or just for cases involving human rights. It is beyond this Note’s scope to determine if each is feasible, or which would be most effective if transplanted. This Note also cannot evaluate if each reform would pose constitutional problems if adopted in America, or any other country. In America, at least, any proposal whose constitutionality has not been tested in another context would likely spark spirited debate, as the Ethics in Government Act did. The proposals mentioned in this Section are thus offered just as examples of how mechanisms that work in Europe might be used to facilitate human rights prosecution in the American system, or any other legal system resembling it.

The American experience with independent counsels, then, confirms that the features that promote human rights prosecutions in Europe would also promote them in an American-style system. It also confirms that these features can be incorporated into an American-style system on a limited basis; they could be made applicable only to cases involving human rights. Admittedly, the American independent counsel system was abandoned due to flaws that allegedly bred excessive prosecution. But these flaws would be limited if counsels investigated only alleged human rights abuses. Thus, an independent counsel system for human rights cases might be one way to transplant desirable features of European systems to America. However, there may be many feasible alternatives. More broadly speaking, this means that guaranteed compliance with international norms of mandatory prosecution is easily achievable within an American style system. Guaranteeing prosecution of human rights offenses in the American system is a realistic proposition.

**CONCLUSION**

Over the past few decades, international law has developed dramatically, generating new challenges and new benefits. Individuals who
commit the most serious crimes now violate a developed international criminal law, a law comprised of treaty provisions and *jus cogens* norms. As crimes were established by treaty or recognized as having *jus cogens* status, obligations to prosecute grew up alongside of them; now, countries have obligations to prosecute genocide, torture, forced disappearances, crimes against humanity, and war crimes when committed within their territory, when committed abroad by one of their nationals, or when committed abroad by a foreigner who later enters national territory.\(^{316}\) These obligations, and compliance with them, serve to deter the heinous crimes to which the obligations are attached.\(^{317}\) Thus, they provide potentially powerful protection for lives and liberties around the globe.

The American justice system, unfortunately, is structured in a way that makes compliance with these obligations unlikely. This due to a conflagration of factors. Federal prosecutors have complete discretion over what crimes to investigate and charge. They are also subject to control by people who may have—and are somewhat likely to have—an interest in squelching a human rights case. There is, moreover, no way to override the decisions these officials take.\(^{318}\) Thus, under the American system, prosecution of human rights abuses is unlikely.

Under European civil law systems, by contrast, human rights prosecutions are more likely to occur when mandated by international law. This is because their systems have features that facilitate prosecution. Prosecutors who are independent and compulsory prosecution rules prevent political leaders from stopping prosecution by public authorities. Victim participation and judges who investigate ensure prosecution can occur even if political leaders tie the prosecutor's hands.\(^{319}\) In countries with judicial systems marked by at least one of these features, the government will have a difficult time preventing human rights cases from going forward.

In the recent past, the U.S. had a system that employed some of these features to handle allegations of misfeasance by top officials. This independent counsel system was designed to stop officials from obstructing cases that targeted them, or administration colleagues. This suggests one possible solution to the quandary identified in Part II: a system of independent counsels who investigate alleged violations of international criminal law. At the very least, this shows that there is precedent in the American system for creating a special mechanism, marked by features

\(^{316}\) See supra notes 14–62 and accompanying text.
\(^{317}\) See supra note 9 and accompanying text.
\(^{318}\) See supra notes 63–116 and accompanying text.
\(^{319}\) See supra notes 119–241 and accompanying text.
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outlined in Part III, to handle special types of crimes, and that application of these principles only to human rights cases may therefore be a feasible, realistic way to facilitate human rights prosecution. More broadly, this suggests that the American system is not inherently unfit for a world with international obligations to prosecute; guaranteed compliance is easily achievable within the broad confines of this system. Not only does examination of how human rights cases will be handled—or not handled—in European and American style legal systems indicate the need for at least minor reforms in the latter, it also points to the necessity and desirability of learning from foreign experience as the world becomes more legally interconnected. Development of international legal norms creates state obligations that, as was illustrated in Part II, a given legal system may not be prepared to handle without at least minimal reform. Examination of foreign systems can help in diagnosing these deficiencies, and identifying solutions to them. These norms, moreover, are designed to produce benefits. When adoption of principles from foreign systems is needed to secure these benefits, such adoption therefore seems desirable.

Comparison of American and European legal systems in light of the international obligation to prosecute also indicates that human rights may be a force for convergence between systems. As previously noted, this is a possibility that others have already observed in another context; acceptance of certain universal rights for the accused, they argue, has led Europeans to embrace some procedures associated with American-style common law systems. Comparison of procedures affecting human rights prosecution reveals that the converse is also true. For America or any country with a similar legal system, a serious commitment to uphold international human rights law must entail some incorporation of civil law procedural mechanisms.

Differences in national legal structures are, in sum, highly significant in the context of international criminal law. This recommends paying

320. For an elegant elaboration of this point, see Rudolf Schlesinger, Comparative Criminal Procedure, a Plea for Utilizing Foreign Experience, 26 BUFF. L. REV. 361, 361–64 (1976–77). On increased legal interconnectedness, see Merryman, supra note 143, at 157–58; Orentlicher, supra note 12.

321. See supra notes 63–116 and accompanying text. For another example of this phenomena, see John Richardson, The European Union in the World—A Community of Values, 26 FORDHAM INT’L L.J. 12, 31 (2002) (noting that development of conventions that form the basis of the European Union has necessitated convergence of member states’ legal systems).

322. See supra notes 8–9 and accompanying text.

323. Frase & Weigend, supra note 10, at 358 ("[t]he fact that Germany (along with other continental systems) has recognized . . . the importance of human rights . . . as a guiding principle of the criminal process has contributed to a process of convergence between the common law and the civil law systems."); Frase, Main-Streaming, supra note 8, at 781–83.

324. Frase & Weigend, supra note 10, at 358.
careful attention to those differences, and their implications. The potential benefits of an established international system of human rights law are enormous. It would be a shame for domestic legal structures to prevent these benefits from being realized.