Punishment for War Crimes: Duty--or Discretion?

Michigan Law Review
COMMENTS

Punishment for War Crimes: Duty—or Discretion?*

In 1968, a movie called The Graduate received wide critical acclaim for characterizing the malaise of youthful America. For many, the scene most representative of contemporary irrelevance took place during the protagonist's homecoming party, at which a businessman, with grave and repetitive insistence, encouraged the recent college graduate to enter the plastics industry. In a CBS-TV news interview on November 24, 1969, Paul D. Meadlo revealed his participation in an incident in Vietnam that has captured the horrified attention of the nation. Meadlo, twenty-three years old, is a machine operator in a Terre Haute, Indiana plastics factory.

I. BACKGROUND

The four Geneva Conventions of 1949 form "part of what are generally known as the laws and customs of war, breaches of which are commonly called 'war crimes.' " Essentially, the function of the Conventions is to provide for the protection of civilian and military victims in the event of an armed conflict between two or more of

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2. "'Ben, I want to say one word to you, just one word,' a friend of the family breathes in his ear . . . . 'Plastics,' the fellow says, imparting the great secret to success in our time. 'There is a great future in plastics.'" Id. at 15.
3. N.Y. Times, Nov. 25, 1969, § 1, at 1, col. 2. See also notes 17, 18, 22 & 176 infra and accompanying text. Prior to Meadlo's disclosure, public and media reaction to allegations of a massacre of Vietnamese civilians by American troops had been routinely unremarkable. The indictment of Army First Lieutenant William L. Calley, Jr., for the murder of 109 unarmed South Vietnamese civilians was reported on page fourteen in the N.Y. Times. N.Y. Times, Sept. 7, 1969, § 1, at 14, col. 3.
the High Contracting Parties (Parties). Minimum standards are also established for the conduct of a Party during an “armed conflict not of an international character” within its territory. The first significant international attempt to protect war victims occurred in 1785 when the United States and Prussia concluded a Treaty of Amity and Commerce, which laid down rules for the protection of the wounded and prisoners similar to those later established by the 1949 Conventions. Subsequent to this initial attempt, a series of similar international conventions have been adopted in an effort to mitigate the consequences of armed conflict. A consistently critical element in the formulation, adoption, and operation of such conventions has been the problem of dealing with breaches by a Party of the standards of conduct established. This problem received increasing attention with each new effort to codify the rules of war. Immediately prior to the adoption of the 1949 Conventions, it was remarked in reference to one of these earlier conventions that “[i]t is one of the greatest weaknesses of the existing rules on prisoners

7. Art. 2 of each Convention provides in part:
[T]he present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the . . . Parties, even if the state of war is not recognized by one of them.

8. Art. 3 of each Convention provides in part:
In the case of armed conflict not of an international character occurring in the territory of one of the . . . Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
(i) . . . Human, nondiscriminatory treatment of protected persons, including prohibition of:
(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment, and torture . . . .


12. The delegates to the 1864 Convention, supra note 11, rejected a clause requiring punishment of violators. Despite support from the Institute of International Law and the President of the Red Cross to require each party to enact penal legislation for Convention breaches, the 1906 revision provided for “repression” of only two violations: acts of robbery and ill treatment of military sick and wounded. 1906 Convention, supra note 11, art. 28. The 1929 POW Convention provided broader sanctions, but did not require that all breaches be punished. 1929 POW Convention, supra note 11, art. 29. The Hague Regulations contained a provision similar to art. 28 of the 1906 Convention, but it again contained no obligation to promulgate penal ordinances. Hague Regulations, supra note 11, art. 21. See 1 PICTET COMMENTARY, supra note 6, at 352-57.
of war that they do not contain definite and written provisions on
sanctions." In view of such criticisms and the ad hoc measures
taken to deal with the war crimes of World War II, negotiators
in 1949 agreed that specific provisions for punishment of breaches
of the new Conventions were essential. Accordingly, each of the
Four Conventions adopted in 1949 contained an article requiring
each Party to "enact any legislation necessary to provide effective
penal sanctions for persons committing . . . grave breaches" of the
Conventions.

On March 16, 1968, the most notorious American atrocity yet
documented in the Vietnam war took place in the Vietnamese prov-
ince of Quang Ngai. Soldiers of the United States Army's America!
Division participated in an operation in which scores of unarmed
South Vietnamese civilians were slain. If the 1949 Conventions are

13. INST. OF WORLD POLICY, PRISONERS OF WAR 89 (1948) (referring to 1929 POW
Convention, supra note 11).
14. See TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS (U.S.
Trial_, in INTL. CONCILIATION 475 (1950).
15. 1 PICTET COMMENTARY, supra note 6, at 359.
16. Field Convention art. 49; Sea Convention art. 50; POW Convention art. 129;
Civilian Convention art. 146 provide:
The . . . Parties undertake to enact any legislation necessary to provide effective
penal sanctions for persons committing, or ordering to be committed, any of the
grave breaches of the present Convention defined in the following Article.
Each . . . Party shall be under the obligation to search for persons alleged to have
committed, or to have ordered to be committed, such grave breaches, and shall
bring such persons, regardless of their nationality, before its own courts. It may
also, if it prefers, and in accordance with the provisions of its own legislation,
hand such persons over for trial to another . . . Party concerned, provided such
. . . Party has made out a prima facie case.
Each . . . Party shall take measures necessary for the suppression of all acts
contrary to the provisions of the present Convention other than grave breaches
defined in the following Article.
In all circumstances, the accused persons shall benefit by safeguards of proper
trial and defense, which shall not be less favourable than those provided by
Article 105 and those following of the Geneva Convention Relative to the Treat-
ment of Prisoners of War of August 12, 1949.

Grave breaches are defined in each Convention as essentially
those involving any of the following acts, if committed against persons or property
protected by the Convention: wilful killing, torture or inhuman treatment,
including biological experiments, wilfully causing great suffering or serious injury
to body or health, and extensive destruction and appropriation of property, not
justified by military necessity and carried out unlawfully and wantonly.
Field Convention art. 50. See also Sea Convention art. 51; POW Convention art. 130;
Civilian Convention art. 147. It has been noted that these grave breaches are reminis-
cent of the Crimes against Humanity set out in the Nürnberg Charter, discussed in
note 119 infra. García-Mora, _Crimes Against Humanity and the Principle of Nonextra-
17. The notoriety of the incident is illustrated by the fact that the trial of Lieutenant
Calley was the most publicized trial in modern military history. N.Y. Times, March 30,
1971, § 1, at 12, col. 5.
18. See, e.g., Hersh, _My Lai 4: A Report on the Massacre and Its Aftermath_,
applicable in the Vietnam War and to the civilian victims at My Lai, the massacre undoubtedly was a grave breach of the standards of wartime conduct imposed on the Parties by the Conventions. Thus, the United States, as a Party to the Conventions, would be obligated to act in compliance with the penal-sanctions provision of the applicable Convention or Conventions. Acting consistently with the possible existence of such an obligation, the United States brought to trial, and convicted of murder, Army First Lieutenant William L. Calley, Jr., Paul Meadlo's platoon leader. Because of his disclosures on national television, Meadlo, by then discharged from the Army, was subpoenaed as a witness for the prosecution. Meadlo, however, invoked his fifth amendment privilege against self-incrimination and refused to testify. Although granted a writ of immunity from military prosecution by the Commanding General of Fort Benning, Georgia, where the trial by court-martial of Lieutenant Calley was conducted, Meadlo consistently refused to testify until the Government issued a federal immunity order protecting him from civilian prosecution. Finally, under threat of arrest for further refusal to testify after having been granted federal immunity, Meadlo took the witness stand on January 11, 1971. Ten days later, Assistant United States Attorney General William H. Rehnquist struck a disquieting note that has been overlooked in the wake of the Calley conviction: Has the United States violated its treaty obligation under the 1949 Geneva Conventions to prosecute those persons accused of "grave breaches" of the Conventions by granting immunity to a confessed participant in the My Lai slayings?

19. See notes 28-49 infra and accompanying text.
20. See note 16 supra.
26. N.Y. Times, Jan. 12, 1971, at 1, col. 1. Under § 6002 of the Organized Crime Control Act, Act of Oct. 15, 1970, Pub. L. No. 91-452, tit. II, § 201(a), 84 Stat. 927, "the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony . . . compelled under the order . . . may be used against the witness in any criminal case."
27. Statement of William H. Rehnquist, Wall St. J., Jan. 21, 1971, at 1, col. 3. Rehnquist stated that the immunity order may have constituted a violation of the Conventions. But see his later remarks and those of the United States Department of State, discussed in note 178 infra.
II. THRESHOLD ISSUES

A. Application of the Conventions

Before comparing the action of the United States in granting immunity with the nature and extent of its obligations under the Conventions, it must first be determined whether the Conventions apply to the Vietnam War and, if so, precisely what obligations within those Conventions are engaged.

For the Conventions to apply generally, "armed conflict" as required by the Conventions must be found to exist.\textsuperscript{28} The International Committee of the Red Cross (Red Cross) has customarily assumed the duty of policing the application of the Conventions.\textsuperscript{29} In 1965 the Red Cross communicated to the major participants in the Vietnam War its belief that "armed conflict," within the meaning of the Geneva Conventions, existed in South Vietnam.\textsuperscript{30} The Government of the United States has indicated its agreement with that assessment.\textsuperscript{31} Therefore, the Conventions are applicable to the American involvement in Vietnam, regardless of the positions taken by other belligerents.\textsuperscript{32}

Although the United States has agreed that an "armed conflict" within the purview of the Conventions exists, this admission alone does not define the applicable standard of conduct. The Conventions

\textsuperscript{28} See all four Conventions, arts. 2 & 3.


\textsuperscript{31} "[T]he United States Government is applying the provisions of the Geneva Conventions and we expect other parties to the conflict to do likewise." Letter from Dean Rusk, Secretary of State, to Samuel Gonard, President of the Red Cross, Aug. 10, 1965, in 4 INTL. LEGAL MATERIALS 1173 (1965).

\textsuperscript{32} Art. 1 of each Convention, which requires each Party "to respect and to ensure respect for the present Convention in all circumstances," makes clear that the obligations are unilateral, not reciprocal in nature, and that their binding force is not limited to the extent that other Parties observe them. G. DRAPER, THE RED CROSS CONVENTIONS 7-8 (1958). See also notes 184 & 185 infra and accompanying text. All of the major belligerents, with the exception of the NLF, have ratified the Conventions: North Vietnam, 274 U.N.T.S. 335-42 (1957); South Vietnam, 181 U.N.T.S. 549-52 (1953); the United States, supra note 21. However, North Vietnam indicated to the Red Cross its refusal to apply the POW Convention to captured American pilots, and its intention to treat them as war criminals. See letter from Bui Tan Linh, Acting Head of the North Vietnamese Cabinet, to the Red Cross, Aug. 31, 1965, in 5 INTL. REV. OF THE RED CROSS 527-28 (1965). See also 9 INTL. REV. OF THE RED CROSS 343 (1969).
establish standards for two types of armed conflict: conflict between two or more of the Parties, or international conflict; and conflict not of an international character. In the case of an international conflict, article two of each Convention makes clear that compliance with all of the obligations created by the Convention is incumbent upon the Parties involved in the conflict. Thus, if the conflict is an international one, the penal-sanctions article common to all the Conventions requires that the Parties punish those responsible for "grave breaches." However, should the armed conflict not be of an international nature, article three of each Convention binds the Parties only to the minimum standards of conduct established by article three itself. In a noninternational conflict, therefore, there is no treaty obligation to prosecute persons accused of violating such minimum standards since not all Convention provisions are engaged. Here again the United States has resolved the problem by committing itself to the position that the Vietnam conflict is international in character. By taking such a position, the United States has bound itself to comply with all of the Conventions' provisions, including the penal-sanctions articles.

It must next be determined whether the Geneva Conventions apply to the My Lai incident specifically. Because the Field Convention and Sea Convention purport to protect only members of the armed forces of a Party, an American violation of the Conventions resulting from the murder of South Vietnamese civilians could be found to exist only under the POW Convention or the Civilian Convention. The latter Conventions proscribe the willful killing of persons protected by their provisions.

33. See note 7 supra.
34. See note 8 supra. The precise scope of a noninternational conflict for purposes of art. 3 was left undefined in the Conventions, although the article was the most debated of all the provisions considered by the Geneva delegates. Yingling & Ginnane, The Geneva Conventions of 1949, 46 AM. J. INTL. L. 393, 395 (1952).
35. See note 7 supra.
36. See note 8 supra.
37. See note 8 supra.
38. Art. 3 of each Convention provides in part: "The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention." Thus, absent the requisite special agreements, Parties to such a conflict are bound only to the requirements of art. 3, which contains no provision for the punishment of persons who violate its terms.
40. This application is made clear by the titles of the Field and Sea Conventions. See note 6 supra.
41. POW Convention arts. 13 & 130 cover "prisoners of war." Civilian Convention arts. 32 & 137 extend to "protected persons," described in art. 4 as "those who, at any
appears to be inapplicable because its terms provide that "nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are." Since the South Vietnamese civilians killed at My Lai were in the "hands" of American soldiers, whose government maintained normal diplomatic relations with South Vietnam, these civilians were not protected under this Convention. Consequently, only the POW Convention remains as a possible source of protection for such civilians.

The protective provisions of the POW Convention embrace those persons who openly "take up arms to resist the invading forces." In the event that such persons are captured by the invading forces, the POW Convention requires that, should there be any question whether such persons are resisting the invading forces and are thus entitled to the Convention's protections, those protections shall apply until such time as a competent tribunal determines the status question. Although it is not clear that the civilians at My Lai had taken up arms to resist Lieutenant Calley's platoon, nevertheless it appears that the requisite uncertainty existed in the minds of the members of the invading force. Many members of Lieutenant Calley's unit suspected that some of the My Lai inhabitants they encountered were Viet Cong. The degree of their uncertainty is illustrated by Meadlo's statement that he shot babies in their mothers' arms for fear the babies might be carrying concealed grenades. The applicability of the POW Convention to the My Lai civilians becomes even clearer in light of the fact that ambiguities in the Conventions should be resolved in favor of the widest possible coverage, consistent with the special humanitarian purpose of the Conventions and the need for flexibility in development customarily attributed to the laws of warfare.

If any further authority is needed for the proposition of the Convention's applicability to My Lai, it is supplied by the United States Army itself. The Army has stated the United States is obligated to prosecute Lieutenant Calley and others for their actions in the

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42. Civilian Convention art. 4.
43. POW Convention art. 4(a)(6).
44. POW Convention art. 5.
45. Hersh, supra note 18, at 64.
My Lai incident. Left unanswered was the question whether the granting of immunity to Meadlo, who has admitted his participation in the My Lai slayings, was consistent with the Convention’s obligation to prosecute those alleged to have committed grave breaches.

B. The Direct and Supportive Obligations

Under the Geneva Conventions a dual system of responsibilities exists for the Parties because two different types of obligations are created. One type establishes rules to govern the conduct of Parties with respect to war victims. These provisions, which directly regulate the treatment of persons protected by the particular Convention, may be described as “direct” obligations. Such direct obligations can apply to the actions of both Parties and individuals and can be breached by either, although a breach by an individual does not constitute a violation of a Party’s treaty obligations unless the Party directed the individual’s breach. Obligations of the second type apply only to the Parties and not to individuals. These obligations do not regulate the treatment of protected war victims directly, but rather require Parties to act in such a way as to ensure observance of the direct obligations by individuals. Such obligations may be described as “supportive.”

The two most important supportive obligations common to each Convention are the requirements to disseminate the text thereof as widely as possible among the citizens of each Party, especially among the ranks of the Party’s armed forces, and to punish those who commit grave breaches. This second supportive obligation is the essence of the penal-sanctions article. That article embodies three subsidiary requirements: (1) to enact any needed legislation to provide effective punishment for grave breaches; (2) to search for any person, regardless of nationality, who may have committed grave breaches; and (3) to try under stipulated procedural safeguards, or to extradite for trial, any person, regardless of nationality, who may have committed grave breaches. It appears clear that the extensive


49. See note 3 supra.

50. The most important of these rules are common to each of the Conventions. For example, each Convention requires the persons it protects to be treated humanely. Field Convention art. 12; Sea Convention art. 12; POW Convention art. 13; Civilian Convention arts. 27 & 32. In addition, each proscribes the most egregious forms of conduct toward war victims as grave breaches. See note 16 supra.

51. Field Convention art. 47; Sea Convention art. 48; POW Convention art. 127; Civilian Convention art. 144.

52. See note 16 supra.
investigations conducted by the United States have fulfilled the supportive obligation to search for those who committed grave breaches in the My Lai incident.\textsuperscript{53} Whether the United States has complied with the other requirements of the penal-sanctions provision presents issues more difficult to resolve.

Prosecution of Convention offenders presumes that the Parties will establish jurisdictional power over those individuals. In this respect, it is not clear whether the United States has complied with its obligation "to enact any needed legislation" if it has not created jurisdiction over alleged offenders otherwise within its power. Specifically, an inability to bring ex-servicemen to trial would constitute a violation of this obligation.\textsuperscript{54} During consideration of the 1949 Conventions by the United States Senate, most legal authorities expressed the view that, given the existing American legislation and case law concerning the prosecution of war criminals, the United States had little, if any, need to enact additional legislation to comply with the requirement of the penal-sanctions article.\textsuperscript{55} However, despite the fact that the Parties to the new Conventions were considered to have a greater obligation to enact necessary legislation than under previous accords,\textsuperscript{56} the minimal additional legislation then considered necessary was not adopted by the United States.\textsuperscript{57} Furthermore,

\textsuperscript{53.} See notes 165 & 176 infra.


\textsuperscript{55.} The Department of Justice stated to the Chairman of the Senate Foreign Relations Committee that a review of existing legislation revealed little need for further enactments to provide effective penal sanctions for grave breaches. \textit{Hearings on Executives D, E, F and G Before the Senate Comm. on Foreign Relations}, 84th Cong., 1st Sess. 58 (1955) [hereinafter 1955 Senate Hearings]. See also Yingling & Ginnane, supra note 24, at 425-26. It was intended that the Conventions be self-executing through existing United States legislation that punished violations of the laws and customs of war. The UCMJ, arts. 1-140, enacted in 1950, 10 U.S.C. §§ 801-940 (1964), \textit{as amended} (Supp. V, 1965-1969), was thought to cover current and certain former members of the United States Armed Forces. Case law such as \textit{Ex parte Quirin}, 317 U.S. 1 (1942), and \textit{In re Yamashita}, 327 U.S. 1 (1946), which upheld the conviction of enemy aliens tried under the jurisdiction of United States military tribunals, was regarded as sufficient to deal with nonnationals; and some American civilians were then subject to military tribunal jurisdiction under \textit{Madsen v. Kinsella}, 343 U.S. 341 (1952). The Justice Department felt, however, that some additional legislation would be necessary to cover those civilians not subject to any of the above-mentioned provisions or existing criminal statutes.

\textsuperscript{56.} \textit{1 PICET COMMENTARY}, supra note 6, at 383.

\textsuperscript{57.} \textit{Compare} the absence of any coherent legislative approach by the United States to exercise its jurisdiction over violators of the Conventions, or of the laws and customs of war generally, \textit{with} the approach of Great Britain, which has exercised jurisdiction
subsequent to the ratification of the Conventions, court-martial jurisdiction over alleged war criminals has been narrowed drastically by such decisions as United States ex rel. Toth v. Quarles— which declared assertions of military jurisdiction over discharged servicemen unconstitutional—and O'Callahan v. Parker—which limited court-martial jurisdiction to service-connected crimes.

In order, then, to prosecute American civilians accused of grave breaches of the Conventions, some authority other than the court-martial jurisdiction must be found. Presently two other sources of jurisdiction remain available to American prosecutors. The first source consists of existing state and federal criminal statutes whose operation is limited to crimes committed within United States territory. The second source of jurisdiction is the military commission, a court instituted to ensure trial of war crimes not covered by court-martial jurisdiction. Although serious constitutional questions have been raised concerning the validity of a military commission's jurisdiction over former servicemen, to date such jurisdiction has been regarded as proper. Numerous proposals have also been made for Congress to confer authority on the federal


60. For a discussion of a constructive status theory by which the military can exercise court-martial jurisdiction over persons not technically military servicemen, and an implied consent theory by which the military can retain jurisdiction over servicemen who remain in the service beyond their obligation, see, e.g., Note, Military Law— Jurisdiction—Serviceman's Implied Consent to Military Status after Enlistment Term Expired Held Sufficient for Continuing Military Jurisdiction—United States v. Holt, 46 N.Y.U. L. REV. 584 (1971).

61. See, e.g., United States v. Assia, 18 FR 915 (2d Cir. 1902). But see, e.g., the Neutrality Act of 1917, 18 U.S.C. § 960 (1964), which makes criminal any military enterprise to be carried on from the United States against any foreign state with which the United States is at peace.

62. Art. 21, UCMJ, 10 U.S.C. § 921 (1964), as amended (Supp. V, 1965-1969). This provision was enacted pursuant to Congress' power to define and punish offenses against the law of nations. U.S. CONST. art. 1, § 8, cl. 10. Accordingly, the commission can exercise jurisdiction over offenses against the common law of war, whereas the court-martial is limited to jurisdiction over statutory offenses, as presently enumerated in the UCMJ. See Ex parte Vallandigham, 68 U.S. (1 How) 243, 249 (1863). See generally C. HOWLAND, DIGEST OF OPINIONS OF THE JUDGE ADVOCATES GENERAL OF THE ARMY 1066-67 (1915).

63. See Rubin, Legal Aspects of the My Lai Incident, 49 ORE. L. REV. 260, 269-70 (1970); Note, supra note 54, at 964. A commission to try discharged servicemen for alleged war crimes in Vietnam has been suggested on several occasions. See, e.g., N.Y. Times, Jan. 15, 1971, at 7, col. 1; id., Nov. 30, 1969, § 1, at 29, col. 1.
courts to try ex-servicemen for illegal acts allegedly committed while in the service.\textsuperscript{64} It has been suggested that proposed jurisdiction of this genre could be granted and exercised to prosecute an individual such as Meadlo.\textsuperscript{65} Thus, there appears to be a constitutional basis for prosecuting ex-servicemen under existing or proposed legislation for violation of the Geneva Conventions.\textsuperscript{66}

Because it has been demonstrated that the United States has complied with two requirements imposed upon it by the penal-sanctions article of the POW Convention by seeking out violators and providing a means to deal with such persons, consideration can now be given to the question of the United States' compliance with the third requirement of that article. The United States is required by the terms of the article to “bring such persons . . . before its own courts . . . [or] in accordance with . . . its own legislation, hand such persons over for trial to another . . . Party,” while ensuring the accused persons the “safeguards of proper trial and defense.”\textsuperscript{67} The obligation to “hand over,” or extradite, an accused person is of uncertain force,\textsuperscript{68} and is the less compelling of the two methods of handling grave breaches. The more likely alternative is that a Party would bring those accused of grave breaches “before its own courts.” The United States has foreclosed this alternative by granting immunity to an individual who participated in the My Lai slayings. Has this exercise of prosecutorial discretion violated the obligation of the Conventions to prosecute war criminals?

III. Prosecutorial Discretion and the Obligation To Punish

A. Interpretation

The article establishing the supportive obligation to impose penal sanctions for infractions of the Conventions is new and vital: “On

\begin{footnotesize}
\begin{enumerate}
\item See Note, supra note 54, at 965-67, which concludes that conferring jurisdiction on federal courts would be valid if jurisdiction of the military commission were originally valid.
\item But see Note, supra note 64, at 302, which concludes there is presently no forum to try ex-servicemen for My Lai offenses. The analysis, however, limited itself to court-martial jurisdiction and did not address jurisdiction of the military commission. Id. at 281.
\item See note 16 supra.
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[it] hinges, in large measure, success or failure of the Conventions.”

This view, and the historical concern for mandatory punishment of violators of the laws of war, illustrate the importance of determining whether the obligation to prosecute embraces all alleged war criminals. Should it be found that the obligation is absolute, the United States will have violated the Conventions by immunizing Meadlo from prosecution. The scope of the requirement, and the answer to whether the United States has complied with its treaty obligation, can be determined through interpretation of the penal-sanctions provision of the 1949 Geneva Conventions.

The process of treaty interpretation necessarily involves the selection of an interpretive method from a body of complex and occasionally conflicting principles. Although many of the interpretive principles espoused by commentators and employed by decision-makers often overlap and are commonly employed in conjunction with one another, two basic theories predominate: the “objective” and “subjective” theories. The recently concluded Vienna Convention on the Law of Treaties (Vienna Convention), although not yet in force, embodies the principles of the “objective” theory. This theory establishes a hierarchy of interpretive factors that must be considered in a fixed order of priority, the sequence of consideration to end as soon as the objective meaning of the term or terms

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70. See notes 12-16 supra and accompanying text.
71. The consequences of the grant of immunity are particularly dramatic inasmuch as Meadlo was reported to be the chief accomplice of Lieutenant Calley in the mass shootings at My Lai. N.Y. Times, March 30, 1971, at 12, col. 5.
73. See, e.g., Jacobs, Varieties of Approach to Treaty Interpretation: With Special Reference to the Draft Convention on the Law of Treaties Before the Vienna Diplomatic Conference, 18 INTL. & COMP. L.Q. 318 (1969). Although three principles are presented—the subjective (actual intent of the parties), textual (ordinary meaning of the words of the treaty), and teleological (interpretation in light of the treaty’s object and purpose)—the teleological is considered a combination of the other two. Id. at 319. For purposes of simplicity, “objective” and “subjective” will be used in this Comment to designate the theories.
75. Vienna Convention arts. 82 & 84 provide that it will come into force thirty days after the deposit of the thirty-fifth instrument of ratification with the United Nations Secretary-General. As of December 31, 1969, only Nigeria had deposited a ratification. MULTI-LATERAL TREATIES IN RESPECT OF WHICH THE SECRETARY-GENERAL PERFORMS DEPOSITARY FUNCTIONS, U.N. Doc. ST/LEG/SER. D./3, at 371-72 (1970). The United States is not a signatory. Id.
under inquiry becomes evident. The "subjective" theory, on the other hand, includes all relevant factors in an attempt to ascertain the intent of the parties. A leading proponent of the subjective theory is the United States, where the theory is used in both federal and state courts. Since the two theories can produce markedly different results when applied to the resolution of a treaty dispute, the initial choice of theory may prove to be determinative of the controversy. The choice of theory may in turn be dictated by the nature of the resolution process. In construing the obligation of the penal-sanctions provision, it must be realized that "only participant States are qualified, through consultation between themselves, to give an official and, as it were, authentic interpretation of an intergovernmental treaty." Thus, should objection to the granting of immunity be made by another Party to the Conventions, resolution of the controversy would hinge on the outcome of the interpretive dispute between the two Parties. Because the Geneva Conventions do not establish an independent organization to make binding interpretations of their terms, it is doubtful that any such conflict would be settled before a formal tribunal unless the disputing Parties agreed to submit the problem to the International Court of Justice.

76. Vienna Convention art. 31 begins the analytical process with the ordinary meaning of the treaty terms in their context and in light of the treaty's object and purpose. Only if this step leads to an ambiguous or absurd result may one resort to the supplementary evaluative factors listed in art. 32. Such factors include the preparatory works and circumstances of conclusion of the treaty.

77. See Restatement (Second) of Foreign Relations Law of the United States §§ 146-47, at 449-52 (1965) [hereinafter Restatement]. Section 147 lists nine interpretive factors to be considered, but no priority of consideration is established. See also M. McDougall, H. Laswell & J. Miller, The Interpretation of Agreements and World Public Order (1967).

78. See, e.g., Nielsen v. Johnson, 279 U.S. 47, 51 (1929) ("Treaties are to be liberally construed so as to effect the apparent intention of the parties."); Eck v. United Arab Airlines, 15 N.Y.2d 53, 59, 203 N.E.2d 640, 642, 255 N.Y.S.2d 249, 251 (1964) ("[I]t must be recognized that the literal wording of one particularly applicable section of the entire treaty should not set the limits of our interpretive examination.").

79. 3 Pictet Commentary, supra note 6, at 1. See also Restatement, supra note 77, § 148(2), at 456.

80. See generally Gutteridge, The Geneva Conventions of 1949, 29 British Year-Book Int'l. L. 294, 302-05 (1949). The elaborate dispute-settlement procedure created by the Conventions begins with consultations between belligerents through the good offices of the Protecting Powers. Field, Sea, and POW Conventions art. 8; Civilian Convention art. 12. Protecting powers are States instructed by another State to safeguard its interests and those of its nationals in relation to a third State. See 1 Pictet Commentary, supra note 6, at 86-103. In contrast to the provisions of the 1929 POW Convention, the Protecting Powers under the 1949 Conventions may consider matters of interpretation as well as application. Id. at 127. It is clear, however, that final interpretation of the Conventions is not entrusted to the Protecting Powers, but that they are allowed only to mediate differences arising with regard to interpretation. Id. at 129. Should consultations fail, an Enquiry Procedure to investigate the matter may be requested. The Enquiry Procedure is to be conducted in a manner agreed upon by the Parties. Field Convention art. 52; Sea Convention art. 53; POW Convention art. 132; Civilian Convention art. 149. Anticipating the possible failure of both con-
Since the possibility that all the Parties to the Conventions would convene to settle a relatively minor interpretive problem is similarly remote, the most probable method of resolving such a controversy would be direct diplomatic consultations between the United States and the objecting Party. This conclusion corresponds with the traditional international procedure used to resolve treaty disputes. Furthermore, direct consultations allow each Party to attempt to negotiate a result in accordance with its own theory of treaty interpretation rather than to have imposed upon it a theory chosen by an adjudicative body. In such a dispute, it may at least be presumed that the United States would invoke the subjective theory of interpretation and press for a result consistent with that theory. Consequently, the following analysis will proceed under this theory and will attempt to ascertain the intent of the Parties by examining all relevant interpretive factors. However, given the overlapping nature of interpretive principles mentioned earlier, it seems evident that even if the objective theory were controlling, the interpretive process could encompass some factors outside any rigid hierarchy.

Before one engages in an analysis of the penal-sanctions provision, two further precepts of general application must be noted. As indicated above, in interpreting the Conventions to determine whether their provisions protected the civilian victims at My Lai, the underlying objective was to achieve the widest possible application of the Conventions' provisions—an objective supported by the purpose of the Conventions and the history of the laws of war, which the Conventions in part codified. In ascertaining the scope of the obligations created by the penal-sanctions provision, however, the underlying objective is different; it is based on the understanding that the Geneva Conventions were a compromise: "The goal was the highest degree of agreement possible . . . [demanding] many compromises once the parties decided the cost of continued disagreement was too great considering the cost of ratification." It serves the human...
tarian goals of the Conventions to interpret their provisions to afford protection to war victims in the maximum number of circumstances. An interpretation of these provisions, however, must also recognize the demands of state sovereignty as that concept operated in the formulation of the provisions under inquiry in light of the goal of attracting the maximum number of signatories willing to abide by the Conventions' terms. This focus requires that interpretive weight be given to the desire of each Party to retain, with minimum modification, those practices it followed prior to undertaking the obligations of the Convention. Finally, in interpreting the Conventions, the intention of the delegates to the 1949 Diplomatic Conference to leave unresolved issues open for future development, rather than to freeze the 1949 understanding of such matters into the Conventions, must be considered. Hence, in addition to all relevant factors under the subjective theory, the following analysis will incorporate the requirements of state sovereignty and the desire of the draftsmen not to foreclose modification of the Conventions by future legal developments.

B. The Conventions

In an attempt to ascertain the extent of the obligation to prosecute violators of the Convention, the first interpretive factor for consideration under the subjective theory is the ordinary meaning of the terms of the penal-sanctions provision itself. This provision states that each Party "shall be under the obligation . . . to bring such persons [those who allegedly have committed, or have ordered to be committed, grave breaches] . . . before its own courts." Although the literal meaning of this phrase seems to establish an absolute obligation to prosecute all accused persons, a result that would foreclose further inquiry under the objective theory, such literal meaning is not solely determinative under the subjective theory of interpretation applicable here. Beyond the explicit mandate to prosecute, this interpretive process would consider the context of the

87. It is clear, however, that despite the desire to give each Party the fullest opportunity to apply its own national laws in a given situation, adherence to the minimum standards of international justice must still be required. See notes 114 & 144 infra and accompanying text.
88. See, e.g., G. Drafer, supra note 32, at 21; 1 PICTET COMMENTARY, supra note 6, at 366. See also text accompanying note 204 infra.
89. RESTATEMENT, supra note 77, § 147(2), at 452. This factor is also the first cited under the objective theory. Vienna Convention art. 31.
90. See note 16 supra.
entire penal-sanctions article. The terms of this article include the POW Convention's guarantee of certain procedural safeguards to an accused prosecuted under its mandate. Such a guarantee might be pertinent to the grant of immunity at issue because the exercise of prosecutorial discretion is a practice traditionally considered to be a part of criminal procedure. The procedures set out by the article, however, are silent with regard to discretionary matters of prosecution. Therefore, if any illuminating information is to be gained from the article, it must be found in its negotiating history. Unfortunately, that source of interpretive assistance is equally unavailing. Prior drafts of the article make no reference to any matters committed to the discretion of the prosecuting Parties. The negotiating history does make clear that the article was intended to strengthen the obligation to enact legislation for the imposition of sanctions, and that the delegates to the Diplomatic Conference were determined to punish all violators. This determination to punish all violators must be considered in the context of the pre-1949 Conventions and their provisions regarding penal sanctions. In these earlier conventions, mandatory punishment, if it existed at all, applied only to certain offenses. Thus, the emphasis on strengthening the requirement to prosecute accused violators discernible in the history of the 1949 Conventions, when compared to the earlier, less comprehensive, obligation, need not suggest an absolute duty to prosecute.

Because examination of the penal-sanctions article results in ambiguity, other provisions of the Conventions that might by implication be helpful must be scrutinized. The only provisions in the Conventions that are similar to the penal-sanctions provision in that they deal with a deliberative process and decisions on findings from that process—which implicitly includes discretionary power to choose among different courses of action based on the findings—are those establishing the Conventions' dispute-settlement procedures. Specifically, the provision most helpful in understanding the approach of the 1949 Conference to the exercise of discretionary power

92. See note 16 supra.
93. See text accompanying note 143 infra.
94. The procedural rights under the Conventions are specified only in arts. 105-08 of the POW Convention. These include rights to notice, counsel, and appeal and humane conditions of imprisonment equal to that afforded nationals of the convicting Party. Negotiating history reveals that these safeguards were derived from those already established by arts. 60-67 of the 1929 POW Convention, and reflected no desire to make new law. 1 PICTET COMMENTARY, supra note 6, at 569.
95. See generally 1 PICTET COMMENTARY, supra note 6, at 359-68.
96. See text accompanying notes 15 & 56 supra.
97. See note 12 supra. See also PICTET, supra note 29, at 470.
98. See note 89 supra and accompanying text.
to prosecute is the article creating the Enquiry Procedure. The
Enquiry Procedure, which is the second and final mandatory step in
the dispute-resolution process provided by the Conventions, entails
action on findings of fact and therefore might address discretionary
practices connected with such action. However, neither the terms of
the article nor its negotiating history makes any reference to alterna-
tive courses of action available once facts are found that constitute a
violation of the Conventions; the Parties are simply required to
suppress the violation without delay. Thus, it may reasonably be
concluded that the Conventions do not speak, either in specific
terms or in drafting history, to any matters of discretionary action.
Consequently, the interpretive maxim *expressio unius est exclusio
alterius*—expression at one place is exclusion elsewhere—cannot be
employed to infer that prosecutorial discretion is precluded in the
penal-sanctions article because such discretionary power is provided
for elsewhere in the Conventions.

Another source of guidance in interpreting the penal-sanctions
provision is the actions taken by Parties subsequent to their ratifica-
tion of the Conventions, because such actions might reveal the in-
terpretations of the Parties relative to discretionary matters. Pursu-
ant to the penal-sanctions article, Parties are required to enact
legislation necessary to implement the terms of the article. These
legislative actions likewise make no provision for the exercise of
discretionary power.

Additional data to aid the subjective process of interpretation are
the opinions of authoritative legal sources. Foremost in degree of
authority, because of its special role in relation to the Conventions
and the great esteem in which its opinions are held, are statements
by the Red Cross. Commentary by this organization provides the
first suggestion that the Conventions’ obligation to punish may em-
body, sub silentio, some measure of discretionary power. As will be
discussed later, one of the factors on which the discretionary power
of the prosecutor may turn is the gravity of the offense, a factor
which a Japanese prosecutor, for example, is legislatively authorized
to consider in domestic cases. In 1949, the Red Cross, in an attempt
to enhance the effectiveness of the supportive obligation to punish
grave breaches, expressed a desire for the development of a model
law for the repress of violations of the Conventions. The Red

99. Id.
100. 1 *PICTET COMMENTARY*, *supra* note 6, at 374-79.
101. See especially the enactments of Great Britain, India, and the Soviet Union,
*supra* note 57. For a summary of the legislative compliance of other Parties, see 3
*PICTET COMMENTARY*, *supra* note 6, at 621 n.1; Levie, *supra* note 68, at 455 n.90.
102. See note 29 *supra*.
103. See note 193 *infra*.
104. 1 *PICTET COMMENTARY*, *supra* note 6, at 353-64.
Cross recommended that the model law specify that the penalty for each infraction of the Conventions be in proportion to the gravity of the offense; this implies that each Party should permit its prosecutor to formulate a charge consistent with his determination of the gravity of the offense. Of more general import, however, are the views of the Red Cross regarding procedural matters in the aggregate. At the Sixth International Congress of Penal Law, at which discussions of the model law suggested by the Red Cross took place, it was agreed that “the fixing of the sentence and the procedure to be followed are . . . matters for national legislation in each country.” Sentencing is a clear example of the exercise of discretionary power in the administration of criminal justice. And, as mentioned earlier, prosecutorial discretion has been considered to fall within the generic term “procedure,” which, according to the quoted statement, is committed to national legislation. Whether “procedure,” in the sense of the 1949 Conventions, could be construed to include such prosecutorial discretion as the United States has exercised is unclear.

American legal thought may also be considered as an aid in the subjective process of interpretation. The late Secretary of State John Foster Dulles, in a letter written to solicit Senate support for the Conventions, stated that his support for the Conventions was based on the need for the United States to aid in the interpretation and enforcement of the Conventions, and the need to invoke them to protect United States citizens. This position implies an understanding that American practices, which have traditionally included the exercise of prosecutorial discretion, are not precluded by the Conventions, but rather should be influential in interpreting the obligations imposed on the Parties. Such a conclusion is also a further indication that national law should govern discretionary practices as a part of the “procedures” committed to national legislation. In support of this general view favoring national control over procedures is a former Chief of the International Affairs Division of the Judge Advocate General’s office, who, although he does not specify prosecutorial discretion to be a part of such procedures, has stated that the procedural safeguards of the penal-sanctions article contemplate the application of national procedures with the limiting proviso that such procedures must not violate minimum

105. Id.
106. 3 PICETT COMMENTARY, supra note 6, at 621 n.2.
108. See note 93 supra and accompanying text.
109. See notes 115-13 infra and accompanying text.
110. 1955 Senate Hearings, supra note 55, at 60-61.
111. See notes 146-50 infra and accompanying text.
international standards. Finally, a former Legal Adviser of the United States Department of State has expressed the belief that a Party to the Conventions trying one of its own nationals for grave breaches, which would be the precise situation should Meadlo be brought to trial, would be governed only by its own national laws. The American opinion on “national procedures” under the Conventions is therefore consistent with that of the Red Cross and other multinational groups.

Although these authoritative legal sources provide a consensus of opinion that procedural matters should be left to the national laws of the Parties, it is still not clear that the procedures were intended to include the discretionary power to withhold prosecution. To resolve such ambiguity, the fundamental principles of treaty interpretation allow resort to the technique of “supplement[ing] the expressions of the parties by making reference to the basic constitutive policies of the larger community which embraces ... [those parties].” Therefore, if it can be shown that there was a wide degree of international practice permitting the exercise of prosecutorial discretion in some form, it may be fairly assumed that such a practice was part of the background assumptions that the draftsmen brought to the 1949 Conference, at least with respect to the decision to allow leeway for future developments in the law. The existence of such a constitutive policy and the failure of the 1949 Diplomatic Conference to gainsay this policy would suggest that the practice of prosecutorial discretion was implicitly included in the aggregate of procedures customarily committed to national determination.

C. International Practice

In ascertaining the nature and extent of discretionary enforcement practices in the international community, two sources of information are important—those that deal with the subject on an

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112. Levie, supra note 68, at 454 n.86. See also notes 87 supra & 114 infra.

113. Yingling & Ginnane, supra note 34, at 426 n.110. Prior to the American proceedings on the My Lai incident, it was generally believed that trials under the Conventions would take place only when one belligerent had gained a decisive victory, and that the accused would presumably be citizens of the vanquished nation. G. Draper, supra note 32, at 23. But cf. Levie, supra note 68, at 461. It could therefore be argued that, regardless of the intentions of the Parties with regard to discretionary power in the normal prosecution contemplated, the problem of discretionary power in the present situation was simply not envisioned by the draftsmen.

114. This view is in accord with the recognized rule of international law that the “regularity of a court’s practice and procedure are to be judged in the first instance by the local law ... [p]rovided the system of law conforms with reasonable principles of civilized justice and provided that it is fairly administered.” 5 G. Hackworth, Digest of International Law 541 (1940).

115. Proceedings supra note 72, at 113. See also M. McDougal, H. Laswell & J. Miller, supra note 77, at 594-95; Restatement, supra note 77, § 148(l)(h), at 451.

116. See notes 106, 113 & 114 supra and accompanying text.
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international basis and those that address the internal practice of
nations. Inquiry into the first source must begin with consideration
of those influential documents that purport to set forth standards
for the protection of human rights to be followed by nations.117 In
particular, reference must be made to the minimum judicial safe­
guards for civil and criminal procedures, which were devised for
the protection of human rights, to determine if such safeguards
include the regulation of prosecutorial discretion. These documents,
however, are silent on the exercise of discretionary powers.118 So
too are the provisions established to govern the procedures that
were followed in the prosecution of war criminals after World War
II,119 although the International Tribunal and signatory States were
given the right to proceed against accused persons, and not the
duty to do so, a provision indicating some latitude for discretionary
decision-making.120 Commentators on international law, consistent
with the conclusion of a leading legal scholar that there is "no
systematic scholarly effort to penetrate discretionary justice,"121
generally make no reference to the practice of prosecutorial discre­
 tion in their discussions of procedure.122 Therefore, to determine if

criminal court procedure is essentially a matter of protecting human rights. . . . The most elementary


120. Nürnberg Charter, supra note 119, arts. 10 & 12.


122. See, e.g., Orfield, What Constitutes Fair Criminal Procedure under Municipal and International Law, 12 U. Prrr. L. Rev. 35 (1950). Even in a recent treatment of
prosecutorial discretion represents a "basic constitutive policy" of the larger community, the practice of individual nations below the international level must be examined. Discretionary power is relied upon to a far greater extent in common-law countries than in European civil-law countries. Indeed, it has been noted that "nowhere is the contrast [between discretionary practices] greater than that between the American assumption that selective enforcement is necessary and the continental assumption that it is not." The use of prosecutorial discretion in the continental civil-law countries would lead one to suspect that the practice is a part of the criminal procedure of nations with less restrictive enforcement standards than the civil-law countries. The following sampling of the practices of nine nations representing three major legal systems supports the belief that prosecutorial discretion has in fact been a common practice.

The concept that provides the marked contrast between the civil- and common-law countries is the "legality principle." It is most strictly applied in the civil-law country of West Germany, where the statutory embodiment of the principle limits the prosecutor's freedom to refrain from initiating proceedings once he has evidence of criminal conduct. Yet, even in West Germany, deviation from the "legality principle" is permitted under the "principle of expediency." Likewise, in the civil-law countries of Sweden and Finland, similar exceptions to the prosecutor's legal duty to proceed are allowed, particularly in the case of youthful offenders. Furthermore, although the discretion permitted German prosecutors may be very limited, German judges have some of the discretionary powers possessed by American prosecutors. This procedure corresponds to the traditional French civil-law practice in which the role of the prosecutor has been to recommend a just solution to the judge, who then makes the prosecutorial decisions. Like his German counterpart,
the French prosecutor has a limited area within which he may de­
cline to prosecute when he thinks it advisable to do so.130 Thus, it
appears that even in those nations in which discretionary power is
thought to be severely restricted, prosecutorial discretion has existed,
either in prosecutors or in judges. Also of note is the fact that some
civil-law countries deviate more widely from the legality principle
than do West Germany and France. In Denmark and Norway, for
example, prosecutors have a wide range of discretion to waive
prosecution for less serious offenses.131 Japan, which operates under
what has been termed a religious and traditional law system,132 pro­
vides yet another illustration of decisional latitude allowed a prose­
cutor. In Japan, authority to determine whether to proceed against
an accused, and in what form, has been vested in the prosecutor
since the late nineteenth century; it was statutorily recognized as
early as 1922.133

The most pervasive use of discretionary power, however, is found
in the common-law countries, where it is an established practice.134
The common-law countries traditionally employ an accusatory sys­
tem in their administration of criminal justice, combining in the
prosecutor the roles of accuser, investigator, and initiator of trial—
roles which the inquisitorial system of the civil-law countries keeps
separate.135 Illustrative of the common-law practice is the observation
that, in Canada, a major aspect of the prosecutor's role in the ad­
ministration of justice is his freedom to exercise wide-ranging dis­
cretion.136 In England there is prosecutorial discretion with respect
to all crimes.137

The foregoing sample of discretionary power in three major legal
systems provides strong evidence of a uniformity of international
practice sufficient to resolve the ambiguity surrounding the penal­
sanctions article of the Geneva Conventions.138 In light of the com­
mon practice of these countries to permit at least some measure of

130. Id. at 488-89. See also Orfield, supra note 122, at 39.
131. See K. Davis, supra note 107, at 192 n.4.
132. See R. Davis & J. Brierley, Major Legal Systems in the World Today 384
(1965).
133. Dando, System of Discretionary Prosecution in Japan, 18 AM. J. COMP. L.
518 (1970). The 1922 Code authorized the prosecutor to consider such factors as "the
character, age, and environment of the offender." Id. at 520. The 1948 Code added
the factor of the gravity of the offense. Id. at 521.
134. See text accompanying note 124 supra.
135. See notes 125-30 supra and accompanying text. It is clear that this common­
law accusatory system is as legitimate under the standards of international law as the
civil-law inquisitorial system. See 5 G. Hackworth, supra 114, at 541; Orfield, supra
note 122, at 43.
136. See Grosman, supra note 121, at 502.
137. See Williams, Discretion in Prosecuting, 1956 CRIM. L. REV. 222.
138. See note 115 supra and accompanying text.
discretion in prosecuting the criminally accused, the silence of the Geneva Conventions on such discretion may be interpreted in one of three ways. First, while discretionary practices apparently were permitted in a number of national procedures, articulation and analysis of prosecutorial discretion has only recently been initiated. It is possible, then, that the draftsmen of the 1949 Conventions either did not advert to prosecutorial discretion, or viewed it as so inherently a part of the administration of justice that they felt no need to give an explicit endorsement to the practice. Second, given the divergence of practice between the common-law and civil-law countries, fundamental disagreement among the delegates concerning what form discretion should take may have led to its omission from the Conventions altogether. Nevertheless, because of the critical goal of obtaining a maximum number of signatories to the Conventions and the number of national systems engaging in such discretionary practices, this omission could be read as a compromise to the principle of state sovereignty, impliedly allowing the practice according to each Party’s national law. Finally, although the use of prosecutorial discretion in the international community may have been less extensive in 1949, the absence of a proscription of the practice may be indicative of the vision of the draftsmen in leaving the matter open for future development, as was done in at least one other provision. Such a position would be in keeping with appropriate canons of treaty interpretation and would recognize the validity under the Conventions of the present widespread exercise of prosecutorial discretion.

The ambiguity of the extent of the Conventions’ supportive obligation to prosecute those accused of committing grave breaches is, under any of the three interpretations above, resolved in favor of recognizing the intent of the Parties to allow the exercise of prosecutorial discretion. Furthermore, the practice of the states sampled above reveals that the discretionary practices are included in the procedures of criminal prosecutions. Such procedural matters are customarily left to national laws, also thought to be the appropriate method for establishing procedures required under the Conventions. Therefore, to determine whether the United States’ decision

139. See notes 121 supra & 145 infra and accompanying text.
140. See note 86 supra and accompanying text.
141. The question whether a person could be handed over for trial to an international penal tribunal was specifically left open by the delegates to the Diplomatic Conference so as not to hamper future developments in the law. G. DRAPER, supra note 32, at 21; 1 PICTET COMMENTARY, supra note 6, at 366.
142. See, e.g., Larsen, Between Scylla and Charybdis in Treaty Interpretation, 63 AM. J. INT’L L. 108, 110 (1969) (“The most one can hope is that . . . lawyers can build an open-ended structure of law which will not restrict the desirable evolution of events, but give some shape and direction to them.”).
143. See notes 106, 113 & 114 supra and accompanying text.
to refrain from prosecuting a participant in the My Lai slayings violates the obligation imposed by the Conventions, it must be established whether the grant of immunity violates United States' law. Additionally, consideration must be given to the dictates of international law, which place limitations even on matters left to the determination of individual nations in order to ensure that minimum standards of justice and fairness are observed.\textsuperscript{144}

D. The Practice of the United States

As was true with the international practice of prosecutorial discretion, scholarly materials dealing with the practice in the United States have been very limited until recently.\textsuperscript{145} In actual practice, prosecutorial discretion includes decisions over many activities in the administration of criminal justice,\textsuperscript{146} but a decision not to prosecute stands as the most dramatic.\textsuperscript{147} The exercise of that discretion is one of the outstanding characteristics of the American legal system. It is a power that has been consistently upheld in the office of the prosecutor.\textsuperscript{148} The reason for the widespread use of prosecutorial discretion in the United States, as in other common-law countries, is that full enforcement of the law has never been considered a tenable objective.\textsuperscript{149} Accordingly, American legal thought has supported the proposition that prosecution may be withheld in certain situations consistent with public interest, despite legal and factual circumstances sufficient to justify initiation of criminal proceedings.\textsuperscript{150}


\textsuperscript{145} See, e.g., note 121 supra; Kaplan, The Prosecutorial Discretion—A Comment, 60 NW. U. L. REV. 174, 176 (1965) (“[N]o serious study of the prosecutorial discretion has appeared in print within the past three decades). For two recent studies, see K. Davis, supra note 107; F. Miller, Prosecution: The Decision To Charge a Suspect With a Crime (1970).

\textsuperscript{146} Decisions subject to prosecutorial discretion include those to investigate, arrest, negotiate, or prosecute. K. Davis, supra note 107, at 6.

\textsuperscript{147} Id. at 188. See also LaFave, The Prosecutor's Discretion in the United States, 18 AM. J. COMP. L. 532 (1970); Schwartz, Federal Criminal Jurisdiction and Prosecutor's Discretion, 13 LAW & CONTEMP. PROB. 84, 83 (1948).

\textsuperscript{148} See, e.g., Pagach v. Klein, 198 F. Supp. 630, 635 (S.D.N.Y. 1961), and cases cited in note 154 infra. See also Model Code of Pre-Arraignment Procedure § 602 (Tent. Draft No. 1, 1966); F. Miller, supra note 145, at 10. Within the federal government, the prosecutorial function was centralized in the Department of Justice; by executive order this function included the discretionary power "to abandon prosecution." Schwartz, supra note 147, at 84. See also The Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts 76 (1967) [hereinafter Task Force Report].

\textsuperscript{149} F. Miller, supra note 145, at 151. See also K. Davis, supra note 107, at 162; Task Force Report, supra note 148, at 5-8.

\textsuperscript{150} See, e.g., ABA Advisory Comm. Project on Minimum Standards for Criminal Justice, Standards Relating To The Prosecution And Defense Function § 3.9(b), at 92 (Tent. Draft 1970) [hereinafter Advisory Committee Report].
The most insistent criticisms of the discretionary system focus on the absence of criteria to define those situations in which the public interest makes it appropriate to waive prosecution.\textsuperscript{151} As a result of such criticisms, principles have begun to emerge against which the validity of a grant of immunity can be measured.

Formal norms designed to guide the prosecutor in the exercise of discretionary power are rarely found in statutes or judicial decisions.\textsuperscript{152} Occasional statutes have required explanatory statements from prosecutors who decline to charge or who reduce an otherwise justifiably higher charge, but such statutes have not provided standards for these decisions.\textsuperscript{153} Judicial statements are equally unavailing. The traditional view has been that "as an incident of the constitutional separation of powers . . . courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions,"\textsuperscript{154} although the establishment of minimum requirements of good faith and a rational basis for dismissal has been urged.\textsuperscript{155} The standards that do exist have been suggested in the writings of commentators\textsuperscript{156} and recently in the formal legitimation of certain discretionary practices by more influential legal sources.\textsuperscript{157} A widely recognized justification for the exercise of prosecutorial discretion is the opportunity it provides to achieve other enforcement goals.\textsuperscript{158} Within that broad category of justification, the principle that an accused might be more valuable as a witness than as a defendant has been

\textsuperscript{151} "The greatest and most frequent injustice occurs ... [in discretionary decision-making] where rules and principles provide little or no guidance, where emotions of deciding officers may affect what they do, where political or other favoritism may influence decisions, and where the imperfections of human nature are reflected in the choices." K. Davis, supra note 107, at 4.

\textsuperscript{152} F. Miller, supra note 145, at 5.

\textsuperscript{153} Mich. Stat. Ann. § 29.981 (1956) (the prosecutor's reasons in fact and law for deciding not to charge must be stated); N.Y. Code Crim. Proc. § 342-a (McKinney's 1958) (the District Attorney must submit to the court his reasons for recommending the acceptance of a guilty plea for a lesser offense or punishment).


\textsuperscript{155} United States v. Cox, 342 F.2d 167, 179 (5th Cir.), cert. denied, 381 U.S. 935 (1965) (Judges Rives, Gewin & Bell, dissenting in part).

\textsuperscript{156} For one of the earliest articulations of a general criterion, see Snyder, The District Attorney's Hardest Task, 30 J. Am. Inst. of Crim. L. & Criminology 167 (1929). Snyder suggests that the prosecutor should select only strategic cases in order to avoid adverse public opinion that he is persecuting so many cases rather than prosecuting the right ones. Id. at 173.

\textsuperscript{157} See, e.g., Advisory Committee Report, supra note 150; Task Force Report, supra note 148.

\textsuperscript{158} See generally F. Miller, supra note 145, ch. 17; LaFave, supra note 147, at 535.
established in practice, approved by a Presidential Commission, and tentatively adopted by a committee of the American Bar Association. The reason generally given for inducing testimony by a waiver of prosecution is the desire to convict a more serious criminal, and in critical federal cases, top officials of the Justice Department have normally assumed direct control from subordinates in the decision to waive prosecution.

In the trial of Lieutenant Calley, it was of paramount importance to the United States Government that the full measure of available evidence be a part of the deliberations and the ultimate decision, for this trial was the stage on which were re-enacted the actions of the United States military at My Lai; it was the setting in which all observers would judge the American legal process and its response to war crimes. The essentiality of ensuring the exhaustive and legitimate nature of the proceedings in view of the type of charges, the symbolic impact of the trial, and the position of the accused as the officer directly responsible for the assault on the village, needs no explication. The emphasis placed by the United States Government on gathering the maximum amount of evidence and proceeding as far as that evidence warranted, while at the same time providing the fullest measure of procedural protections for the accused is illustrative of the significance attached to the Calley trial. The importance of securing Meadlo’s testimony as one who, by his own admission, had fired upon South Vietnamese civilians under orders of the accused and had seen the accused do the same, is equally clear. Such circumstances traditionally have been consid-

160. TASK FORCE REPORT, supra note 148, at 4-6.
161. See ADVISORY COMMITTEE REPORT, supra note 150, § 3.9(b)(vii), at 92.
163. TASK FORCE REPORT, supra note 148, at 76; Kaplan, supra note 145, at 175.
164. See, e.g., the comment of the Army prosecutor for the trial of Lieutenant Calley: “The trial of Lieutenant Calley was also in a very real sense the trial of the military judicial system.” N.Y. Times, April 7, 1971, § 1, at 12, col. 1. See also notes 165 & 176 infra.
166. See White Paper, supra note 48.
167. For the special procedural protections afforded the accused, see the letter of the Army prosecutor, Capt. Aubrey M. Daniel, to President Nixon, in N.Y. Times April 7, 1971, § 1, at 12, col. 1, which cites as one special procedure the jury-selection method, which allowed the defense three peremptory challenges instead of the normal one.
168. The Department of Justice has acknowledged that the purpose of granting immunity was to improve the chances of a successful prosecution of Lieutenant Calley. See Rehnquist Letter, supra note 54. Although the defense eventually admitted that
erred appropriate for the exercise of prosecutorial discretion. Additionally, the grant of immunity was especially necessary because of Meadlo's adamant refusals to testify. Therefore, this decision not to prosecute an alleged war criminal does not, by American standards, constitute an unwarranted exercise of discretionary power. On the contrary, the reasons for withholding prosecution in this case fit squarely within the emerging principles that are thought to justify the exercise of such power.

While the grant of immunity is thus consistent with the "national procedures" of the United States, to meet the requirements of the Geneva Conventions the grant must also comport with the minimum standards of international law. These standards provide no precise formula against which to measure a particular action, even when the practice involved is of a more structured nature than the practice at issue here. The paucity of articulated principles relating to the exercise of discretionary power by national and international judicial systems makes it particularly difficult to elicit any clear guidelines for evaluating the grant of immunity. The only compelling international criterion for judging the United States' action is the fundamental purpose of the penal-sanctions article itself: to sanction grave breaches and to deter such breaches in a spirit of reprobation of war. For more than a century it has been this spirit that has periodically caused nations to agree on means of regulating the conduct of armed conflict, and it is this spirit that must be the touchstone for determining whether the United States has fulfilled its obligations under the Conventions. Thus, as the achievement of other enforcement goals justifies the exercise of discretionary power in the American system, so under international standards service to the spirit of the Conventions seems equally to justify the discretionary actions of a Party.

Calley ordered and participated in the execution of civilians at My Lai, this admission came after the granting of immunity to Meadlo. N.Y. Times, Feb. 16, 1971, at 10, col. 1.

169. See notes 147, 155, 158-63 supra and accompanying text and note 170 infra and accompanying text.


171. What constitutes failure to comply with international standards of justice, however, has never been clearly established, but remains to be determined on a case-by-case basis. "International tribunals have traditionally declined to lay down a comprehensive definition of 'denial of justice' just as the [United States] Supreme Court has declined to give a comprehensive definition of 'due process.'" Wise, supra note 117, at 138.

172. Pictet, supra note 29, at 475.

173. See notes 11 & 12 supra.

174. See note 158 supra and accompanying text.
tion of Meadlo cannot be isolated from the Government’s awareness of the acute national and international interest in its conduct of military operations in South Vietnam, and especially its actions with regard to the war crimes committed at My Lai. The Government’s sensitivity to domestic and world opinion concerning the My Lai proceedings is amply demonstrated by the extraordinary lengths to which it has gone to investigate the incident and bring charges on the evidence so gathered. Further, the meticulous attention devoted to the proper conduct of the trial of Lieutenant Calley and the granting of immunity to Meadlo are outgrowths of the Government’s desire for a successful and unimpeachable prosecution of the Lieutenant, a desire fully in accord with the objective of the penal-sanctions article. Even if the United States has violated the letter of the Conventions’ obligation to prosecute those accused of grave breaches, the objective sought, the conviction of the most notorious of the accused under the fairest of circumstances, falls within the underlying spirit of the Conventions’ dictate. Indeed, in this instance the failure to grant immunity could be said to be a violation of the treaty obligation to prosecute war criminals. Without an order of immunity to induce Meadlo’s testimony, the prosecution would have been unable to marshal all critical evidence against Lieutenant Calley and thus arguably would have failed in its duty to ensure punishment of war criminals.

The decision to forgo prosecution of Meadlo does not appear then, to contravene any minimum standard of international justice. It has further been demonstrated that the federal grant of immunity is consistent with national norms regulating the practice. These determinations are important because the Geneva Conventions themselves provide minimal guidance in defining the contours of the prosecutorial obligation. Rather, the Conventions envisioned that the scope of the obligation would be delimitated in the national and

175. President Nixon, in expressing United States policy in Vietnam shortly after the indictment of Lieutenant Calley and Meadlo’s television interview, stated that we are fighting for the goal of keeping the South Vietnamese “from having imposed on them a government which has atrocity against civilians as one of its policies, and we cannot ever condone or use atrocities against civilians in order to accomplish that goal.” N.Y. Times, Dec. 9, 1969, § 1, at 16, col. 1.

176. The Government commissioned the Peers Panel, headed by United States Army Lieutenant General William Peers and composed of five other officers and two civilians, to investigate the inadequacy of the initial military inquiry into the My Lai incident. The result of this thorough effort was the indictment of twenty-five men under various articles of the UCMJ. Thirteen officers were charged with failure to investigate and report the incident. Twelve infantrymen, including Captain Ernest Medina, Company Commander of the force that assaulted My Lai, and his platoon leader, Lieutenant Calley, were charged with criminal violations. See generally N.Y. Times, March 17, 1970, at 1, col. 2; id., March 18, 1970, at 1, col. 8.

177. This position has been advanced by the Department of State. See Futterman Letter, supra note 54.
international regimes. In the present case, those regimes support the exercise of prosecutorial discretion.}\footnote{178. Despite his earlier statement to the press that the United States' grant of immunity might have violated its obligation under the Conventions, Assistant Attorney General Rehnquist has subsequently espoused the view that "no violation of the Conventions took place." See Rehnquist Letter, supra note 54, and note 27 supra.}

\section*{IV. Legal Consequences of the United States Position}

Recognition of the justifications apparent in the American action suggests that a disputatious response would be unlikely. However, any strictly legal analysis will not be free from ambiguity because of the vagaries of treaty interpretation and the variance among nations in discretionary practices. Therefore, in order to achieve a more complete perspective on the legal consequences of the issuance of the immunity order, consideration must be given to the effects of a challenge to that order as a violation of the Conventions.

At the outset, the distinction noted between the Conventions' direct and supportive obligations\footnote{179. See notes 50-53 supra and accompanying text.} again is instructive. Certainly the most serious contentions may be raised by those South Vietnamese civilians who suffered personal and property losses from the American military action at My Lai; at their instigation, the Government of South Vietnam might press a war claim on their behalf against the United States.\footnote{180. Such a procedure would represent what are traditionally called "war claims," types of conduct by which the liability of a nation is engaged under the broader rubric of the law of international claims. See, e.g., G. Hackworth, supra note 114, at 471-851; M. Whitteman, DAMAGES IN INTERNATIONAL LAW (1945); Restatement, supra note 77, §§ 164-214, at 499-633. For an individual to avail himself of the process of an international claim he must request his government to press such a claim in his behalf, since the right under which he claims is the violation of an international legal interest of his government, not an individual personal right. Whether a government will pursue its citizen's claim, either through informal negotiations or through more formal proceedings before some international tribunal, is normally a matter of national policy or law. See generally E. Borchard, The Diplomatic Protection of Citizens Abroad 355-98 (1915). Thus, there is no assurance South Vietnam would press such a claim for its injured citizens even though there may be a valid theory of liability under the "war claims" category of liability-producing conduct. That category provides for recovery of damages resulting from illegal acts of war falling outside the ambit of nonrecoverable losses resulting from "legal" acts of war ("war losses"). See generally G. Hackworth, supra note 114, at 682-706; Hanna, Legal Liability for War Damage, 43 MICH. L. REV. 1057 (1945). The fact that a treaty codifies certain norms of conduct during war, as do the Geneva Conventions in their direct obligations, makes it easier to ascertain whether the United States military actions at My Lai fall outside the permissible boundaries of "war losses." The war claims mechanism has generally proved unsatisfactory. The terms have more often been imposed by the victors than by the rules of international law. See, e.g., W. Bishop, INTERNATIONAL LAW, CASES AND MATERIALS 725 (5th ed. 1971). See also note 113 supra. In the present case, the possibility of an amicable settlement would be greater because the parties are allies.} If the Conventions should constitute grounds for such a war claim, the claim would be based on the violation of a direct obligation prohibiting grave breaches, and not on
the supportive obligation to punish such breaches. However, it is also possible that an objection could be raised to the hypothetical violation by the United States of its supportive obligation to prosecute those accused of grave breaches. This objection could only be raised by Parties to the Geneva Conventions, since non-Party nations would have no standing to object to the violation of a treaty to which they were not signatories.

There are three sources of controversy within this limitation. The first such source, and the first Party that might conceivably object to the granting of immunity, would be the Government of South Vietnam, especially since under existing treaty obligations South Vietnam is unable to take direct action against the United States servicemen and therefore must rely upon the United States to redress its grievances. While South Vietnam would be the most aggrieved Party if the United States is in violation of its treaty obligation, it is highly improbable that the South Vietnamese Government would object to the United States' decision regarding immunity. The South Vietnamese Government's primary concern would be directed to rectification of the breach of the Conventions' direct obligations, after which South Vietnam, as an American ally recognizing the lengths to which the United States has gone to fulfill its supportive obligations under the penal-sanctions provision, would probably be in accord with the United States' position.182

The second source of objection to the failure to prosecute would be the Government of North Vietnam, which conceivably could take one of three courses of action. First, the North Vietnamese Government could assert that the failure to prosecute is a material breach of the Conventions and thereby claim the right to suspend the operation of the Conventions between itself and the United States. However, this possibility is remote for a number of reasons. To the extent that North Vietnam does not now consider itself bound by the Conventions with regard to captured American pilots, such a claim would be an empty gesture. More importantly, the nature of the Conventions reveals that the legal doctrine that normally permits the unilateral suspension of treaty obligations

181. United States servicemen have immunity from both the criminal and civil jurisdiction of the Government of South Vietnam under the Agreement for Mutual Defense Assistance in Indo-China among the United States, Cambodia, France, Laos, and Vietnam, Dec. 23, 1950, [1952] 2 U.S.T. 2757, T.I.A.S. No. 2447. Art. IV of the treaty provides that personnel assigned by one party to uphold the defense of another will be treated as "part of the diplomatic mission" of the party providing such assistance.

182. The Department of State has expressed the view that the Government of South Vietnam recognizes the extensive efforts and good faith of the United States in its attempts to prosecute "those individuals who are within the reach of the military courts," and would be unlikely to pursue any formal actions. See Futtermann Letter, supra note 54.

183. See note 32 supra. The North Vietnamese do, however, regard themselves bound by the Conventions respecting other protected persons.
upon a material breach is inapplicable, since suspension of treaties for the protection of the human person is not permitted.184 Finally, the Conventions themselves make it clear that their obligations are not reciprocal in nature and that they cannot be suspended during the armed conflict.185

The other two alternatives open to North Vietnam are available to the other Parties to the Conventions, the third potential source of objection to the grant of immunity. First, any of the Parties could invoke the dispute-settlement procedures established by the Conventions. The controversy would probably end in negotiations, because only the first two steps of the dispute-settlement procedures (Conciliation and Enquiry) are mandatory and they provide for no binding resolutions. The third step, which would lead to a binding settlement by the International Court of Justice, is optional.186 Second, should any of the Parties, including North Vietnam, consider the procedures established by the Conventions unsatisfactory, such Party might bring a claim before the International Court of Justice without the consent of the United States.187 Either approach would be an appropriate method for attempting to invoke the jurisdiction of the International Court over the United States, although the unilateral claim would initially appear to have the better chance of success.188 However, even the unilateral claim would probably

184. The most persuasive authority regarding the permissible actions of a party pursuant to a breach of a treaty is found in the Vienna Convention art. 60. Paragraph 5 excludes from the aggrieved party's traditional power to suspend obligations those "provisions relating to the protection of the human person contained in treaties of a humanitarian character."

185. See note 32 supra. Field Convention art. 63, Sea Convention art. 62, POW Convention art. 142, and Civilian Convention art. 158 provide that if a Party involved in an armed conflict denounces the Convention, such denunciation shall not be effective until peace has been concluded.

186. See note 80 supra.

187. The Resolution to the Final Act of the Conventions recommends that Parties agree among themselves to resort to the International Court of Justice. See note 80 supra. Absent American consent to this procedure, objecting Parties would have to rely upon the category of "breach of treaty" as the cause of action by which they might unilaterally attempt to invoke the jurisdiction of the International Court of Justice. See generally, Restatement, supra note 77, §§ 164-214.

188. No nation is bound to appear before the International Court of Justice unless it should (a) consent to the Court's jurisdiction by treaty agreement with the nation seeking remedy against it (inapplicable here since the 1949 Conventions do not include such an agreement); (b) consent to the Court's jurisdiction by ad hoc agreement with the nation seeking remedy against it (as recommended by the Resolution to the Final Act of the Conventions, note 80 supra, but presumably inapplicable here since the United States would not likely agree to appear before the Court on the issue of the immunity grant); or (c) consent to the Court's jurisdiction through adherence to the "optional clause," art. 36, § 2, Statute of the International Court of Justice. The "optional clause" provides that all nations that declare themselves to be bound to the jurisdiction of the Court shall be so bound without special agreement as against all other nations undertaking an equivalent obligation. Id. Thus, if the Party objecting to the American grant of immunity states a valid cause of action
be unsuccessful because the My Lai victims were South Vietnamese citizens, and any government other than that of South Vietnam would appear to lack the requisite legal interest in the subject matter of a claim contesting American failure to prosecute one allegedly responsible for the slayings. Other objecting Parties would lack standing to bring the claim before the Court.\textsuperscript{189} Finally, should the standing doctrine not defeat such a unilateral claim, the United States would still be able to resist the International Court’s jurisdiction by maintaining that the decision to immunize a citizen from prosecution is within the domestic jurisdiction of the United States. In adhering to the “optional clause” of the Statute of the International Court of Justice,\textsuperscript{190} the United States specifically reserved from that Court’s jurisdiction any dispute “within the domestic jurisdiction of the United States of America, as determined by the United States of America.”\textsuperscript{191}

The United States Government exercised its discretionary power not to prosecute for valid reasons, in a decision consistent with its own standards and with international standards of justice and, therefore, consistent with its obligations under the Geneva Conventions. That action is little susceptible to challenge, but should grounds for objection exist, the limited number of Parties in a position to raise objection to a breach of the supportive obligation to prosecute have recourse only to dispute-settlement procedures that lack binding force absent the consent of the United States. Thus, the use of the prosecutor’s discretionary power to refrain from proceeding against a suspect has been accomplished in a war-crimes setting without significant legal consequence. The challenge now is to learn from that precedent.

\section*{V. Proposals for the International Regime}

A legal analysis can easily lose any urgent characteristic it might otherwise have when the subject of inquiry is the slaying of hundreds of unarmed civilians. The analysis can be of consequence, before the Court, note 187 \textit{supra}, and if that Party has assumed an “equivalent obligation” by declaring itself bound to the “optional clause,” the United States would apparently be bound to appear before the Court to contest such a claim. This is so because the United States has declared itself, under the provisions of the “optional clause,” to be bound to the compulsory jurisdiction of the International Court of Justice. 61 Stat. 1218, 15 DEPT. OF STATE BULL. 452 (1946). \textit{But see} note 191 \textit{infra} and accompanying text.


\textsuperscript{190.} See note 188 \textit{supra}.

\textsuperscript{191.} 61 Stat. 1218, 15 DEPT. OF STATE BULL. 452-53 (1946). This proviso, known as the “self-judging” reservation or the “Connally Amendment,” has been the subject of wide dispute. See, e.g., the nine articles presenting both sides of the question in \textit{46 A.B.A.J.} 184, 486, 729, 732, 737, 741, 744, 749 & 851 (1960).
however, if joined with efforts to prevent the recurrence of such an atrocity. The contribution of the foregoing discussion in this respect is to focus careful attention on the substance of the 1949 conventions. The need for such attention is critical, for those humanitarian treaties require the Parties to communicate their dictates to the citizenry.\textsuperscript{129} It is evident that
to be effective, the injunctions in the Geneva Conventions must be looked upon not as a jewel in a case, to be worn on gala occasions and the rest of the time locked up in a safe. Instead, for those who are called upon to observe them, they must become "everyday wear."\textsuperscript{193}

Although in several developing countries of Africa the Geneva Conventions constitute a part of primary-school education,\textsuperscript{194} in the United States only military personnel receive instruction; and that was limited until recently to three hours of lessons on the POW Convention.\textsuperscript{195} The My Lai incident illustrates that it cannot be presumed that military personnel have such minimal need for education on the rules of war; without thorough familiarity by those who must execute them, these rules will remain a dead letter.\textsuperscript{190} It is, therefore, not enough to conclude that the decision to grant immunity to Meadlo was not a violation of American obligations under the 1949 Conventions because such discretion is a legitimate device in American law enforcement. This would fail to recognize the central role of the Conventions and the need to explicate their mandates. Instead, emphasis must be placed on why that decision was proper within the context of the Conventions' obligation to punish

\textsuperscript{192} See note 51 supra and accompanying text.

\textsuperscript{193} 10 INTL. REV. OF THE RED CROSS 366 (1970) (statement by Jean de Preux, Legal Adviser of the Red Cross).

\textsuperscript{194} 7 INTL. REV. OF THE RED CROSS 70 (1967).

\textsuperscript{195} See, e.g., U.S. DEPT. OF THE ARMY, PAMPHLET No. 20-151, CARE AND TREATMENT OF PRISONERS OF WAR (1958). Officers received two to six hours more instruction than enlisted men.

\textsuperscript{196} See H. COURSIER, supra note 10, at 2. Lieutenant Calley, as an infantry platoon leader, was responsible for ensuring compliance with the rules of war at the lowest and most critical level of tactical operations and thus should have had at least some grasp of the rudiments of those rules; yet he testified at his trial that he had never been instructed that he should refuse to obey an illegal order. TIME, April 12, 1971, at 16. Comments by other military officers likewise illustrate that military personnel are more concerned with the military commander's influence than with the Geneva Conventions. See, e.g., N.Y. Times, April 4, 1971, § 4, at 12, col. 6. The pervasive influence of command guidance in Vietnam places on commanders the duty of ensuring compliance with the Conventions, yet evidence indicates that that duty is not always performed. Army Lieutenant James Duffy, convicted by court-martial for ordering his sergeant to kill a deserting South Vietnamese soldier and to record him as a Viet Cong suspect, defended his order on the ground that platoon leaders never received guidance on the proper treatment of prisoners of war, but rather were told by commanders to increase their "body count." TIME, April 12, 1971, at 18. The emphasis placed upon the "body count" in Vietnam suggests that the Conventions are in fact being tacitly violated by the encouragement of excessive zeal in combat.
and their purpose to protect war victims. And, as a more formal communicative effort, the United States Government should take steps to initiate more explicit indoctrination on the rules of war for those persons responsible for controlling and conducting American combat operations, as the United States Army has apparently done since the My Lai incident.197

An analysis of the international practice of prosecutorial discretion also has significance for the United States outside the context of the punishment of war crimes. The United States is a party to various treaties in which the parties agree that certain conduct shall be punishable,198 and ratification of similar treaties in the future seems probable.199 It is conceivable, therefore, that the United States may again be in a position to exercise discretionary power not to prosecute, as may other Parties to such treaties in situations in which the United States may have some interest. The essentially unstructured and unexamined practice of discretionary prosecution in many national legal systems, and the absence of treatment of this subject in international law, provides little assistance in determining how treaty provisions should address such possibilities or how Parties should conform to obligations to punish. The dangers of unstructured discretion have been noted;200 the consensus of American legal thought urges development of a system of controls to ensure rational and purposeful exercise of the power consistent with the public interest.201 There is no reason why there should not be a similar formulation of standards to control the practice in the international legal system, especially in light of the wide disparity among nations regarding the limits of prosecutorial discretion.202 Such a standardization, moreover, would be facilitated, and the problem of application solved, by the establishment of an International Criminal Court to administer justice consistent with established standards.

The overarching interests present in any legal analysis concern-

200. See note 151 supra.
201. See, e.g., K. Davis, supra note 107, at 108 (full study of prosecuting power will lead to greater controls of discretion); Task Force Report, supra note 148, at 4 (prosecutorial discretion should be subject to systematic factual determinations, procedural regularity, and some type of judicial consideration of the decision).
ing the My Lai incident necessarily are international in nature, and
the interest in a treatment of prosecutorial discretion is no excep-
tion. Deterrence of war crimes is not a purely American concern,
nor should investigations of allegations of atrocities rest in the hands
of the government whose own forces allegedly committed those
atrocities, no matter how objective that government may consider
itself to be. 203 The 1949 Diplomatic Conference expressly left open
the possibility of the future development of an international penal
tribunal. 204 The international investigation of atrocities in Vietnam
that has been called for 205 would require resort to such an inter-
national forum. The common interests of all nations would be
served by the creation of a deliberative body less susceptible to na-
tional bias, with the power to impose on nations standards of con-
duct preservative of life in the face of armed conflict. In a minor
yet illustrative way, the conclusions reached in this Comment sup-
port such a scheme. As the war-crimes trials of an earlier generation
led to the 1949 Geneva Conventions and the first proposals for an
international tribunal to adjudicate international crimes, perhaps
the My Lai incident and the response of the American legal system
to it will prompt further humanitarian developments as the civilized
world attempts to reduce the loss of life on whatever future battle-
field the political mind of man finds necessary to its ambition.

203. See generally, Comment, My Lai Massacre: The Need for an International
Investigation, 58 Cal. L. Rev. 703 (1970). The clearest example of the inability of
the United States Government to allow the legal process to operate without being
influenced by extralegal factors is the intervention of President Nixon subsequent to
the conviction and sentencing of Lieutenant Calley. In apparent response to public
dissatisfaction with the verdict, President Nixon released Calley from confinement
pending the outcome of the appellate process and later publicly stated his decision
to review the case personally before the sentence was carried out. N.Y. Times, April 2,
1971, § 1, at 1, col. 8; id., April 4, 1971, § 1, at 1, col. 8. Criticism from the foreign
press was immediate and nearly unanimous in charging that popular appeal had taken
precedence over due process of law and that the President's intervention had violated
the independence of the judiciary. See, e.g., N.Y. Times, April 6, 1971, § 1, at 18, col. 5.
Another suggestion of the lack of objectivity lies in the investigative response to My
Lai. The Peers Panel, supra note 176, had as a member Colonel Joseph R. Franklin.
In a separate action, United States Army Lieutenant Colonel Anthony B. Herbert is
drafting charges that Colonel Franklin himself is guilty of covering up war crimes
perpetrated by the brigade Colonel Franklin commanded in Vietnam. TIME, March 22,
1971, at 16. Furthermore, of twenty-one servicemen other than Lieutenant Calley
convicted of premeditated murder in Vietnam, all were originally sentenced to life
imprisonment, and all sentences were reduced on military appeal; most now stand at
five to ten years. N.Y. Times, April 13, 1971, § 1, at 1, col. 8. There is evidence then
that the military system is not capable of handling objectively the investigation and
punishment of alleged war crimes in Vietnam without the interference of influences
that derogate from the demands of the rule of law. It is submitted that a supranational
tribunal such as an International Criminal Court would be the only acceptable alter-
native to what is now at best a national embarrassment.

204. See note 141 supra.

205. See notes 63 & 203 supra.