tions, through which most conflicts and disputes are indeed solved. This happens mostly at a stage preceding the establishment of a panel and possibly also while the proceeding is pending, not as a rule after it has been concluded.

After the conclusion of the proceeding, the recommendations or rulings of the WTO Dispute Settlement Body must be promptly complied with under Article 21 of the Dispute Settlement Understanding. Mutually acceptable compensation is mentioned in Article 22 as a *temporary* measure pending implementation.

The prompt compliance by the United States with the first decision of the Appellate Body in the *Gasoline* case hopefully points to a high level of respect by member governments toward the new dispute-settlement mechanism of the WTO.

GIORGIO SACERDOTI*

TO THE CO-EDITORS IN CHIEF:

In her Editorial Comment on WTO dispute settlement in the July issue (90 AJIL 416 (1996)), Mrs. Judith H. Bello clearly implies that, by entering into treaty commitments or otherwise assuming obligations under international law, a state *abandons* its sovereignty.[1] I believe that this way of thinking is mistaken and may lead to unfortunate results.

It is mistaken since, as was observed by the Permanent Court of International Justice in its 1923 Judgment in the *Wimbledon* case and confirmed in subsequent decisions, one should not see in "the conclusion of any Treaty by which a State undertakes to perform or refrain from performing a particular act an *abandonment* of its sovereignty" (emphasis added). The correct position, according to the Court, is quite the opposite: "the right of entering into international engagements is an *attribute* of State sovereignty" (emphasis added).[2]

The reason why the view to which I take exception may lead to unfortunate results is not far to seek: since treaty and other international undertakings are most useful means of international cooperation, that view provides valuable ammunition to right-wing extremists who oppose such cooperation and for whom the concept of sovereignty remains a handy instrument for promoting the jingoism that generates this opposition.

Finally, it seems to me that Mrs. Bello did not need to endorse that view in order to make the arguments she advances. Her analysis could well have been not in terms of *abandonment* of sovereignty but of *avoidance* of binding international commitments, a perfectly neutral and unobjectionable concept.

ROBERTO LAVALLE†

TO THE CO-EDITORS IN CHIEF:

The Note by Messrs. Robert Kushen and Kenneth J. Harris on surrender of fugitives to the ad hoc international criminal Tribunals (90 AJIL 510 (1996)) raises at least two serious points of contention. The first involves a "rule of non-inquiry" (*id.* at 514, 517–18) concerning foreseeable procedural deficiencies or persecution in fora of requesting states. The second involves a supposed inability of the United States to prosecute war crimes of foreign and/or civilian perpetrators (*id.* at 515 & n.18).

According to the authors, common Articles 1, paragraphs 2 of the executive Agreements with the ad hoc Tribunals, which attempt to preclude "additional conditions or

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[1] See, in particular, the last two sentences of the penultimate paragraph on page 417 and the first and last sentences of the penultimate paragraph on page 418.

[2] S.S. Wimbledon (Merits), 1923 PCIJ (ser. A) No. 1, at 25 (Aug. 17). *See also* Exchange of Greek and Turkish Populations, 1925 PCIJ (ser. B) No. 10, at 21 (Advisory Opinion of Feb. 21); Jurisdiction of the European Commission of the Danube between Galatz and Braila, 1927 PCIJ (ser. B) No. 14, at 36 (Advisory Opinion of Dec. 8).

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defenses" (*id.* at 514), impliedly incorporate a "rule of non-inquiry." Importantly, however, no international agreement (including bilateral extradition agreements) can expressly or impliedly obviate obligations under the United Nations Charter,[1] which include the obligation to respect and to ensure respect for human rights.[2] Thus, the United States cannot lawfully enter into an international agreement attempting to obviate human rights of an accused or to avoid its duty to respect and to ensure respect for human rights. The fact that the ad hoc Tribunals operate under Security Council powers should not change this limitation on U.S. power or U.S. general obligations with respect to human rights. Indeed, the Tribunals are also bound to afford due process under human rights law,[3] and it is evident that even Security Council powers are limited by human rights.[4] It is therefore not likely that either Tribunal will violate human rights of the accused or engage in related acts of persecution, but the executive Agreements cannot lawfully preclude inquiry into foreseeable human rights deprivations.

Additionally, human rights, including the right to an effective remedy in domestic tribunals,[5] involve matters of law appropriate for judicial inquiry.[6] They are not mere matters of foreign policy, foreign discretion or comity. If executive officials are about to participate in a denial of human rights of an accused (as complicitors, aiders and abettors, or in other ways), the federal judiciary should assure that U.S. officials comply with Charter-based duties, as well as related obligations in human rights treaties.[7]

A major error also appears with respect to the ability of the United States to prosecute war crimes. The authors allege, in particular, that violations of the 1949 Geneva Conventions would not be prosecutable except under the Uniform Code of Military Justice when offenses are engaged in by U.S. service people (90 AJIL at 515 n.18). This assertion ignores the possibility of trials of U.S. and other civilians in certain military fora in time of war,[8] of civilians abroad in military or other fora in the case of occupation,[9] and of persons accused of violations of the laws of war in federal district courts.[10]

[1] UN CHARTER Art. 103.

[2] *Id.*, Arts. 1(3), 55(c), 56; Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, GA Res. 2625, UN GAOR, 25th Sess., Supp. No. 28, at 121, UN Doc. A/8028 (1970) ("States shall co-operate in the promotion of universal respect for, and observance of, human rights. . . . Every State has the duty to promote through joint and separate action universal respect for and observance of human rights . . . . "); *see also* Soering Case, 161 Eur. Ct. H.R. (ser. A) (1989), *reprinted in* 28 ILM 1063 (1989); Ng v. Canada, Report of the Human Rights Committee, UN GAOR, 49th Sess., Supp. No. 40, at 203, 205, UN Doc. A/49/40 (1994); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §475 comment *g*, §476 comment *h*, §711 reporters' note 7 (1987); RICHARD B. LILLICH & HURST HANNUM, INTERNATIONAL HUMAN RIGHTS 759–60 (3d ed. 1995); Jordan J. Paust, *Extradition and United States Prosecution of the* Achille Lauro *Hostage-Takers: Navigating the Hazards*, 20 VAND. J. TRANSNAT'L L. 235, 247–49 (1987).

[3] *See, e.g.*, Statute of the International Tribunal, Art. 21, Annex to Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993), UN Doc. S/25704 (1993), *reprinted in* 32 ILM 1192, 1198–99 (1993); and the Report of the Secretary-General, *supra*, paras. 106–07, *reprinted in id.* at 1163, 1185.

[4] *See, e.g.*, UN CHARTER Preamble, Arts. 1(3), 24(2), 25; Jordan J. Paust, *Peace-Making and Security Council Powers: Bosnia-Herzegovina Raises International and Constitutional Questions*, 19 SO. ILL. U. L.J. 131, 138–42 (1994). *But see* Kushen & Harris, 90 AJIL at 514.

[5] *See, e.g.*, JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 198–200, 256 (1996).

[6] *See, e.g., id.* at 6–9, 198–203, 212, 245–46, 366–68, *passim.*

[7] *See also id.* at 6–10, 143–65, 469–71, *passim*; *supra* note 2; *Ex parte* Kaine, 14 F. Cas. 78, 81 (C.C.S.D.N.Y. 1853) (No. 7,597) (quoting Thomas Jefferson's statement to the French Minister in 1793: "until a reformation of the criminal codes of most nations, to deliver fugitives from them would be to become their accomplices").

[8] *See, e.g.*, Jordan J. Paust, *After My Lai: The Case for War Crime Jurisdiction over Civilians in Federal District Courts*, 50 TEX. L. REV. 6, 7 (1971), *reprinted in* 4 THE VIETNAM WAR AND INTERNATIONAL LAW 447, 448 (Richard A. Falk ed., 1976). Reid v. Covert, 354 U.S. 1 (1957), did not preclude this possibility. *See id.* at 33–35. *See also Ex parte* Mudd, manuscript opinion of Judge Boynton (S.D. Fla. Sept. 9, 1868), *reprinted in part in* INTERNATIONAL CRIMINAL LAW: CASES AND MATERIALS 251–52 (Jordan J. Paust, M. Cherif Bassiouni, Sharon A. Williams, Michael P. Scharf, Jimmy Gurulé & Bruce Zagaris eds., 1996); U.S. DEP'T OF THE ARMY FIELD MANUAL 27-10, THE LAW OF LAND WARFARE 178, paras. 498–99, 180–81, para. 505 (1956) [hereinafter FM 27-10].

[9] *See, e.g.*, FM 27-10, *supra* note 8; INTERNATIONAL CRIMINAL LAW, *supra* note 8, at 232, 253–75; Robinson O. Everett & Scott L. Silliman, *Forums for Punishing Offenses Against the Law of Nations*, 29 WAKE FOREST L. REV. 509 (1994); *see also* United States v. Tiede, Crim. Case No. 78–001A (U.S. Ct. for Berlin 1979), *reprinted in* 19 ILM 179 (1980).

[10] *See, e.g.*, Paust, *supra* note 8, at 8–34; PAUST, *supra* note 5, at 409, 411–12.

Sections 818 and 821 of title 10 of the United States Code incorporate the laws of war (including breaches of Geneva law) by reference for purposes of criminal prosecution and sanctions and thus supplement the result more generally that customary laws of war are part of the laws of the United States.[11] The Supreme Court affirmed this general point with respect to the same language in the precursor to sections 818 and 821, adding important recognition of the historic incorporation of the laws of war without a statutory base.[12] Under 18 U.S.C. §3231, federal district courts recognizably have jurisdiction over "all offenses against the laws of the United States," which necessarily include the offenses incorporated by reference in 10 U.S.C. §§818 and 821, as well as offenses that are a part of our law in other ways.[13] Additionally, the Executive has formally declared that the United States has legislation adequate for prosecution of violations of the Geneva Conventions.[14]

JORDAN J. PAUST

Messrs. Kushen and Harris reply:

Professor Paust suggests that, because the U.S. implementing scheme does not provide the fugitive with the opportunity to raise humanitarian concerns before the U.S. *judiciary*, it violates human rights protections under international law. Even assuming the existence of an obligation on the part of a surrendering state to take such humanitarian concerns into account, the United States is in compliance. The rule of noninquiry in no way results in U.S. acquiescence in potential human rights violations. It merely vests consideration of allegations of such violations in the *executive* branch, which, as we pointed out (90 AJIL at 517–18), retains discretion to deny surrender even after the judiciary certifies that the requirements of the applicable agreement have been satisfied.

In asserting that the U.S. judiciary should rule on these matters, Professor Paust seeks to confer upon it powers it has declined to assume itself. In international extradition cases, as a matter of domestic law, the judiciary has routinely deferred to the executive branch on such issues,[1] desiring to avoid judicial determinations that could adversely affect the Executive's conduct of foreign policy,[2] and recognizing that the Executive can be relied on either to deny extradition or to ensure that the fugitive's rights are respected.[3]

With regard to Professor Paust's second contention, we did not state that the U.C.M.J. was the sole means of prosecuting violations of the Geneva Conventions. Rather, we stated that the Conventions have never been implemented in U.S. legislation, and therefore that U.S. ability to prosecute such violations is limited. The other military fora Paust suggests might not, as a constitutional matter, be available for crimes arising out of conflicts such as those in Rwanda and the former Yugoslavia, where the United States was not a party except as a participant in peacekeeping. Moreover, the War Crimes Act of 1996 (enacted August 21, 1996)[4] makes clear that neither Congress nor the President felt that prior U.S. law provided sufficient authority for United States civilian courts to impose punishment for violations of certain provisions of the Conventions. This statute creates new offenses under title 18 of the U.S. Code, namely, the commission by U.S. service people or nationals of grave breaches of the Conventions, either in the United States or abroad. The House Report accompanying the statute states that its purpose was to fill significant gaps in U.S. legal authority to prosecute violations of the Geneva Conventions, due to the absence of specific implementing legislation.[5]

[11] *See* Paust, *supra* note 8, at 10–12, *passim*; PAUST, *supra* note 5, at 408–09.

[12] *See Ex parte* Quirin, 317 U.S. 1, 27–31 (1942). On direct incorporation of international criminal law, see also FM 27-10, *supra* note 8, at 180–81, para. 505e; PAUST, *supra* note 5, at 7–8, 44–45, 60–61, 297–98.

[13] *See, e.g.*, Paust, *supra* note 8, at 17–27; PAUST, *supra* note 5, at 409; *see also* FM 27-10, *supra* note 8, at 180–81.

[14] *See, e.g.*, Jordan J. Paust, *My Lai and Vietnam: Norms, Myths and Leader Responsibility*, 57 MIL. L. REV. 99, 123–24 (1972).

[1] Glucksman v. Henkel, 221 U.S. 508 (1911); Neely v. Henkel, 180 U.S. 109 (1901).

[2] *See, e.g.*, Ahmad v. Wigen, 910 F.2d 1063, 1067 (2d Cir. 1990).

[3] *Ahmad*, 910 F.2d at 1067; Sindona v. Grant, 619 F.2d 167, 174 n.10 (2d Cir. 1980), *cert. denied*, 451 U.S. 912 (1981).

[4] Pub. L. No. 104-192, 110 Stat. 2104 (1996).

[5] H.R. REP. NO. 698, 104th Cong., 2d Sess. 6–7 (1996).